

**INTRODUCTION TO FIDIC  
DISPUTE ADJUDICATION BOARD  
PROVISIONS**

**CONDITIONS OF CONTRACT FOR  
CONSTRUCTION**

**FIDIC 1999**

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## **1.0 INTRODUCTION**

This course reviews of the requirements and procedures for the FIDIC Conditions of Contract from a practical point of view with regard to the Dispute Adjudication Board. It is a practical guide rather than a detailed legal analysis, to assist engineers and others will use construction contracts.

Reference will be made to the FIDIC form of contract and clause references will generally apply to clauses in the Conditions of Contract for Construction 1999 edition, the "new red book". The notes are comments on the clauses and references should be made by the reader to the complete wording in the FIDIC contract.

## **2.0 THE CONSTRUCTION CONTRACT**

A construction contract is made between two parties:

- An owner who is referred to as the Employer, who has decided that he needs the project and who will pay for the project. The Employer will need to establish his requirements, decide who will prepare the detailed design and check that the construction meets his requirements, and
- A Contractor who will prepare all or any part of the design as required by the employer and who will actually construct the works.

The project organisation for the design, supervision and construction may vary but the tasks must be carried out by someone, either on behalf of the Employer or on behalf of the Contractor. The FIDIC Conditions of Contract for Construction are based on design by the Employer. The actual design is usually carried out by a Consulting Engineer, on behalf of the Employer. The Conditions of Contract for Plant and Design Build and the Conditions of Contract for EPC/Turnkey Projects are based on design by the Contractor. Again, the actual design may be carried out by a Consulting Engineer, but on behalf of the Contractor.

## **3.0 THE CONDITIONS OF CONTRACT**

The Conditions of Contract include:

- General Conditions
- Particular Conditions

FIDIC General Conditions of Contract are intended to be used unchanged for every project. The Particular Conditions are prepared for the particular project taking account of any changes or additional clauses to suit the local and project requirements. Some employers have available their own versions of the General Conditions which incorporate some changes to suit their own requirements.

Normally General Conditions include the Appendix to Tender which gives essential project information some of which must be completed by the Employer before issuing the tender documents, together with some information which must be added by the tenderer upon submission of the tender.

In any project in order to overcome problems it will often be necessary to carry out additional work and this will take time and money. The most common situation is that the Contractor spends money and claims it back from the Employer.

It is then necessary to decide whether the Employer must pay, or whether the Contractor must bear the additional cost. The initial decision will normally be made by the Employer's Representative or Engineer. However this can only be an interim decision and is subject to appeal to the Engineer or the Dispute Adjudication Board and ultimately to an arbitrator or the courts. The actual dispute resolution processes vary in different FIDIC forms of contract.

The basis on which such decisions must be made is laid down in the Conditions of Contract. The Conditions of Contract deal with the roles of the parties to the Contract and lays down their rights and obligations under the Contract.

## **4.0 INTERNATIONAL CONTRACTS**

An international contract may be defined as a contract in which one of the parties is from a different country to the country of the project. In many cases the requirements outlined in the Conditions of Contract for international contracts are similar to those for domestic contracts, but there are additional matters such as different legal systems, or local customs and procedures, currency which must be considered.

## **5.0 THE FIDIC FAMILY OF CONTRACTS**

In 1999 FIDIC published the first edition of four new standard forms of contract:

- Conditions of Contract for Construction

Recommended for building or engineering works designed by the Employer or by his representative, the Engineer. Under the usual arrangements for this type of contract, the Contractor constructs the works in accordance with a design provided by the Employer. However, the works may include some elements of Contractor designed civil, mechanical, electrical and/or construction works.

- **Conditions for Plant and Design Build**

Recommended for the provision of electrical and / or mechanical plant, and for the design and execution of building or engineering works. Under the usual arrangements for this type of contract, the Contractor designs and provides, in accordance with the Employer's requirements, plant and / or other works; which may include any combination of civil, mechanical, electrical and/or construction works.

- **Conditions of Contract for EPC/Turnkey Projects**

Suitable for the provision on a turnkey basis of a process or power plant, of a factory or similar facility, or of an infrastructure project or other type of development, where (i) a higher degree of certainty of final price and time is required, and (ii) the Contractor takes total responsibility for the design and execution of the project, with little involvement of the Employer. Under the usual arrangements for turnkey projects, the Contractor carries out all the engineering, procurement and construction (EPC): providing a fully equipped facility, ready for operation at the "turn of the key".

- **Short Form of Contract**

Recommended for building or engineering works of relatively small capital value. Depending on the type of work and the circumstances, this form may also be suitable for contracts of greater value, particularly for a relatively simple or repetitive work or work of short duration. Under the usual arrangements for this type of contract, the Contractor constructs the works in accordance with a design provided by the Employer or by his representative, but this form may also be suitable for a contract which includes, or wholly compromises, contractor designed, civil, mechanical, electrical and / or construction works.

To complement the above FIDIC published its Contracts Guide during 2000.

In the preparation of the Conditions of Contract for Construction, it was recognised by FIDIC that, while there are many sub clauses which may be generally applicable, there are some sub clauses which must necessarily vary to take account of the circumstances relevant to the particular contract. The sub clauses which were considered to be applicable to many but not all contracts

have been included in the General Conditions, in order to facilitate their incorporation into each contract.

The General Conditions were prepared on the following basis :

- Interim and final payments will be determined by measurement, applying the rates and prices in a Bill of Quantities
- If the wording in the General Conditions necessitates further data, then the sub clause makes a reference to that data being contained in the Appendix to Tender, the data either being prescribed by the Employer or being inserted by the Tenderer.
- Where a sub clause in the General Conditions deals with a matter on which different contract terms are likely to be applicable for different contracts, the principles applied in writing the sub clause were:
  - Users would find it more convenient if any provisions which they did not wish to apply could simply be deleted or not invoked, than if additional text had to be written (in the Particular Conditions) because the general conditions did not cover their requirements; or
  - In other cases, where the application of the above was thought to be inappropriate, the sub clause contains the provisions which were considered applicable to most contracts.

The FIDIC Conditions are based upon the principle that the Engineer has the authority to determine additional payments. However, neither the Employer nor the Contractor is finally bound by the Engineer's interpretation or determination. Clause 20 defines the steps to be taken where the Engineer's decision is not acceptable to one or both parties.

## **6.0 DISPUTES – DISPUTES ADJUDICATION BOARD**

The Conditions of Contract gives the rights and obligations of the parties to the contract. Other people such as the engineer, consultant or sub-contractor may also be involved in the preparation, analyses or administration of any claim but cannot be the principle who makes or receives the claim. While it may be legally possible for an outside person to claim that either the employer or the contractor has caused them damage by negligence or failing to comply with some legal obligation, any such claim is outside the scope of this presentation.

Disputes result in a substantial dilution of effort, delays and diversion of capital. The FIDIC Conditions of Contract include provisions for the submission, consideration and resolution of claims and disputes under a number of different clauses. The primary clause of interest here, clause 20, deals specifically with Claims, Disputes and Arbitration. It envisages the establishment of a Dispute Adjudication Board, known as the DAB.

A DAB is a panel of experienced, respected, impartial and independent reviewers. The board is normally organised before construction begins and meets at the job site periodically. The DAB members are provided with the contract documents, plans and specifications and become familiar with the project procedures and the participants and are kept abreast of job progress and developments. The DAB meets with the Employer's and Contractor's representatives during regular site visits and encourages the resolution of disputes at job level. When any dispute flowing from the contract or the work can not be resolved by the parties it is referred to the DAB for Decision.

The DAB procedure was conceived as a method of primary dispute resolution. Thus the procedures should facilitate prompt reference of disputes to the board as soon as job level negotiations have reached an impasse. Referral to the board only after multiple levels of Employer and Contractor reviews is inconsistent with the process and counter-productive in terms of time and expense.

## **7.0 PRINCIPAL PARTICIPANTS IN CONTRACT**

The purpose of this presentation is not to examine the legal role of each of the participants of the contract. The Contract is a legally binding agreement which imposes duties and responsibilities upon the parties who entered into the agreement, that is the Employer and the Contractor. The Engineer is not a party to the contract but is appointed by the Employer to carry out duties that are stated in the contract. The Engineer has no rights to change any of the conditions of contract. The following notes outline the role of the Engineer, Employer and Contractor with regard to any claims resulting from the contract or the works.

The FIDIC 1999 contracts have introduced a number of contract administration procedures which must be followed by both parties. Whilst these procedures are normally considered as good working practice the obligations which they impose on the parties within the contract will involve additional cost and considerable additional paperwork particularly for the contractor. The Employer in a FIDIC contract delegates the administration to the Engineer.

Particularly noteworthy of these administrative procedures are the following:

- Clause 2.4 enables the Contractor to require the Employer to provide details of his arrangements to finance the project
- Clause 2.5 requires the Employer to follow a procedure for any claims against a Contractor
- Clause 4.9 refers to a quality assurance system which must be specified
- Clause 4.21 requires the Contractor to submit details in monthly progress reports
- Clause 6.7 requires the Contractor to maintain health and safety records
- Clause 6.10 requires the Contractor to submit details of personnel and equipment
- Clause 8.3 requires the Contractor to give notice of programming implications of future events or circumstances
- Clause 13.2 gives a procedure for the Contractor to submit value engineering proposals
- Clause 14.3 gives a procedure for the Contractor to submit reports for interim payment valuations
- Clause 20 provides stringent claims procedures and requirements for the upkeep of contemporary records
- The FIDIC guidance notes suggest an additional sub clause within the standard Clause 3 to allow for management meetings.

