

On adjudication boards in constructions matters, with specific focus on the new FIDIC dispute adjudication/avoidance board ("DAAB")

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Abstract

This article discusses the concept of dispute adjudication boards ("**DAB**") in construction matters that allow resolving disputes on a rolling-on basis, while the construction is being completed. After a general introduction to the different types of DABs, the article describes the DAB mechanism of the International Federation of Consulting Engineers ("**FIDIC**"), based in Geneva, Switzerland. FIDIC is the internationally well-known organisation for construction matters and publishes various standard contracts to be used for construction works (so-called "**FIDIC Rainbow Suite**"). After presenting advantages and disadvantages of using the FIDIC DABs, the author concludes with some hands-on advice for the practitioner.

Keywords

FIDIC, dispute resolution, adjudication board, dispute adjudication, avoidance board, constructions, DAAB, DAB, engineers, architects

1. Introduction

Construction matters are a specific kind of dispute: issues arise during ongoing construction and typically, their resolution is postponed until after the completion of the project. None of the parties wish to risk delays or complications. This results in large and complex post-completion disputes, often with numerous items to be resolved by the mediator or arbitrator.

Dispute adjudication boards (commonly "**DAB**") serve as an ideal relief in such situations. They allow for the resolution of the disputes on a rolling basis, simultaneously while the construction is being completed. Eventually, side-issues can be filtered out, and only the major disputes remain for the arbitrator (or, hopefully, none at all).¹

There are two types of DABs: First, there is a standing board that is established at the time of the execution of the construction agreement between the parties to undertake a specific project. Second, there is an *ad-hoc* board that is established once an issue arises and needs to be decided. Each of those systems has advantages and disadvantages: While a standing board is established from the outset and thus provides for a quicker decision process, an *ad-hoc* board allows a separate expert nomination for each dispute, and those experts might be a better fit for the specific questions that are to be decided.

Typically, members of DABs are engineers or architects; they are major experts in their fields. In case of a three member DAB, one might opt for a chair with a legal background, who would

¹ A well-known example with an adjudication board was the Channel Tunnel project, where disputes had to be submitted to a panel of experts and ultimately to ICC arbitration; see Jan-Michael Ahrens: Escalation Clauses – Stairway to Heaven or Highway to Hell?, in: Müller/Rigozzi (ed.), Centre de recherche sur les modes amiables et juridictionnels de gestion des conflits, New developments in International Commercial Arbitration 2010, pp. 173-195 at 183.

ensure the feasibility and legal enforceability of the decision, and assist the parties and the other panel members in streamlining the decision making process in an efficient and equitable way.

DABs are often confused with so-called "early neutral evaluation boards." This is a process where a third party neutral examines the evidence, listens to the parties' positions, and presents the parties his or her evaluation. However, such evaluation often requires extensive discovery of evidence, and is ultimately more adversarial than the work product DABs provide: adjudication boards are more likely comprised of professionals such as engineers, rather than lawyers or judges. Thus, their approach tends to be more pragmatic and parties in general might have the impression that the adjudication board's process is less adversarial. Early evaluations are therefore typically more suitable right after completion of the project, to help the parties to decide whether to take further proceedings (either a mediation or an arbitration process, more from a "business decision" perspective).

Another important aspect of DABs is the possibility to transform their decision into a binding, formal judicial decision, which can later be enforced by either of the parties. Typically, the parties agree that if a decision is made by the DAB, and if no party objects after a specific period of time, the parties will be entitled to forward the decision to an arbitral panel who then would confirm the decision and make it "enforceable".² The idea behind this "confirmation" process is to ensure that both parties have been heard equally and that the decision was rendered, after all, fairly. This is the main distinction to mediation or conciliation: The latter are third party facilitated negotiations, which however at no time result in an enforceable judicial decision.

2. FIDIC and its Dispute Adjudication/Avoidance Board (DAAB) Mechanism

The International Federation of Consulting Engineers (based in Geneva, Switzerland) is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide.³ FIDIC publishes various standard contracts to be used for construction works, large-scale machinery supplies, infrastructure projects, consultancy services, etc. which are commonly referred to as the "**FIDIC Rainbow Suite**." Each contract applies to a specific project-type and is characterised by an individual color label. The contracts aim to distribute liabilities and risks among the relevant parties. The latest edition of the FIDIC Rainbow suite dates from 2017, and consists of

- The **Red Book** for Building and Engineering Works Designed by the Employer;
- The **Yellow Book** for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor; and
- The **Silver Book** for EPC/Turnkey Projects.

Depending on who should bear the significant risk in a project (the employer or the contractor), the parties may opt for one or the other of these standard terms and conditions.

² Here, the terminology can be somewhat confusing, as "adjudication boards" are to be distinguished from "dispute review boards": While adjudication board decisions are provisionally binding and may be invalidated by a notice of dissatisfaction and subsequent court or arbitration proceedings, dispute review boards make recommendations that will become binding only if they are not challenged within a specified period of time. Put simply, adjudication board decisions are binding from the outset, while review board decisions are not.

³ <http://www.fidic.org/about-fidic>.

All these books contain **mandatory** multi-tier dispute resolution provisions, which include the use of the DAB mechanism generally described above. "Mandatory" means that once such provisions are agreed upon, the parties may not unilaterally opt out from the use of such mechanisms. Whenever a dispute arises during the project, it will have to be resolved according to these stipulated mechanisms.

