

FIDIC Latin America Users' Conference

DABs Role under FIDIC Conditions – the new Rules
by

Siobhan Fahey

Member of FIDIC contracts Committee

12 & 13 September 2017

Siobhan Fahey

Chartered Engineer & Chartered Arbitrator

BA BAI (Hons) LLB(Hons) CEng Dipl. Arb FCI Arb MIEI MICE RConsEI

CI Arb Accredited Adjudicator (Rep. of Ireland)

FIDIC President's List Adjudicator

CI Arb Accredited Mediator

FIDIC Accredited International Trainer

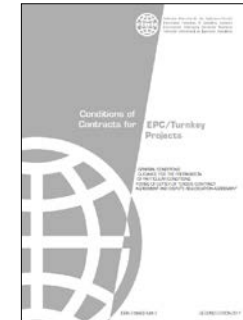


Gold Coast Road, Ballinacourty,
Dungarvan, Co. Waterford, Ireland
tel: +353 58 44505
email: siobhanfahey@cablesurf.com

In FIDIC contract updates:

dispute → DAB → arbitration as before

...but **standing DAB**
separate Clause 21
new definitions



“**DAAB**” or “**Dispute Avoidance/Adjudication Board**”

-sole member or three members:

named in the Contract

or appointed under s-c 21.1 or 21.2

“**DAAB Agreement**”

- agreement entered into by both Parties and (each) DAAB member



International Federation of Consulting Engineers

Lima, Peru
12 & 13 September 2017

2

Constitution of the DAAB – Sub-Clause 21.1 ~ wording of s-c 20.2 of YB 1999

... but amended/added:

*“The Parties shall jointly appoint the member(s) of the DAB within the time stated in the Contract Data (if not stated, **28 days**) after the date the Contractor receives the Letter of Acceptance” **

→ ‘standing DAAB’: last 18 years have been proven undoubtedly to be more effective

- consistency if there is more than one dispute to be resolved
- invaluable advantages of dispute avoidance & DAAB part of the ‘project team’.

- **DAAB constituted:** both Parties and (all) the member(s) have signed DAB Agreement(s)

- **expiry of the term** of DAAB:

- on the date Performance Certificate is issued, **or**
- 28 days after DAAB’s decisions on all disputes referred before Performance Certificate was issued
- if termination:
 - < 28 days after date DAAB gives decision on all disputes referred <168 days after date of termination
 - or** < 28 days after “the Parties reach a final agreement on all matters (including payment) in connection with the termination” *



* The FIDIC contract updates are currently being finalised - wording may be subject to change!

Failure to Appoint DAAB Member(s) – Sub-Clause 21.2 ~ wording s-c 20.3 of YB 1999

- new conditions for appointment of DAAB member by appointing entity/FIDIC:
 - either Party **fails to agree** a member nominated by the other Party within the date stated a 1st para s-c 21.1
 - if Parties have agreed DAAB member but one Party **refuses / fails to sign** the DAAB agreement < 14 days after request by other Party

- after appointment by appointing entity/FIDIC:

*“the Parties and the member so appointed shall be **deemed to have signed** and be bound by a DAB agreement under which:*

 - (i) *the monthly services fee and daily fee shall be as stated in the terms of the appointment; and*
 - (ii) *the law governing the DAB agreement shall be the governing law of the Contract defined in Sub-Clause 1.4 [Law and Language]” **

* The FIDIC contract updates are currently being finalised - wording may be subject to change!

Lima Peru
November 2017



Avoidance of Disputes – Sub-Clause 21.3

- dispute avoidance by DAAB facilitating:
*“assistance and/or informally discuss and attempt to **resolve any issue or disagreement** that may have arisen” **
- only at Parties' agreement and by **joint referral**
*or “If the DAB becomes aware of an issue or disagreement, it may **invite** the Parties to make such a joint referral” **
- at any time (during the term of the DAB) *“except during the period that the Engineer is carrying out his duties under Sub-Clause 3.7 [Agreement or Determination] unless the Parties agree otherwise” **
 => **no DAAB ‘interference’** with Engineer acting under 3.7
- DAAB can give assistance : *“during any meeting, Site visit or otherwise” **
but: *“unless the Parties agree otherwise, **both Parties shall be present** at such discussions” **



*“The **Parties are not bound** to act on any advice given during such informal meetings, and the **DAB shall not be bound in any future Dispute resolution** process or decision by any views given during the informal assistance process, whether provided orally or in writing.” **



* The FIDIC contract updates are currently being finalised - wording may be subject to change!