## **7.1 RISK**

The allocation of risks between the Employer and Contractor is defined within the contract. In general the Contractor accepts all the risks that are not specifically allocated to the Employer. The Employer's liabilities include what are known as special risks, which are described out Clause 17.3.

The General Conditions allocate the risk between the parties on a fair and equitable basis, taking account such matters as the insurability, sound principles of project management, and each party's ability to foresee and mitigate the effect of the circumstances relevant to each risk.

The Conditions of Contract gives the rights and obligations of the parties to the contract. All claims which are made because of problems which arise under or in connection with the contract must follow the procedures which are laid down in the contract.

Claims are generally made by the Parties due to the following circumstances :

- Entitlement to an extension of time

- Entitlement to additional payments
- Entitlement to the recovery of costs
- Non fulfilment by one party of an obligation under the contract
- Additional payments due to legal entitlement

## **7.2 THE ENGINEER**

The contract is administered by the Engineer who is appointed by the Employer. The Engineer does not represent the Employer for all purposes. The Engineer is deemed to act for the Employer and is included in the schedule of Employer's Personnel as listed in Clause 1.1.2.6. However, under clause 3.5 if the Engineer is called upon to make a determination then after consulting with each party he is required to make a fair determination.

Under clause 14.6 the Engineer is required to certify interim payment certificates in an amount which he fairly determines to be due. Clause 14.3 (f) states that interim valuations shall include any additions or deductions which may have become due under clause 20. The inclusion of any sums due from any decision of the DAB in any interim valuation certificate should be made irrespective of any notice of dissatisfaction issued by either party. This is due to the wording in the fourth paragraph of Clause 20.4 which states that the parties shall promptly give effect to the decision of the DAB until it has been revised by an amicable settlement or by an arbitration award.

Clause 3.1 states that the Engineer has no authority to relieve either party of any duties, obligations or responsibilities under the contract. The main exception to this is the authority to instruct variations, because they may include omission of work. The FIDIC contract allows the Engineer, but not the Employer, to issue an instruction under Clause 3.3. The Contractor is not permitted to change the permanent works unless the Engineer has instructed or approved the variation. If the Employer wants to make any changes, he must request the Engineer to issue the instruction. If the Employer gives an instruction directly to the Contractor then the Contractor must obtain the Engineer's confirmation and instruction before he executes the change. Strict adherence to these requirements is essential for the Engineer to maintain technical and financial control over the project

The Engineer has an extremely important role in the administration of the contract and the way in which he carries out his duties will have a major impact on the work of the Contractor and the success of the project. In accordance with clause 3.1 if the Engineer is required to attain the approval of the Employer before exercising a specified authority the requirements shall be as stated in particular conditions. The Employer undertakes not to impose further constraints

on the Engineer's authority except as agreed with the Contractor. Any additional constraints on the Engineer would therefore be a breach of contract by the Employer for which the Contractor would be entitled to claim damages.

Under Clause 1.3 the Employer's approval of the Engineer exercising any specific specified authority shall be in writing and shall not be unreasonably withheld or delayed. When deciding which constraints to list in particular conditions the Employer should take account of the likelihood of the Contractor being entitled to recover the additional costs he incurs whilst the Engineer awaits the Employer's written approval. When the Contractor receives an Engineer's communication for which is the Employer's prior approval was required, the Contractor is not entitled to query whether it was approved. For the purposes of the contract the Employer is deemed to have given approval. For the purpose of the Engineer's agreement with the Employer, whether the Employer actually approved is a matter of fact an acting without approval may be a breach of his consultancy agreement.

The Engineer is empowered under Clause 3.3 to issue instructions and Contractor is generally obliged to comply. If the Contractor considers that certain specified circumstances prevent him from complying with a variation instruction then he may give notice which is described in Clause 13.1. It may be necessary for immediate oral instructions to be given under certain circumstances, although they should be avoided wherever possible, procedures are specified for instructions which are not immediately confirmed in writing. The procedures require prompt confirmation or denial of an alleged oral instruction, in order that its validity or invalidity can be established as soon as practicable.

Under Clause 3.5 of the contract the Engineer is required to make determinations. Clauses 2.5 and 20.1 specify procedures for the submission by each party of claims for financial compensation and / or extensions of the contract period. Major projects give rise to major risks which have to be dealt with if they occur. Claims procedures are specified so as to provide the degree of formality considered necessary for the proper administration of a project. Complying with these procedures and maintaining a co-operative approach to the determination of all adjustments to the contract should enhance the likelihood of achieving a successful project.

In accordance with Clause 1.3 determinations shall be in writing and not be unreasonably withheld or delayed. The Engineer shall not delegate his authority to determine any matter in accordance with Clause 3.5. The procedure for making a determination is that the Engineer first consults with each party separately or jointly and endeavours to achieve the agreement of both parties. If the agreement of both parties cannot be achieved within a reasonable time the Engineer is then required to make a fair determination in accordance with contract. The Engineer is then required to notify both parties of his determination

which is binding until and unless it is revised under the dispute resolution procedure under clause 20. In practice the Engineer may first make an interim determination indicating his intention to revise it when further particulars are presented to him, and meanwhile including the appropriate adjustments in any interim payment certificates.

### **7.3 CLAIMS BY THE EMPLOYER**

If the Employer considers himself to be entitled to any payment under any clause of the contract then the Employer or the Engineer shall give notice and particulars to the Contractor. In some cases such as under clause 4.19 and 4.20 notice is not required. These procedures are much less onerous than those for Contractor's claims. After the Employer has provided notice the Engineer makes determination under clause 3.5.

With regard to claims by the Employer a number of clauses specifically refer to Clause 2.5 but a number of others do not. The Employer should take great care to exercise the correct procedure before making any deduction or claim under the contract.

Clauses requiring notice under clause 2.5 include:

- Clause 7.5 rejection
- Clause 7.6 remedial work
- Clause 8.6 rate of progress
- Clause 8.7 delay damages
- Clause 9.4 tests on completion
- Clause 11.3 extension of defects notification period
- Clause 15.4 payment after termination

Clauses not requiring notice under clause 2.5 include:

- Clause 4.19 electricity water and gas
- Clause 4.20 Employer's equipment and free issue material
- Other services requested by the contractor

Other clauses allowing for claims a deduction by the employer include:

- Clause 4.2 performance security
- Clause 5.4 evidence of payments to nominated subcontractors
- Clause 9.2 delayed tests
- Clause 10.2 taking over of parts of the works
- Clause 11.4 failure to remedy defects

- Clause 11.6 further tests
- Clause 11.11 clearance of site
- Clause 13.7 adjustments in legislation
- Clause 17.1 indemnities
- Clause 18.1 general requirements for insurances
- Clause 18.2 insurance for works and contractors equipment

## **7.4 CLAIMS BY THE CONTRACTOR**

Most claims are made by the Contractor and may be claims for an extension of time for the completion of the works, for the reimbursement of costs including in some cases reasonable profit. Claims for additional time frequently result in a claim for additional payments, which under the FIDIC conditions must be submitted as a separate claim.

All claims for additional time or money must follow the procedures of clause 20.1 which require a notice to the Engineer as soon as practicable and in any event not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstances. If the Contractor fails to give notice of a claim under this clause he shall not be entitled to additional payment and the Employer shall be discharged from all liability in connection with the claim. The Contractor is also under an onerous obligation to keep contemporary records as may be necessary to substantiate the claim.

In general the sequence of procedures for the submission of claims in accordance with Clause 20 and other clauses may be summarised as follows :

1. The Contractor notifies that he is aware of a situation in which may give rise to a problem
2. The Contractor gives notice that he considers himself to be entitled to additional time or additional payment
3. The Contractor gives notice when he actually suffers delay or additional costs
4. The Contractor keeps contemporary records
5. The Contractor submits his fully detailed claim with supporting particulars
6. The Engineer responds to approve or disapprove the claim
7. The Engineer then certifies interim payments
8. The Engineer proceeds in accordance with clause 3.5 to determine any extension of time or additional payments
9. If the Contractor does not agree with the Engineer the claim becomes a dispute and the procedures of clause 20.4 are followed

The definition of a dispute under Clause 20.4 is wider than the requirement for a notice under Clause 20.1. For example if the Contractor objects to an instruction by the Engineer then the Contractor is obliged to comply with the instruction under clause 3.3, but there may be a dispute which could be referred directly to the DAB under clause 20.4. In any event the Contractor is obliged under Clause 8.1 to proceed with the works with due expedition and without delay.

Disputes concerning additional time or money must follow the procedures of clause 20.1. This procedure could take several months before the problem could be referred to the DAB unless both sides to agree to ask the DAB for an opinion under clause 20.2.