To give an example, there can be no direct recourse to arbitration until the pre-arbitration steps set forth in the respective sub-clauses have been exhausted (for instance, where none of the parties has issued a notice of dissatisfaction within a specific amount of days from the receipt of a decision by the DAB).

According to the standard rules contained in the FIDIC Rainbow Suite contracts, the arbitration includes a full hearing on the merits of the dispute. The arbitrator is not bound by any prior determination of the DAB (nor by any other form of prior expert determination). On the other hand, if one of the parties misses the **time limit for the notice of dissatisfaction**, the DAB's decision becomes **final and binding**. In that case, the arbitral panel has no discretion and **must enforce the DAB's decision**.⁴

The main concepts described herein are also an inherent part of the current 2017 edition of the FIDIC standard conditions contained in each of the books. Specifically, sub-clauses 20 (on "claims") and 21 (on "disputes and arbitration") contain the described DAB standard mechanism. Sub-clause 20 includes both, employer's and contractor's claims.

The 2017 edition of the Rainbow Suite contracts introduced **standing DABs as the default** rule and also contains new provisions for informal advice and opinions by such standing boards.

Further, the term DAB was changed to **DAAB**, referring to dispute adjudication "**and avoidance**" boards. This refers to a new sub-clause, wherein the Parties might request the standing DAAB for their opinion even before officially making the notice of a dispute to the board, i.e. before starting the adjudication process.

The standing DAAB's decision is, according to the 2017 edition, **preliminarily binding**. For pecuniary claims, the DAAB, has discretion to ask the requesting party to pay a bond.

The 2017 edition further **expressly** confirms that starting the adjudication process with the DAAB **suspends any time limitation** to introduce a legal claim for judicial adjudication.

3. Advantages and disadvantages of using DAB mechanisms

The main **advantages** of using DAB mechanisms are (1) cost and time efficiency, (2) greater flexibility and freedom and (3) minimal acrimony as settlement discussions can take place in a less adversarial environment.

The main **disadvantage** of using such mechanisms lies in the circumstance that multi-tier arbitration clauses are not easy to draft in an unequivocal way. On an international scale, if the parties have not drafted the multi-tier clause with clear language, there is a risk that the clause may not be enforced by the courts. This was the major topic of a decision rendered by the

⁴ A similar notice of dissatisfaction mechanism takes place when the parties agree first on the determination by an expert engineer, then by a DAAB, and then by arbitration. After each single determination or decision by the specific body, a notice of dissatisfaction is to be sent to the superior body within the time limitations as specified in the rules. Otherwise, the determination/decision becomes final and binding.

Swiss Federal Supreme Court in 2011⁵. A few years later, in 2014, the Swiss Federal Supreme Court had the chance to analyse the DAB multi-tier clause of FIDIC, and came to the conclusion that the pre-arbitration steps contained therein were clear, and even went further holding that the FIDIC DAB pre-arbitration steps are **mandatory** in nature (as described above in this article).⁶ The Court considered that any other approach would render the entire dispute resolution mechanism redundant.

Further disadvantage is that whenever parties agree on the DAAB procedure provided by FIDIC, emergency arbitration is, at the same time, impliedly excluded.⁷

4. Conclusion

While many international arbitration institutions provide model clauses for arbitration and mediation (ICC, LCIA, SCAI or JAMS), they do not have a model clause that includes adjudication boards. The FIDIC Rainbow Suite is therefore a very useful "one of a kind" tool for those active in the construction industry. It provides the parties with a solid multi-tier dispute resolution clause, without running the risk that the clause might not be enforceable or create additional unnecessary procedural delays during the dispute resolution process. This is all the more important as in the construction business - like in any other fast-moving business - "justice delayed" often means "justice denied".

The author of the present article encourages parties to consider adding DAB mechanisms to their construction contracts, or at least consider the advantages and disadvantages of such procedures. They might fit for one case, and not for another. In any event, particular focus should be put on how such clauses are drafted, and that there be an inherent logic behind each of the escalation steps contained in the dispute resolution clause. Also of major importance is setting clear time limitations for each of the steps, from the very first notice of claim to the rendering of a final award in the arbitration. Otherwise, the parties risk that the clause will not be regarded as "mandatory," and hence not enforceable.

⁵ See Decision of the Swiss Federal Supreme Court 4A_46/2011 para. 3.1.1, ASA Bull. 2011, pp. 643-647, discussed by Baizeau (see Fn. **Error! Bookmark not defined.**), at 2789-2790.

⁶ See Decision of the Swiss Federal Supreme Court 4A_124/2014, ASA Bull. 2014, pp. 826-848, discussed by Baizeau (see Fn. **Error! Bookmark not defined.**), at 2790-2791. The mandatory character of the FIDIC pre-arbitration steps has recently also been confirmed in the ICC Commission Report on Construction Industry Arbitrations, Recommended Tools and Techniques for Effective Management, 2019 Update, International Chamber of Commerce (ICC), 2019, at 9

⁷ ICC Commission Report on Construction Industry Arbitrations, Recommended Tools and Techniques for Effective Management, 2019 Update, International Chamber of Commerce (ICC), 2019, at 9.