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# FIDIC-SIDiR-EFCA Regional Infrastructure Conference

**Krakow  
7 & 8 March 2016**

Taner Dedezade



International Federation of Consulting Engineers


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## DAB, the body who can avoid dispute escalation?

To test the proposition postulated in the title, in this presentation, I intend to explore:

- The different types of FIDIC dispute board
- The number of members in a typical board
- The necessary skills of DAB members
- Responsibility for remuneration of the DAB and why
- The rationale behind the appointment process
- How the DAB fits within the multi-tiered dispute resolution mechanism in the contract
- Flag up the difficulties with the system



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## DAB, the body who can avoid dispute escalation

Currently FIDIC 1999 has two types of dispute board:

- Standing (Red); and
  - Formed at the outset of the project
  - Board meets normally on a quarterly basis
  - Becomes familiar with the project
  - Board obtains a rapport between the parties and the DAB.
- Ad hoc (Yellow and Silver)
  - Formed when dispute arises
  - No rapport between the parties and the DAB



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## No. of members and skills

- 20.2 One or three. Default is three across all books.
- Skills:
  - communication skills,
  - availability,
  - technical knowledge,
  - legal knowledge,
  - dispute resolution experience,
  - independence and impartiality



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## 4 reasons why DABs Succeed

1. The Board meets on site at regular intervals, and hears the complaints of all parties concerned at an early stage. "Gripes" are dealt with at the outset and never develop into disputes
2. The DB gives all parties concerned an opportunity to "have their say" and the catharsis of "getting it off your chest" is the extent of what most parties want. Hence, it is unnecessary to go before a formal tribunal.



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## Why DABs Succeed

3. An unexpected dynamic develops so that the parties, who work with each other on site every day, see the DB as a group of intruders, against whom the site personnel must "gang up" in order to repel them. Accordingly, when the DB arrives on site for its regular visit, the parties will put on a common front, and hastily compromise whatever incipient disputes there may be, so that they do not have the DB "interfering" in the site's "private business". This has been put forward as the explanation for why the DB procedure does not act as a "fly-paper" which attracts disputes, and instead only minimises disputes.



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## Why DABs Succeed

4. Most members are not lawyers! Generally, the “mix” on the Board will be two engineers, and one lawyer. The parties will often see this as a more “user-friendly” entity than the forbidding sight of three lawyers.

See paper written by Dr Robert Gaitskell Q.C. where he sets out the above 4 points.



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## Independence & Impartiality

- Independence.
  - Dependence arises from relationships between the Member and one of the parties or someone closely connected with the parties (e.g. his lawyer).
  - An objective test
- Impartiality
  - Partiality arises when the decision maker favours one of the parties over the other or where he is prejudiced over the subject matter in dispute.
  - Subjective test



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## Institutional Rules and Guidelines

- #3 Appendix General Conditions of DAA:
  - “The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement of impartiality and independence.”
  - CI Arb Code of Professional and Ethical Conduct for Members
    - “both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so”
  - IBA Guidelines on Conflicts of Interest in International Arbitration
    - Traffic Light Rules.



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## Case-law

- In UK
- John Magill v (1) David Weeks (2) Dame Shirley Porter
  - The test was not whether the councillors were in fact biased but whether at the time the decision maker in question gave its decision a fair minded and independent observer having considered the facts might conclude that **there was a real possibility that the decision maker was biased.**
- Pinochet case
  - *Lord Hoffman had links to Amnesty International which were not disclosed. The HL held that whilst it was not suggested that Lord Hoffman was actually biased, his relationship with AI meant that he could not be seen to be impartial*



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## Recent QBD case

- Cofely v Anthony Bingham and Knowles Ltd
  - 18% of Mr Bingham's appointments and 25% of his income as arbitrator/adjudicator derived from cases involving Knowles (#104)
  - Mr Bingham did not recognise the relevance of the relationship information or the need of any disclosure (#113)
  - The judge found that, considered cumulatively (not everything is set out above), "they do raise the real possibility of apparent bias"



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## Remuneration

- Sub-Clause 20.2:
  - The Terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment.
  - Each party shall be responsible for paying one-half of this remuneration.



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## Renumeration

- Paragraph 6 of the General Conditions of DAA
  - Retainer (in red book)/daily fee/expenses/taxes
  - The Contractor shall pay each of the Member's invoices in full within 56 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement for one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.



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## Appointment process

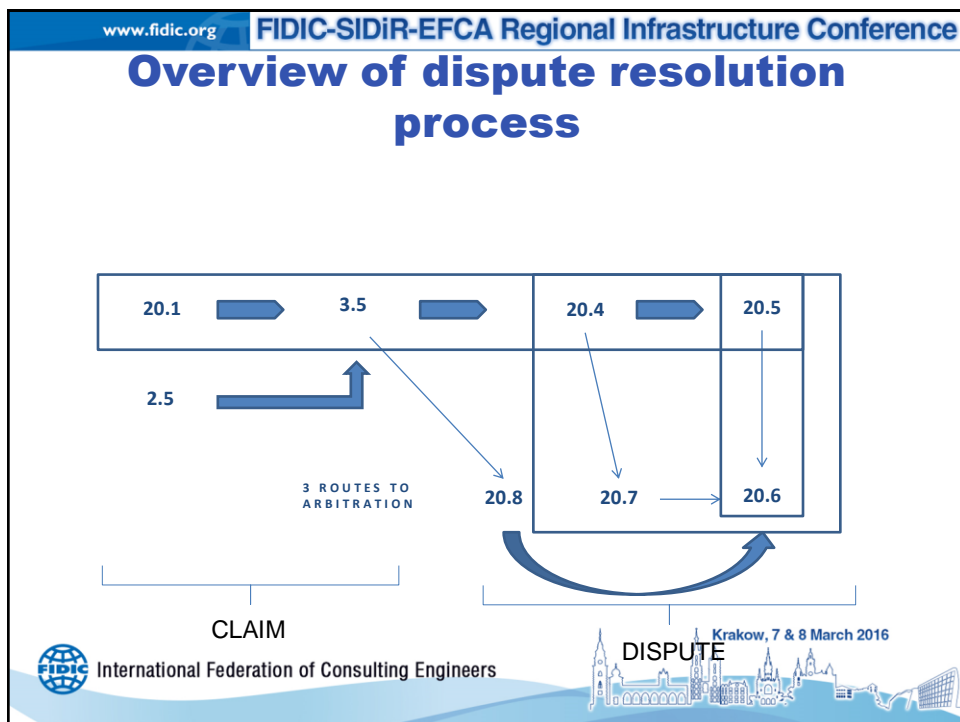
- If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as a chairman.
- Rationale behind this consensual appointment process



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## Issues with the current DAB system

- Difficulties with enforcing binding but not final DAB decisions.
- If no DAB is in place then can a party refer a dispute straight to arbitration?
  - Recent Swiss case: Decision 4A 124/2014
  - Recent UK case: Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 (TCC)

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