The various requirements for the submissions of claims could result in parallel procedures and more than one referral to the Engineer under Clause 3.5 from the same situation. In some circumstances it may be desirable for the Engineer to proceed under Clause 3.5 as quickly as possible after the situation has arisen, in order to avoid further argument, or at least establish clear boundaries of any difference of opinion.

Clause 8.3 also includes a general requirement for the Contractor on to promptly give notice to the Engineer of specific probable future events or circumstances which may adversely affect the work, increase the contract price or delay the execution of the works.

When submitting a claim the Contractor should include reference to all clauses which may be relevant. Some claims situations are covered by more than one clause and Contractor's entitlements may vary depending upon which clauses are used as the justification for the claim.

Clauses including specific requirements for claims include the following:

Clauses which require the contractor to give notice of an event which may cause delay or additional cost:

- Clause 1.9 delayed drawings or instructions
- Clause 4.12 unforeseeable physical conditions
- Clause 4.24 fossils
- Clause 16.1 Contractor's entitlement to suspend work
- Clause 17.4 consequences of Employer's risks
- Clause 19.4 consequences of force majeure

Clauses which entitled the contract out to an extension of time and or additional payments:

- Clause 1.9 delayed drawings or instructions
- Clause 2.1 right of access to the site
- Clause 4.7 setting out
- Clause 4.12 unforeseeable physical conditions
- Clause 4.24 fossils
- Clause 7.4 testing
- Clause 10.2 taking over parts of the works
- Clause 10.3 interference with tests on completion
- Clause 11.8 Contractor to search
- Clause 13.7 adjustments for changes in legislation
- Clause 16.1 Contractor's entitlement to suspend work
- Clause 17.4 consequences of Employers risks
- Clause 19.4 consequences of force majeure

Clauses which involve valuation or similar requirements:

- Clause 12.3 evaluation
- Clause 12.4 omissions
- Clause 15.3 valuation at date of termination
- Clause 16.4 payment on termination
- Clause 18.1 general requirements for insurances

Classes which provide for the Contractor to claim profit as well as costs:

- Clause 1.9 delayed drawings are instructions
- Clause 2.1 right of access to the site
- Clause 4.7 setting out
- Clause 7.4 testing
- Clause 10.2 taking over parts of the works
- Clause 10.3 interference with tests on completion in
- Clause 11.8 Contractor to search
- Clause 16.1 Contractor's entitlement to suspend work
- Clause 16.4 payment on termination
- Clause 17.4 consequences of Employers risks on

## **8.0 CLAUSE 20: CLAIMS & DISPUTES**

### **8.1 CLAUSE 20.1**

#### **8.2 GENERAL**

Clause 20.1 prescribes the procedure to be followed by the Contractor if he considers himself to be entitled to an extension of time to additional payment or

to both. This clause refers only to claims by the Contractor. Equivalent provisions for claims by the Employer are included in Clause 2.5 which contains much less stringent requirements.

The requirements of Clause 20.1 are in addition to other requirements for notices in similar circumstances. Clearly these notices can be combined but the supporting information that is required and the further actions that are to be taken by the Engineer and the Contractor will vary for each notice.

Various clauses that Contractor's entitlements to claim are expressed using similar words which typically are as follows:

- *"The contractor shall give notice"* – this is obligatory but a failure to notify may be due to him not having suffered delay and not having incurred costs
- *"The contractor shall be entitled"* – this is not stated as being subject to anyone's opinion
- *"Subject to Clause 20.1"* – the second and final paragraphs of which may affect the Contractor's entitlements
- *"An extension if completion is delayed"* – so it should be calculated by reference to the delay in completion
- *"Payment of any such costs"* – which is the cost attributable to the event or circumstances excluding costs which are not attributable thereto
- *"Plus reasonable profit"* – this phrase is included in clauses relating to failures by or on behalf of the Employer and not to other risks

Clause 20.1 specifies the procedures which the contractor must follow in pursuit of a claim and the consequences of a failure to do so.

### **8.3 NOTICE PERIODS**

If the Contractor considers himself to be entitled to any extension of time for the completion of the works or for any additional payments under any clause of the contract he should give notice to the Engineer.

The notice shall describe the event of circumstances giving rise to the claim and shall be given as soon as practicable. In any event the notice must be given not later than 28 days after the Contractor became aware or should have become

aware of the relevant event or circumstance giving rise to the claim. In practice it may be easier to establish whether notice was given within 28 days after the Contractor should have become aware of the relevant event or circumstance giving rise to the claim. Generally there is no need for this notice to indicate how much extension of time or additional payments may be claimed or to state the clause or other contractual basis of the claim.

Notices must comply with Clause 1.3. Clause 4.21 requires progress reports to list all notices which have been given under Clause 20.1.

The notice is to be sent to the Engineer with a copy to the Employer in accordance with Clause 1.3. The recipient is not required to respond other than to acknowledge receipt and Clause 1.3 and should not regard the notice as an aggressive act but merely as an act which enables the Employer to be aware of the possibility that the Contractor has an enhanced entitlement. This first notice is the start of the detail procedure specified in Clause 20.1. The Contractor must ensure that notices are given in due time in order to protect his rights under the contract. Failure to give notice in accordance with the first paragraph of Clause 20.1 deprives the Contractor of all his entitlement to any extension of time and/or compensation.

Notices are vitally important will for the administration of the contract by the Contractor and for the administration of the contract and its life consequences by the Engineer and Employer.

Notices enable the Engineer to make his own observations and make his own records of the events giving rise to the claim. They also enable the Engineer to consider what possible actions he may take to overcome the problem. Notices put the problems on record and enable the Contractor to receive prompt decisions on his entitlement. A further, and possibly more drastic, consequence of the notices will be to enable the Employer to take a decision to determine the contract. This decision may be taken if the Employer considers that the consequences of claims made by the Contractor will render the project to be no longer feasible.

Whether a failure to give a notice or provide information can remove legal entitlement is a matter which may depend on the applicable law. However it is clear that under this contract notice is essential for the Contractor to establish his legal entitlements. Clause 20.1 imposes procedural obligations on the recipient of the Contractor's claims and submissions. By comparison with the Contractor's procedural failures it will be noted that no consequences are stated in respect of the failures of such recipients. If a dispute arises the Contractor may draw the DAB's attention to the Engineers or the Employer's procedural failures. In some

circumstances the Contractor may have an entitlement under applicable law in respect of these failures.

## **8.4 RECORDS**

It is the requirement under Clause 20.1 that the Contractor shall keep contemporary records. The records are those that are necessary to substantiate the claim. The extent of recording is the responsibility of the Contractor as he is the one who is able to anticipate what substantiation will be appropriate. The importance of good record keeping cannot be overemphasised. The resolution of disputes frequently rests on the adequacy of contemporaneous records.

Records are to be kept on site or at any other locations acceptable to the Engineer. The Engineer may monitor the record keeping and he may instruct the Contractor to keep further contemporary records. There is no apparent restriction in the clause relating to the definition of further and better particulars. The Contractor is obliged to permit the Engineer to inspect the records and if instructed provide copies to the Engineer.

## **8.5 NOTICE OF DETAILED CLAIM**

Within 42 days after the Contractor became aware of the event or circumstance giving rise to the claim he is required to submit to the Engineer a fully detailed claim. The claim must include full supporting particulars.

If the claim has a continuing effect then the procedures specify that the Contractor :

- submits each detailed interim claim
- submits interim claims at monthly intervals
- submits further particulars as the Engineer may reasonably require
- to make a final claim within 28 days after the end of the end of the circumstance giving rise to the claim

Within 42 days after receiving acclaim the Engineer shall respond with his approval or disapproval and detailed comments.

The above two time periods are subject to the alternative proviso that any, *"...other such period as may be proposed...and approved..."* could be adopted. Whether the requested additional time is reasonable will depend upon the circumstances and complexity of the matter. However it any event of the

approval or disapproval of the Engineer may not be unreasonably withheld or delayed.

The Contractor is entitled to prompt payment of such amounts as have been reasonably substantiated as due under contract. He does not need to wait until he has submitted every element of the substantiation of any particular claim.

The final paragraph of Clause 20.1 confirms that its requirements are in addition to those of any other clause applicable to any claim. Although it may be possible for one notice to satisfy the requirements of different clauses, under this final paragraph if the Contractor fails to comply with any such requirement then he runs the risk that any extension of time or additional payment may be reduced by reason of the failure having prevented or prejudiced proper investigation of the claim. This final paragraph must not be regarded as allowing a penalty to be applied in some arbitrary manner, however it should be recognised that the Contractor should have been able to comply with the requirements.

Of interest here are the following 2 cases relating to the failure to give notice not being fatal to a successful claim. Some commentators consider that the clause may be construed as *contra proferentem*. It should however be noted that neither case relates to the FIDIC 1999 form of contract but do relate to similar finite clauses.

**UK jurisdiction :** Holland Hannen & Cubits (Northern Limited v Welsh Health Technical Services Organisation (1981) 18 BLR 80 (QBD); (1985) 35 BLR 1 (CA)

**US jurisdiction :** Mertz (JW) IBCA No 64, 59-1 BCA (CCH) para 2,086 (1959)

## **8.6 DISPUTES ADJUDICATION BOARD**

The Disputes Adjudication Board (DAB) is an impartial and independent panel of one or three people who are ideally appointed at the start of project and give decisions on any disputes. When requested by both the Employer and the Contractor the DAB shall be available to give advice or opinions on any matter relevant to the contract.