Obtaining DAAB's Decision – Sub-Clause 21.4

21.4.1 Reference of a Dispute to the DAAB

- < **28 days after NOD**, if not: *“the NOD shall be deemed to have lapsed”* *
- in writing and setting out the referring Party's case

21.4.2 The Parties' obligations after the reference

- make available to DAAB: information, access to Site, appropriate facilities
- Contractor to continue to proceed with Works

21.4.3 The DAAB's decision

- < 84 days **or** other period agreed with the Parties but ... *“the DAB shall not be obliged to give its decision until all such outstanding invoices have been paid in full ...”* *
- decision binding on both Parties and the Engineer, whether or not NOD given
If the decision is payment by one Party:


- **immediately due and payable** by invoice from other Party: no certificate or claim
- DAB may require payee to *“provide an appropriate **security**”* *

21.4.4 Dissatisfaction with DAAB's decision ~ 5th para 20.4 of YB1999

* **The FIDIC contract updates are currently being finalised - wording may be subject to change!**

Amicable Settlement – Sub-Clause 21.5 ~ s-c 20.5 of YB1999

Arbitration – Sub-Clause 21.6 ~ s-c 20.6 of YB1999

... but:  “In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a **Party failed to cooperate** with the other Party **in constituting a DAB** under Sub-Clause 21.1 [Constitution of the DAB] and/or Sub-Clause 21.2 [Failure to Appoint DAB Member(s)].”

Failure to Comply with DAAB's Decision – Sub-Clause 21.7 ~ s-c 20.7 of YB1999

... but:

- whether NOD given or not → failure can be referred directly to arbitration
- arbitral tribunal empowered to order enforcement of the DAAB decision “*whether by an **interim or provisional measure** or an award (as may be appropriate under applicable law or otherwise)*” and to order damages / other relief.
- if NOD has been given: “*such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the **merits of the Dispute are reserved** until they are resolved by an award*”

No DAAB in place – Sub-Clause 21.8 ~ s-c 20.8 of YB1999



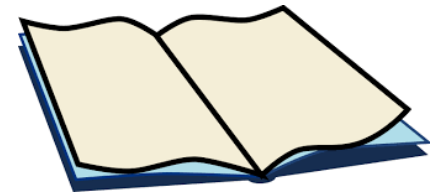


FIDIC DAAB Rules

- serious consideration was given by FIDIC to use the newly updated ICC DB Rules 2015 - ultimately FIDIC decided to **retain FIDIC DAB Rules in the updates** ... but 1999 DAB Rules to be reviewed and updated
- the **DAB takes the place of the Engineer in deciding the Parties' disputes (not claims!)**, as appeared in FIDIC contracts before 1999
(for example, the 1987 FIDIC Red Book)
- in the 1990s, Users' feedback to FIDIC: as the Engineer was appointed and paid for by the Employer, his independence and 'impartiality' in deciding disputes was always open to be questioned by the Contractor
(it became more usual than not for the Engineer's decision to be rejected out-of-hand by the Contractor and so the first stage of dispute resolution became less and less effective)
- as such, in the 1999 contracts FIDIC introduced the concept of the DAB as the first stage in dispute resolution instead of the Engineer's decision.