The DAB has four main functions :

- To visit the site periodically and become familiar with the details of the project
- To keep up to date with activities, progress, developments and problems at the site
- Encourage the resolution of disputes by the parties

- When a dispute is referred to it, hold a hearing, complete its deliberations and prepare a Decision in professional and timely manner

The DAB's role is to settle disputes. Settlement will not have been achieved if a party subsequently refers the dispute on to arbitration.

The FIDIC guidance notes for the preparation of particular conditions include an alternative paragraph for Clause 20.4 which enables the Engineer to be appointed as the DAB. This cannot be recommended, as in practice the Engineer is an employee of the Employer and will not be perceived to be either independent or impartial.

Although the contract states that the DAB shall comprise of either 1 or 3 suitably qualified persons it is often the case that on large complex projects involving a number of disciplines the tribunal may consist of 5 persons of whom any 3, selected by the chairman, will sit at any time on a particular dispute.

Ideally the members of the dispute adjudication board are appointed at the beginning of the contract. FIDIC's example for the letter of tender allows the Contractor to accept or reject names proposed by the Employer and to include the Contractor's own suggestions for his nominee. If this procedure is used it is essential that the tenderer does not feel and any pressure to accept the Employer suggestions but feels free to propose his own suggestions. It is preferable but not essential for the individuals to be agreed before the letter of acceptances issued. The adjudication procedure depends for success on amongst other things and the party's confidence in the agreed individuals who will serve on the DAB, and therefore it is essential that candidates for this position and not imposed by either party on the other.

FIDIC as an appointing entity will nominate individual DAB members if requested to do so. FIDIC does not administer adjudication other than to nominate adjudicators, if the nominating authority has been delegated to it under the contract.

Typically the DAB is organised at the beginning of the contract and conducts an initial meeting at the site when construction is just beginning. It meets with both parties and is supplied with copies of the contract documents and is provided with a project briefing which acquaints the DAB with the nature of the work and the Contractor's plans and proposals for executing it. At the initial meeting the timing of the board's regular site visits are established and the procedures for submitting data to the DAB by the parties are established.

One of the unique features of the DAB is that it is established to promote resolution of disputes while construction is still underway. The board's ability to

respond promptly and intelligently requires that it be kept informed of construction activities, progress and problems. Each board member should be provided with a complete set of contract documents and included on the distribution list of periodic progress reports and progress meeting minutes. It is recommended that a joint progress report should be delivered by the parties to the DAB members on a monthly basis.

The DAB normally meets on site every three months with a view to remaining acquainted with the progress of the works at any actual potential problems or claims. At the conclusion of the site visit the DAB shall prepare a short report of its activities during the visit and shall send copies to each of the parties.

The very existence of a readily available mutually acceptable and impartial board tends to promote bilateral agreement on matters that have historically been referred to third party adjudication. Experience has shown that the DAB facilitates positive relations, open communications, trust and co-operation normally only associated with partnering. There are several reasons for this. Participants to the process are effectively deprived of any opportunity to posture - they do not want to lose their credibility with the DAB by taking tenuous or extreme positions. In addition since the typical DAB handles disputes on individual basis, the accumulation of claims is minimised and there is generally not an ever-growing backlog of unresolved claims or issues creating an atmosphere fostering acrimony.

On any DAB project the parties are encouraged to identify evaluate and deal with claims and disputes in a prompt businesslike manner. At each regular meeting the DAB asks about any potential disputes and also requests a status report on claims that may feature in the future. In this manner the parties focus for an early identification and analysis and prompt resolution while remaining aware of the board's availability in the event of an impasse.

With the agreement of the parties the board is also available to provide non binding advice and opinions on any matter relevant to the contract. This is particularly useful where technically knowledgeable and experienced neutrals have been selected to participate on the board. The procedures adopted by the DAB should be simple, straightforward fair and efficient facilitating prompt reference of disputes to the board.

The output of the board generally takes the form of a decision. The decision of the board is normally made by the unanimous consensus of its members. The decision is reasoned and sets out the matter in dispute, the board provides opinions on the principles involved and the basis of its decision. Reasons are essential part of the decision as when properly written they may persuade both parties that any further action may result in similar conclusions.

## **8.7 COST & COST BENEFIT**

Each party is responsible for paying one half of the remuneration of the DAB members. Both the Employer and the Contractor are jointly and severally liable to pay the DAB members their fees and expenses.

Historical data indicates that the normal costs of the DAB within a contract do not amount to more than 1% of the total contract value. Data available from the Dispute Resolution Board Foundation in the United States indicates that in 1988, 7 projects were known to exist with DRBs (Dispute Review Board) registered. In these projects 16 recommendations were made of which none were appealed. Up to December 2001 over 820 contracts were completed with either a DAB or DRB representing an aggregate value in excess of US\$ 68B. More than 1,000 disputes have been settled within these projects and only 30 proceeded to further litigation.

One of our great DAB success stories in Europe has been the construction of the Channel Tunnel where the DAB consisted of five members. Only three members sat on any particular panel. Panels made recommendations on some 16 disputes with a total value of US\$ 3B. It is reported that 3 of the recommendations were not accepted and were further appealed to arbitration. The first recommendation was accepted after the arbitration was terminated the second was partially altered during arbitration and the third and this is mum was referred back to the panel for a further decision and eventually settled.

The success of the Channel Tunnel DAB in addition to further success stories with major infrastructure projects in the US, Central Europe, China, India and Southern Africa indicate the trends of acceptance of the system worldwide. The World Bank has now adopted a policy requiring dispute review boards producing recommendations rather than decisions on all its larger projects.

## **8.8 PERCEIVED BARRIERS**

The DAB process, along with most current ADR processes, are comparatively new and may be considered by some to be experimental. In reality the DAB procedure provides readily available considered dispute resolution advice on an ongoing basis. The DAB does not supplant the decision-making responsibility or authority of the parties but can facilitate decision making. The typical DAB timetable encourages ongoing dispute resolution. Often at a third party decision by an agreed neutral is of great benefit to public employers who are sometimes understandably sensitive to the potential for taxpayer and media attention

associated with decisions resulting in additional compensation or increased project time.

It is difficult to quantify the benefits of a DAB in real cost terms. As the procedure of the DAB is of a prophylactic nature, the lack of disputes may to the casual observer indicate a redundancy of the board. However the presence of the board normally acts as a catalyst for better communication and cost effective resolution of day to day issues on site.

Amongst some there may be a perception that the DAB imposes its own concepts of fairness and equity. However a competent board will not impose its own ideas of fairness and equity on the parties. Rather it will strive for a procedure and decision making process which is consistent with the language of the contract which form the basis of the party's agreement. The standard tripartite agreement requires members to comply with applicable laws and contract provisions. The ultimate safeguard is the ability of either of the parties to serve a notice of dissatisfaction which is allowed by Clause 20.

Potential users of the DAB system may consider that as the effort and expense of submitting the dispute to the board is relatively small a contractor may utilise the process to test the viability of seemingly marginal claims. However on the contrary it has not been observed that parties follow this route and statistical evidence shows that numerous projects which include DABs have had few or no disputes.

Some observers have commented that DABs add another layer unnecessarily to the dispute resolution process. This in turn is claimed will add to the time taken for absolute dispute resolution. However in my opinion the contrary is the reality. Boards with well informed members, available on a continuous basis during the duration of the projects often provide recommendations, advice and decisions normally with no delay.

Typical DAB procedures involve pre-hearing submissions, referral and response statements from the parties all normally accompanied by supporting documentation. Some observers claim that this documentation provides parties with free discovery. However as a more practical matter, supporting documentation is likely to surface early in any event and as such this is not considered to be a valid criticism.

My experience shows that the DAB process prevents or reduces acrimony. Rather than fostering a win-lose philosophy, the process encourages a win-win philosophy. Mutual cooperation eliminates such action expenses as legal and expert fees, which are normally a significant cost burden to the parties and ultimately add to the costs of any dispute resolution process.

Criticism that limited discovery and sworn testimony and the lack of cross-examination during informal hearings creates drawbacks to the process. These comments to a large extent miss the point of any DAB process. The DAB process is a consensual procedure. True disputes of material facts seldom remain after the hearing process. The extensive documentation on larger projects as well as any readily available knowledge of witnesses minimises factual disputes.

The major criticism of the DAB process is its apparent lack of enforceability. In most jurisdictions any adjudication procedure is non statutory. In the FIDIC form the DAB process is contractual. Hence any failure to abide by the process will result in breach of contract. The parties are provided with various options within the contract for dealing with decisions generated by the DAB. Experience has shown that in cases where decisions have not been implemented in their entirety during the period of a project they have formed the basis for negotiated settlements.

## **9.0 CLAUSE 20.2 & 20.3**

### **9.1 DISPUTES TO DAB**

Clause 20.2 states that disputes shall be adjudicated by a DAB. The scope of a dispute is made in Clause 20.4, which is wider than the requirements for a notice under Clause 20.1.

FIDIC does not define what is meant by the word dispute. The word will therefore have its normal meaning, that is, any statement, complaint, request, allegation or claim which has been rejected and that rejection is not acceptable to the person who made the original statement or complaint. It is clearly not necessary for a complaint to have been considered by the Engineer in order to create a dispute. The wording of Clause 20.4 states that a dispute of any kind whatsoever may be referred to DAB 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 or valuation of the engineer.

A dispute may be said to have arisen when :

- A final determination has been rejected
- Discussions have been terminated without agreement
- When a party declines to participate in discussions to reach agreement
- When so little progress is being achieved during protracted discussions that it has become clear that agreement is unlikely to be achieved

## **9.2 DAB CONSTITUTION**

Clause 20.2 deals with the appointment of the DAB. It requires that the DAB shall be jointly appointed by the parties by the date stated in the appendix. The default date is stated to be 28 days after the Commencement Date. The DAB shall comprise of either one or three suitably qualified persons. The definition of suitably qualified persons will be discussed below.

FIDIC conditions of contract state that that the DAB's decision shall be binding on both parties who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitration award. Hence the parties empower the DAB to reach decisions with which they undertake to comply. The DAB members must therefore be selected very carefully. In order to maximise the DAB's chances of success in avoiding arbitration members must be trusted and have the confidence of both parties. It is therefore essential that the membership of the dab is mutually agreed upon by the parties and not imposes at the party.

This Clause states that in the case of a three person DAB each party shall nominate one member for the approval of the other party. Approvals, as stated elsewhere in the contract, shall not be unreasonably withheld or delayed. Each party should endeavour to nominate a truly independent expert with the ability and freedom to act impartially and develop a team spirit within the DAB and make unanimous decisions. It may therefore be reasonable to withhold approval of a proposed member if it appears unlikely that he will not endeavour to reach a unanimous decision. This reason for disapproval may be based upon reasonable grounds for anticipating that he will decline to discuss matters constructively within the DAB.

Having chosen two members the parties are then required to consult both the members chosen and agree upon the third member, who shall become the chairman of DAB. The agreement on the chairman can sometimes be difficult for numerous reasons. In reality the members may find it easier to agree with each other the nomination of chairman and then propose that person to the parties for their agreement.

The Clause anticipates that the nomination of a one person DAB or the chairman of a three person DAB is mutually agreed. In such cases the Employer normally provides the names of suitable persons for the tenderer to select. A party may be reluctant to choose names from a list of people who have already been contacted by the other party. Experience shows that this process becomes more difficult during the contract when the DAB has not been established at the start of the project.

It is reasonable to assume that for smaller contracts a one person in DAB is sufficient. Current practice in the United States indicates a small contract to have a value of \$20M or less, however in some states such as Florida, small contracts are said to be below \$2M. Within the EC 3 man DABs are the norm on all contracts. On mega projects and projects with varied technical complexity it is normal to have a 5 man panel from which the chairman will choose any 3 suitable persons to hear a particular dispute.

Where projects involve many layers of sub contractors or have a number of contractors then some advantage may be considered by having either a common DAB or an "Interlocking" DAB member who sits on a number of boards within the same project.

Where projects involve a number of "layers" such as consultant agreements, supplier agreements and nominated sub contract agreements, in addition to the contractor's own sub contractors the a multi layer DAB may be considered to be beneficial. Procedural and administrative problems are inherent in such systems, particularly with regard to confidentiality and admissibility. However, the enhanced dispute resolution process may outweigh the difficulties in establishing and running such a system.

### **9.3 SELECTION OF MEMBERS**

As mentioned above each party nominates one potential member. Often the invitation to tender issued by the Employer contains a schedule with names of potential DAB members. The Tenderer is not obliged to select anyone from this list and may substitute further names which become suggestions and do make the tender conditional. It is preferable that the list of potential names is prepared jointly by the parties. In such cases nominations may be agreed after the submission of tenders but prior to the commencement date.

In the event of failure to agree nominations the provisions of Clause 20.3 will apply. Clause 20.3 provides a default appointment procedure in the event that the parties fail to agree nominations by particular dates.

The specific "*failure*" dates are:

- Failure to appoint a sole member by the date stated in the appendix to tender
- Failure to nominate members by the date stated in the appendix to tender

- Failure to agree on the appointment of chairman by the date stated in the appendix to tender
- Failure to agree member replacement within 42 days of vacancy

The default appointment procedure allows for the appointing entity to appoint members upon a request by either or both of the parties for such appointment. In the appendix to tender the default appointment entity is the President of FIDIC or a person appointed by him. The Clause allows for due consultation with both parties by the appointing entity on prior to its determination of the appointment. This provision may prove problematic in the case where one party is already resisting the appointment of anyone on to the DAB. The consultation process may be seen as a further opportunity for delay and veto.

In order obtain the nomination of a board member it is necessary to make a request to the President of FIDIC together with the submission of a fee. The request should contain sufficient detail of the contract and of the problems to be decided by adjudication to enable the President to make a suitable nomination. The normal consultation takes the form of the submission to the parties of one or more names of suitable candidates together with their CV's. It is expected that the parties respond with no delay with either their acceptance or rejection of the names put forward. Once made the appointment becomes final and conclusive.

A further method of member selection occasionally used is to have a list of potential members included in the contract appendix from which the parties may select candidates whenever necessary. As with the consultation process above, this method is not ideal. Listees may no longer be available when required and depending upon the origin of the list no names may prove suitable to a party intent on proceeding directly to arbitration.

## **9.4 QUALITIES OF DAB MEMBERS**

Board members must be selected carefully because :

- The parties empower the DAB to reach decisions with which they undertake to comply, and
- The DAB member cannot ordinarily be removed, except with the agreement of both parties

The members of the board should be experienced and should have the respect of the parties in order to fulfil their obligations adequately. The board acts as a team and not as individual representatives of the parties. As such the board should exhibit a balance of experience and professional expertise. Unless the

Employer and the contractor are from the same country it is preferable for each member of the DAB to be of a different nationality to each other and not of the same nationality as either of the parties.

Training courses for board members have been established by FIDIC and a list of suitable board members has been published by them. Several other organisations throughout the world have also established lists of potential nominees.

The standard criteria for inclusion on such a list normally consist of :

- Membership of the listing organisation
- Appropriate academic and professional qualifications
- Minimum of ten years experience in a senior position
- Knowledge and experience of the relevant contract documentation
- Formal dispute adjudication training and assessment
- Good interpersonal communication skills
- Ability to be impartial and objective

## **9.5 BASIC QUALITIES REQUIRED BY DAB MEMBERS**

The parties empower the DAB members to reach decisions with which they undertake to comply. Therefore the DAB must comprise of members have the ability and experience to wield these powers wisely and who are willing to do so.

## **9.6 EXPERIENCE**

It is important that the member has experience of the discipline in which the dispute has occurred. He is then able to understand the problems which face the parties during the execution of the works and better appreciate the skills needed to undertake the works in a professional manner. When problems occur, knowing the difficulties which each party faces, he has a better understanding of the solutions required.

An understanding and knowledge of construction methods is also advantageous. Although construction methods change from project to project and indeed from country to country, knowledge of standard systems as they relate to particular conditions is imperative. The selection of correct or adequate working methods and equipment is normally vital to the successful implementation of projects. One of the functions of the DAB may be to provide advice and opinions if required to do so. It is therefore of great benefit to the parties that the board members are experienced and have a broad base of industry knowledge. Without this

experience there would be little benefit in consulting the members on any aspect of problem solving.

It is of course impossible that members are always completely up to date with all new construction developments throughout the world. However at the beginning of a project the member is required to familiarise himself with all aspects of the project and it is for the parties to ensure that the members are adequately briefed. Any gaps in the members knowledge or experienced may thus be addressed at an early stage.

Having a board member who has an overview on a number of similar projects in differing areas of the world will provide the parties with the confidence that their chosen dispute resolver understands the problems which they face on a day to day basis.

## **9.7 CONTRACT KNOWLEDGE**

An understanding of the rights, obligations and liabilities of the parties is of fundamental importance for board members. Projects upon which DAB's are used are normally large complex works involving many disciplines and skills. In order for a project to be successfully undertaken it is vital that the coordination and dispersal of information between the parties involved runs as smoothly as possible. Often parties involved in complex projects employ large numbers of staff, many of whom are unaware of the detailed responsibilities and risk allocation between the parties.

Contract documentation involving the general and particular conditions of contract in addition to specifications and contract details may become voluminous. It is the case that judiciously placed questioning by board members may contribute to the smooth running and free flow of information between the parties without interfering with any contractual posturing being established by either party.

During the consideration of issues and particularly during site meetings knowledge of the contractual position of the parties is essential in order that meaningful observations may be made regarding the allocation of risk and the liabilities of the parties.

## **9.8 LANGUAGE CAPABILITY**

A working knowledge of the language of the contract is required by each of the members of the board. The ruling language of the contract may be defined in the

appendix to tender. However, FIDIC considers that the official and authentic texts to be the versions in the English language.

It may be the case that some of the documents produced during the running of a project are in a different language to the language of the contract and that many of the employees involved in the project may communicate in a language other than the official language of the contract. It is of some benefit to the parties if the member is sufficiently fluent in the languages involved in the project in order that he may remain fully conversant with all the activities of the works.