Updated DAAB Rules to be published as a separate document?



now decided: **NO**

- to give a clear and unequivocal message to Employers that FIDIC firmly believes that the DAAB is an integral part of the 'Project Team'
- => will continue to be part of the FIDIC forms of contract (as in 1999 contracts)



Standing DAAB vs Ad-hoc DAB



- standing DAABs have proven undoubtedly to be **more effective**
 - consistency if there is more than one dispute to be resolved
 - the **invaluable advantages of dispute avoidance**
 - opportunity for the DAB to become part of the 'project team'.
- ⇒ in Clause 21 of the updates of the FIDIC suite of contracts: **all DAABs will be standing DAABs**

also giving an *option* for an ad-hoc DAAB (in the Guidance Notes)

⇒ the Parties can decide for their own project





Dispute Avoidance

- Clause 21 of the updates of the FIDIC suite of contracts: DAAB engages in dispute avoidance if *both* Parties jointly request
- DAAB can provide assistance and/or informally discuss disagreements with the Parties before they become disputes
- DAAB can itself bring potential disagreements/differences to the attention of the Parties and invite them to jointly request assistance
- neither the Parties nor DAAB bound by anything stated during informal discussions
- Rules to be revised giving the DAAB express authority (and duty) to engage in dispute avoidance

Dispute avoidance

= insurance to shield against the cost (in time & money) of disputes!



Correction of DAB decision

- at present, there is no express authority for the DAAB to make corrections to a DAAB decision
- complex dispute, short time for decision
- greater possibility of:
 - clerical errors
 - typographical errors
 - arithmetic errors
- notified by either Party or identified by the DAAB



⇒ **DAAB can correct its own decisions** (within a certain time of issuing the decision)



Interpretation of DAB decision

- at present, there is no express authority for the DAAB to clarify a DAAB decision if requested by either Party
 - complex dispute, short time for decision
 - greater possibility that one of the Parties may require (further) explanation or clarification of what is written in the decision
- ⇒ give DAAB the power to issue clarification of its decision (within a certain time of issuing the decision)

⇒ but **DAAB can decline** to give an clarification



Challenge of a DAB member:

- revised FIDIC DAAB rules: more structured approach
- by either Party (or other members of DAAB, if 3-member DAB)
- if there are justifiable doubts about a DAAB member's impartiality or independence

Currently under consideration:

- challenge is to be **decided by the FIDIC President**
 - within 56 days
 - with assistance from International Chamber of Commerce (ICC)



Resignation/termination of a DAB member:

- revised FIDIC DAAB rules: more details on the consequences:
 - if sole DAAB: time limits for rulings/decisions to be suspended until replacement DAAB has been appointed
 - if 3-member DAAB: the other members can proceed with rulings/decisions?
 - or the time limits for rulings/decisions to be suspended until replacement DAAB has been appointed?
- obligation of confidentiality to continue for the resigned/terminated member
- handback/destruction of all documents in his/her possession
- both Parties obliged to provide information to the replacement DAAB member => consistent rulings/decisions after replacement



DAAB fees

standing DAAB: monthly fee + daily fee + expenses

monthly fee = payment for keeping up-to-date with what is going on in the Works, reviewing reports and newly issued drawings, reading Site correspondence, etc and being available for regular site visits/meetings and urgent involvement in critical events of the Works

many users' view:

= 'money for nothing' => reluctance to use standing DABs!

but: **standing DAB** → **dispute avoidance** → **"insurance"**

If agreement on fees cannot be reached with a DAB Member:

- either Party or the DAB Member can refer this non-agreement to the appointing entity named in the Contract Data (default: the FIDIC President)

- the **appointing entity decides**



DAAB Members:

- new FIDIC initiative:
 1. FIDIC **training** for potential DAAB members – around the world
 2. Review current system for FIDIC's **assessment** of potential DAAB members



Aims:

- new **national lists** of FIDIC adjudicators
- higher number of qualified adjudicators on existing national lists
- greater 'geographical spread' of adjudicators on the FIDIC President's List of Approved Adjudicators

=> **more choice** for Parties in appointing DAAB members under FIDIC contracts.





Thank You for
Your Kind
Attention

Siobhan Fahey

Chartered Engineer & Chartered Arbitrator

BA BAI (Hons) LLB(Hons) CEng Dipl. Arb FCI Arb MIEI MICE RConsEI

CI Arb Accredited Adjudicator (Rep. of Ireland)

FIDIC President's List Adjudicator

CI Arb Accredited Mediator

FIDIC Accredited International Trainer

Gold Coast Road, Ballinacourty,
Dungarvan, Co. Waterford, Ireland

tel: +353 58 44505

email: siobhanfahey@cablesurf.com



International Federation of Consulting Engineers

12 & 13 September 2017