There may be occasions however where the particular knowledge of a language by a member may be disadvantageous. A case may exist where both parties are of a different nationality and have no knowledge of each other's language but rely on the common language of the contract with which to communicate. If the board member has knowledge of the common language together with the language of one of the parties then any dealings by the member in one of the party's language may be seen as compromising his independence. This situation most commonly occurs in the consideration of untranslated documentation where common language translations are not provided.

## **9.9 DISPUTE RESOLUTION EXPERIENCE**

The process of dispute resolution is one involving techniques and understanding not normally provided to project participants during the course of their working lives. Dispute Resolution techniques utilised by the DAB are to be considered as contract tools available to the parties. As with all other aspects of the project successful use of these tools require skill and experience. It is of great benefit to the parties that the participants in the DAB have a knowledge of the particular dispute resolution skills required in order to instil confidence in the parties that their problems and disputes have been adequately considered and that the decision reached takes into account all of the matters raised by the parties as well as their contractual obligations.

The success of any DAB will be measured against any finality it achieves. Thus proceeding to arbitration may be an indication that the decision of the DAB is to be challenged. The issue of a Notice of Dissatisfaction on the other hand is not necessarily an indication that the matter put before the DAB has not adequately been determined. The issue of the Notice may be the only opportunity which a party has to extend the time in which it considers the opinion of the DAB. This may be made by the agreement of the parties and may be an essential element of the agreement process particularly where one of the parties to a decision is a joint venture or government body where complex internal consultation is necessary.

## **9.10 PROCEDURAL KNOWLEDGE**

It is probably true that all projects and problems are unique. The scope of issues involved within the problems may be similar to those encountered elsewhere. However the unique nature of many situations often lead to differences of opinion. It is therefore important that DAB members are familiar with various forms of problem solving procedures. Differing procedures may be utilised to resolve differing problems.

The FIDIC form of contract specifies procedures to be utilised by the DAB. Thus each party and board member is fully aware of the steps to be taken in the day to day routine of the process. However it is naïve to consider that in a non binding and possibly informal process the procedure to be adopted for all eventualities will be the same. Each problem may contain a feature which may render resolution within a rigid set procedure unsuitable. Members need to be experienced and knowledgeable about what procedures are available and which would best fit the matters in hand.

The DAB is a consensual process and as such the parties must have sufficient confidence in the board members to enable a flexible approach to be taken when a unique situation arises. The DAB chairman's responsibility will include a requirement to ensure that the procedure to be adopted under any particular situation provides the parties with a fair and equitable opportunity to prepare their case and to respond to the case of the other party. The choice of any particular procedure, or deviation from it, may be necessary to ensure that the process proceeds in a timely and cost efficient manner.

A deviation to the agreed procedure may be made by the parties upon the suggestion of either of the parties but will always appear to be more acceptable as an impartial suggestion if made by the DAB chairman.

## **9.11 QUALIFICATIONS**

Formal qualifications are always an emotive issue when comparing standards from one country to another. It is the case that DAB members probably originate from a broad spectrum of experienced practitioners whose seniority and industry based experience is qualification enough. However a basic criterion in the modern world when dealing with matters relating to either technical complexity, legal obligation, programming or financial issues is that the qualifications of the member provides a theoretical and informed background for the basis of any

opinion. The qualification process is also an opportunity to learn from, and be assessed by, specialist experts in the subject matter.

In our modern commercial world it is a condition precedent in most professional institutions that membership is preceded by a course of study culminating in an acceptable qualification. Membership of a professional institution indicates that a minimum standard of knowledge and assessment has been achieved by the individual.

However the qualifications required by DAB members will relate to the issues to be considered by him.

## **9.12 AVAILABILITY**

Availability is of key importance to any DAB process. The members are required to become familiar with the details of the project but are not involved on a day to day basis. Hence the commitment to membership of the board is one of a part time nature over the period of the project. In some cases this may extend into a number of years. Potential members must be aware of the commitment and must allocate time within their diaries for such eventuality.

Attendance at regular progress meetings or hearings is a specific date related requirement. Allocation of regular adequate periods of time to remain familiar with the project is also required. Members will be required to study regular progress reports, normally provided on a monthly basis.

Member's availability may also be affected by health or age factors. If a potential member is to retire from professional life then it is incumbent upon him to ensure that he does not enter into a DAB commitment from which he may need to withdraw due to retirement during the term of the DAB. It is up to individual aspirants to ensure that their health is adequate for the tasks which they may wish to undertake. A typical example may be where a project is located in an area in which persons with some breathing difficulties may find problematic such as in high altitude or damp or impure atmospheres.

Availability may also be affected through political circumstance. It is of little value to appoint board members who are unavailable due to their inability to obtain the necessary travel documentation to visit the site or any location where prime components may be manufactured.

In some states in the US members, due to economic restraints on the expenses of board members, DAB aspirants in some states, such as California, are said to be unavailable if they reside more than 2 hours travelling distance from the job site.

### **9.13 IMPARTIAL**

Impartiality is of fundamental importance to the DAB decision. Members are required to be impartial and must be seen to be impartial. Although at times the member may be called upon to use his own knowledge and experience, if he intends to rely on that knowledge or experience then he must so inform the parties and give them an opportunity to address him on that particular submission.

He should not have any prior knowledge of the subject matter of the particular dispute which he may decide is persuasive. The prior knowledge may be either incorrect or may create difficulty when attempting to distinguish differences with submitted evidence.

The rules of natural justice must prevail in all dealings between the DAB and the parties and all information must be provided to all parties. Correspondence between the parties and the DAB is to be copied to the other parties and other DAB members> DAB members must not meet privately with either of the parties.

If a procedural meeting is requested by one party but objected to by the other it is often prudent for the DAB to agree to the meeting. Any failure to do so may be seen by the requesting party to be a bias against him. The DAB must decide in many cases what requests are genuine and what requests are made with impure ulterior motives such as delay or frustration. The remedy for calling unnecessary meetings may be found by a cost award against the calling party.

### **9.14 INDEPENDENT**

The members are not permitted to be commercially linked in any way with the parties nor have any financial interest in the project. This restriction stretches to both direct financial relationships such as employment or consulting services, as well as other financial dealings such as share ownership. In the FIDIC form this restriction does not apply to past relationships. However any such relationships are to be declared in writing to the parties prior to the execution of any DAB contract or agreement. It is incumbent upon the potential board member to declare any interest which he has or as ever had with the parties as soon as possible. The parties may then decide by agreement whether they perceive the declared interest to be of any significance.

The member must also not enter into any discussions nor make any agreements with either of the parties in relation to any future work or employment.

Frivolous objections to the membership of the board may be discounted if it clear that the objection has no real foundation. However if there is any doubt this should be aired as soon as possible and wherever and whenever the situation permits prior to the confirmation of a member on to the board.

## **9.15 LAWYERS**

The inclusion of lawyers on a primary dispute resolution board at job level may be considered to be questionable. This may the case where any decision required revolves around technical issues only. However most major projects have complex legal relationships and the question of contract interpretation may often become at issue in any consideration of the matters in dispute. A lawyer who has a further technical qualification or understanding will be a great asset to any board and will provide a firm basis of legal understanding.

However, it is the case that the requirement of any aspirant DAB member, particularly within the FIDIC forms, should have a knowledge and understanding of contract law. Wherever issues of legal interpretation are to be made by the board then the respective views of the parties will be made to the board by their submissions. It is then the duty of the board to interpret the information provided to them by the parties. The board is not required to make any primary decisions regarding legal interpretations. It is my opinion that this is not a recognised function of any DAB. The board may however make an interpretation regarding the compliance of a party with any particular condition of the contract.

## **9.16 TERMINATION OF DAB MEMBERS**

Clause 20.2 provides for a procedure for the selection of a replacement DAB member or for the termination of the appointment of any member. The clause safeguards against any unilateral decision of a party. For the termination of a member it is required that the both parties agree. The conditions of termination are defined within the tripartite agreement entered into with the member and the parties.

It is notable that the clause notes that a replacement member shall be installed due to the inability of a member to act. Definitions of inability to act include disability. It can only be assumed that it must be the case that it must be shown that the disability actually prevents a member from undertaking the full gambit of his role on the board.

Legislation in some jurisdictions may also determine the capacity to terminate an appointment due to disability.

## **10.0 DAB FRAMEWORK**

### **10.1 GENERAL CONDITIONS OF DISPUTE ADJUDICATION AGREEMENT**

The appendix to the General Conditions of the 1999 FIDIC form of Contract contains conditions upon which Dispute Adjudication will be undertaken in the Contract. The Dispute Adjudication Agreement is a tripartite agreement between the parties to the contract on the one hand and the board member on the other. The board member is an individual and the agreement is personal to him alone. He is not permitted to assign or subcontract the agreement without the prior agreement of the parties.

The agreement will define whether the member is a sole adjudicator or a member of a panel and if he is to be acting as chairman.

The general provisions of the agreement define the period of the DAB and particularly define the start date and the completion date which is normally the discharge date mentioned in Clause 14.12 of the contract. The start date takes effect on the occasion of a number of alternatives:

- The commencement date of the contract
- The date when all the participant in the tripartite agreement have executed the agreement, or
- When all the tripartite agreements between the parties and other DAB members have been executed.

When the agreements have taken effect then it is the responsibility of each of the parties to notify each of the board members.

It is evident that when a DAB has not been constituted at the beginning of a project then procedural delays may be encountered after the agreement of the DAB constitution, but before it has any jurisdiction to act. If it is considered that delays in the commencement of the DAB activities may give rise to extensions of period under Clause 20.4 (period in which a DAB has to reach a decision) then a further clause more closely defining the commencement date of the tripartite agreement should be considered. This may take the form of a definition of an

actual commencement date or a date unrelated to any further notice by either of the parties, such as the date of execution of the tripartite agreement alone.

The member is obligated to remain available to undertake the provisions of the tripartite agreement despite a period of 6 months elapsing during which the silence of the parties is permitted. This may be problematic to a busy practitioner who needs to make decisions regarding the most beneficial use of his time. Parties should attempt in all cases to minimise the delays between the execution of the tripartite agreement and the commencement of the DAB activities.

During periods of non confirmation of the contract commencement the member is obliged to remain available to the parties, however will be at risk of the agreement not proceeding. He will be uncompensated for the period prior to the termination or confirmation of the agreement. The long period of allowable silence prior to the determination of the agreement will in the long term inflate the costs of DAB participation to the industry.

The agreement may be terminated by the resignation of the member. Applicable law may entitle the member to resign under certain conditions. Clause 6 of the agreement also entitles him to resign in the case of the non payment of his fees and expenses.

Resignation is a very drastic action to be taken by the member and one which may have considerable consequences. Confidence of the parties and their supporters in the DAB system will be undermined if a member resigns in anything other than a genuine circumstance not already envisaged in the contract.

## **10.2 WARRANTIES**

The warranties of the member are very onerous in the FIDIC conditions. The warranties are far reaching and will have effect throughout the life of the agreement. Although two of the members of the DAB may have been nominated or selected by the parties, each member enters into an agreement with both parties and owes no allegiance to any party.

The prime warranties of the members of the DAB are :

- That he is independent of the Parties
- That he will be impartial to the parties
- That he shall promptly disclose to the parties any matter which may arise which could cause the member's independence or impartiality to be brought into question.

The agreement also defines the representations upon which the parties have relied when entering into the agreement. In order to satisfy his contractual obligations the member must ensure that he is fully aware and informed of the identities of the parties to the contract. This information he will specifically need in order to investigate his own conflicts of interest with the parties.

The parties have particularly relied upon the knowledge that the member is :

- Experienced in the work which the contractor is to carry out under the contract
- Experienced in the interpretation of Contract Documentation
- Fluent in the language for communications defined in the Contract.

### **10.3 OBLIGATIONS OF THE DAB MEMBERS**

The general obligations of the member are listed by FIDIC to ensure that he is fully aware of the detail of his obligations and his duty to maintain his independence and impartiality.

The obligations may be summarised as :

- No financial interest & Independence

This is a further detailed definition of the required independence of the member. It is imperative that the independence of the member is established and maintained in order to ensure the continued confidence of the parties in both the member and the DAB system.

- Disclosure

It is understood that in some cases some contact between the parties and the member may have existed prior to the present contract. Indeed, if one of the parties is to nominate a potential member then the likelihood of a previous contact is high. This eventuality is catered for by the disclosure to the parties by the member of any previous relationships prior to the present agreement. The disclosure is deemed to be broader than merely contact with the parties as any personal contact with any director, officer or employee of the parties or the Engineer is also required to be disclosed.

The level of the disclosure is to be to the best of his knowledge and recollection. The level of disclosure may be less than that imposed by the strict disclosure regime imposed by some states in the US. However it is prudent to assume that compliance with local statute may override any

contractual obligations by the member and as such strict compliance with the disclosure rule will reduce any possible problems at any later date.

- Compliance with rules
- Availability
- Privacy

It is undoubtedly intended that the DAB procedures and deliberations are to remain private and confidential. The privacy affects not only the communications and decisions of the board but also its deliberations. In some cases even the fact of the DAB will remain confidential. In the US, where public policy may demand that any hearing or meeting where public funds or projects are to be discussed will be regarded as open public meetings, such public admittance should be resisted. It may be regarded that the DAB process is not a final and binding procedure but is rather a private dispute resolution procedure and not subject to public scrutiny.

The case may exist where the availability of documentation presented for any DAB procedure is required for a future arbitration or litigation. It is to be noted that this confidentiality agreement relates to the member and not to the parties. Note that the provisions of Clause 20.6 allows for the decision of the DAB to be admissible as evidence in any arbitration proceeding.

- Advice and opinions

It is often of great value to the parties to solicit the opinion of the DAB regarding particular issues. This is in line with the object of the DAB which is to enhance relationships between the parties to such an extent that all problems and difficulties between them are resolved prior to their becoming disputes. The general obligations state that a member shall be available to give advice and opinion on any relevant matter.

The giving of the advice is conditional to the agreement of the parties and the other members. In most normal circumstances advice or opinion will be formally requested and the DAB will consult with each other prior to the advice or opinion being provided. The advice or opinion, as with all communications, will be provided to both parties simultaneously. Advice or opinion may be solicited on procedural matters as well as substantive issues. It may be the case that the parties wish to agree on certain issues whilst retaining some elements of the matter for the decision of the board. Advice in such a case may be on the structure of the wording of the pre-agreement issues. In any case it is imperative that advice or opinion is only

given within the formal communications guidelines of the DAB communications procedure.

## **10.4 OBLIGATIONS OF THE PARTIES**

The Parties agree that the DAB members shall not be solicited for advice or opinion without the prior approval of the other party and the other members.

The parties undertake that no member of the DAB should participate in any future arbitration either as arbitrator or witness other than by the agreement of the parties and all the DAB members. Any involvement as a future arbitrator would render the member considerable difficulties in complying with say S.33(1)a of the UK Arbitration Act which calls for the arbitrator to act impartially particularly if he has already decided the matter in a particular way under another procedure.

The parties also undertake not to hold the member liable for any act or omission unless it is shown to have been in bad faith. The act of bad faith, particularly with regard to the obligations of the member, would become significant if at some stage the act would render any decision of the DAB to become unenforceable, void or defective.

Whenever a dispute is referred to the DAB the parties are obligated to provide a security of expenses which members may reasonably be expected to incur during site visits and hearings. It is reasonable to expect that most hearings will be undertaken during normal site visits, however cases may arise when extended hearings or additional visits are required. The expenses for these particular visits will not be specifically accounted for in the routine payments made to members under their individual tripartite agreements.

## **10.5 PAYMENT OF DAB MEMBERS**

The individual tripartite agreement between the parties and the member may define the precise method of payment of the member. However, the General Conditions define the scope of such payments.

The member is to be paid in the agreed currency. It is the responsibility of the member to ensure that the agreed currency is suitable for him and is capable of acceptance by him.

The payment to the member is made up of four elements :

- Retainer Fee

The retainer is considered to be payment for the member's availability to act as required by the agreement. It is normally computed as being the equivalent of one or two days per month.

The retainer also recompenses the member for the time involved in remaining conversant with the project and for maintaining his files. All elements of his office expenses are deemed to be included in the retainer fee. In the case of the chairman of the DAB the retainer may have an increased value from that of other members due to his administrative role.

- Daily Fee

The daily fee represents the time of the member at the site during regular visits which is deemed to include a certain amount of travelling time.

The rate also includes the time involved in the reading of submissions in preparation for hearings, the time spent at hearings, in deliberations and in the preparation of decisions. If it is anticipated by the member to incur costs or fees relating to any other activities then the member should seek approval of the parties in advance of incurring any liability.

Both the retainer and daily fee will remain at a fixed sum for the first two years of any project. The rates will therefore reflect any anticipated inflation for the period. Future alterations to the fees are by agreement. It is prudent that such agreement is specified in the original base document to ensure that future fees reflect any anticipated increases.

It is of interest to note that many FIDIC infrastructure projects are located in countries where local currency and costs are subjected to uncertain inflation levels. Payment of members in such states needs to be sympathetic to such alterations.

- Expenses

This includes the reimbursement of any direct costs incurred by the member during the undertaking of his duties. Any administrative costs relating to the expenses will be recovered by the member through his retainer fee which is deemed to include his overhead costs.

- Taxes in country of project

The payment to the member will include any local taxes to which the member's fees and expenses may be subjected. In some cases this may relate to withholding taxes or notional earnings related taxes at the point of origin of the payment. This reimbursement will not apply if the member is a permanent resident in the contract country.

This provision may provide the member with some difficulties if, in order to obtain a work permit or business visa, he needs to become a notional permanent resident in the contract country. In such a case the taxes to which he will be subject will not become reimbursable through the contract.

- Payment Timing

In accordance with Clause 20.2 each party shall be responsible for paying one half of the member's remuneration. However in terms of the Tripartite Agreement both the parties, jointly and severally, undertake to pay the member.

Payment for all fees and expenses are made by the submission of invoices by the member to the Contractor. The Contractor is obliged to pay all of the member's invoices in full within 56 days. The Contractor is reimbursed by the Employer by one half of the invoiced amount. In the event of any failure of the Contractor to pay the sums required then the Employer has a duty to pay the full invoiced amount within a further period of 14 days. The Employer is thereafter reimbursed by the Contractor for one half of the invoiced amount plus any collection costs and financing charges.

The monthly retainer and air fares are paid are paid each 3 months, in advance of the period. Invoices for the daily fee and all expenses other than airfares are submitted after each site visit or hearing.

- Default of Payment

In any case where the parties default in the payment to the member of any of the retainer, fees and expenses after a period of 70 days from the submission of invoice, then he is entitled to either suspend his services without notice or resign his appointment by giving the requisite notice. Both events may run concurrently.

## **11.0 TERMINATION OF DAB**

It is the object of the DAB to be in place for the duration of the project. The termination clause is included for the eventuality of a joint requirement, by

agreement, to bring to an end the members appointment. The notice period to the member of such termination is 42 days. The member may resign his appointment by giving 70 days notice to the parties.

If on the other hand the member fails to comply with any condition of the Dispute Adjudication Agreement then the parties may, by agreement, immediately terminate the appointment of the member. In the event of any failure of the Employer or Contractor to comply with any condition of the Adjudication Agreement then the member may give an immediate notice of termination to the parties.

## **12.0 DEFAULT OF MEMBER**

If the member fails to comply with any of the obligations which he is under then he is not entitled to any fees and expenses. Furthermore he is liable to reimburse the parties for any fees and expenses of the other DAB members for any proceedings of decision of the board which are rendered void or ineffective.

This is an onerous clause and any minor infringement or minor procedural error would not typically invalidate any decision. Any infringement must be of some substance. The parties are duty bound to hold the member harmless for any act or omission unless it was in bad faith. Hence his actions to render a decision void or ineffective must have been in bad faith.

It is of interest to note that one of the duties of the member is to act impartially. If a member always favours the party which nominated him and refuses to reach a unanimous decision against such a party due to an allegiance with that party may run the risk of his actions being shown to have been in bad faith. In such a case he will lose the immunity granted to him under the contract and become in default.

## **13.0 DISPUTES**

All disputes relating to the DAB Agreement between the member and the parties is to be resolved by one arbitrator under the rules of the ICC.

## **14.0 TRIPARTITE AGREEMENT**

The standard form of tripartite agreement is included as part of the selection of forms available in the FIDIC Conditions of Contract. It is an agreement between

the parties on the one hand and the member on the other. Various form of the agreement exists and each will reflect the particular circumstances of the parties, the project and the form of DAB.

Each form of the agreement, in whatever presentation format, will contain the following sections:

- Details of the parties and member
- Situation of the parties and purpose of the DAB
- Validity period
- Scope of work
- DAB Procedures & terms of reference of the DAB members
- Payment terms and conditions
- Disputes & Governing Law
- Signatures

The date of the execution of the Tripartite Agreement is normally the trigger date for the commencement of the DAB procedure within the contract.

## **15.0 CLAUSE 20.4**

### **15.1 OBTAINING A DAB DECISION**

One of the primary objectives of the DAB is to facilitate the early resolution of disputes by informal non adversarial means. The DAB's role is to settle disputes. Settlement will not have been achieved if a party refers to dispute onwards to arbitration.

The strength of the DAB procedure is that whenever there is a problem between the people on site, whether it is caused by a difference of opinion or a technical matter, a problem of interpretation of the contract, or of communication, or simply a misunderstanding, it can be referred quickly to an independent tribunal. The problem can then be resolved, with the assistance of the DAB, whether this requires an opinion, advice or a binding decision.

If a dispute of any kind whatsoever arises between the parties in connection with or arising out of the Contract for the execution of the works then either party may refer the dispute in writing to the DAB for its Decision.

The reference to the DAB must be construed as being a request by the Claimant under the procedure agreed by both parties and included within the contract. The DAB will apply the provisions of contract and the Governing Law to the matters in dispute.

Unless the parties have agreed otherwise they have not empowered to the DAB to disregard any provision of the contract and make a decision on principles of fairness and equity alone. On the contrary, they have agreed to give effect of the DAB's decision complying with the terms of the contract.

The discussion of the meaning of the word dispute is given elsewhere in this document. It is not necessary for the matter relating to any claim to have been considered by the Engineer under either Clause 2.5 or 3.5 to create a dispute, however it is probable that notice would already have been given under Clause 2.5 or 20.1.

Copies of the referral notice are to be circulated to the other party and to the Engineer.

The Referral Notice will state the clause of the contract under which it is made and will include all the supporting documents. The referral will state the claims made and basis of the dispute. It will also include a detailed analysis of the claims made including the terms of the contract which are relevant and will clearly define what determination is required from the DAB.

The presentation of the documents and arguments should be made in a clear and logical format. The Referral Notice ideally needs to outline to both the other party and to the DAB members all aspects of the dispute without further explanation. Time is very short for the determination process and any time lost in further explanation detracts from the time available for the analysis of the issues in hand. This is particularly important when considering complex technical argument or the presentation of arguments by experts.

Having received the Referral Notice, the DAB is required to follow the Procedural Rules (discussed below). One of the Rules empowers the DAB to establish the procedure to be applied in deciding a dispute. In order to assist the DAB, the parties are obliged within the contract to make available to the DAB such matters as further information, access to the site and any appropriate facilities as the DAB may require for the process of making a decision.

It is important that the parties are aware of the Referral Date of the dispute as the period of time in which the DAB reaches its decision runs from that date. In the case of the FIDIC conditions of contract the Referral date is the date upon which the chairman of the DAB receives the reference.

The period of time in which the DAB is required to reach its decision is defined in the general conditions as 84 days, but this is often amended to 56 days in the Particular Conditions of Contract.

Immediately upon receipt of the Referral Notice the chairman of the DAB circulates copies of the Referral to the other members of the board and notifies the parties of the Referral Date. The detailed role of the chairman of the DAB is discussed below. In the case where the panel of DAB members is more than 3 the DAB chairman will also inform the parties which 3 members will make up the DAB for that particular dispute.

Together with notification to the parties of the Referral Date the chairman issues procedural directions for the conduct of the dispute resolution process. The procedural directions will define the steps which are to be taken during the Decision period and will include a time table for such matters as:

- Response to the Referral
- Exchanges of documents and further and better particulars
- Site visits and information submission
- Hearings
- Attendance
- Witnesses
- Opening Statements
- Decision period

The period of time in which the decision of the DAB is to be published is noted in the contract. However the DAB may propose to the parties a different time period for their approval.

The DAB may consider that an interim decision or a decision in parts may be of some benefit to the parties for the dispute resolution procedure and may suggest that a number of decisions may best serve the situation where complex issues may be interdependent.

The Decision is required to be reasoned and is binding upon the parties unless and until it is revised by an amicable settlement or an arbitral award. The format and content of the decision is discussed below.

With the issue of the decision the parties are bound to undertake the following :

- Give effect to the decision

The parties have empowered the DAB to reach a decision with which they undertake to comply irrespective of any dissatisfaction with that decision. The decision may be revised by some later course of action but any future action will not invalidate the necessity to comply with the requirements of the decision promptly.

- Proceed with the Works

The contractor is obliged to proceed with the works in accordance with the contract irrespective of whether it agrees or not with the decision of the DAB.

If a party eventually decides to reject the decision of the DAB then it must issue a formal Notice of Dissatisfaction. The notice must be issued within 28 days of the DAB's decision and must state the reasons for the dissatisfaction. Any failure of the DAB to reach a decision by the due date will also be a valid reason for issuing a Notice of Dissatisfaction.

If no notice of dissatisfaction is served by either party within the 28 day period then the decision shall become final and binding on both parties.

With the exception of the matters referred to in Clause 20.8, the issue of a decision of the DAB on any dispute is a condition precedent to the commencement of any arbitration proceedings under or in connection with the contract during the term of the DAB.

## **16.0 CLAUSE 20.7**

### **16.1 FAILURE TO COMPLY WITH A DAB DECISION**

Unless allowed by law, neither party may challenge the decision of the DAB after it has become final and binding. In the case where the decision has become final and binding and a party fails to comply with the decision then the failure itself may be referred to arbitration. This process will allow for the mechanics of an arbitral award to be applied to the DAB's decision.

The remedy offered by Clause 20.7 will not prejudice any other rights that the parties may have. These will include other enforcement remedies within the contract which will be discussed below.

## **17.0 CLAUSE 20.8**

### **17.1 DISPUTES TO ARBITRATION**

Disputes may be routed directly into arbitration thus by-passing the requirements of Clause 20.4, in the event that there is no DAB in place.

There may be no DAB in place due to the expiry of its appointment or by any other reason such as non agreement of its constitution due to the intransigence of one of the parties. In some cases, although the DAB may have ceased to exist due to the termination of its appointment period, however its reconstitution on an ad-hoc basis may be considered to be a reasonable forum within which any dispute may be resolved, avoiding unnecessary delay and expense. In some jurisdictions the submission of a dispute to arbitration may involve considerable time and expense which may be unwarranted due to the scope of the dispute.

In cases where a direct referral to arbitration is adopted then the specific requirements of Clause 20.4 and 20.5 will not apply.

## **18.0 PROCEDURAL RULES**

The Procedural Rules embodied within the General Conditions of Contract guide the DAB through the execution of its duties and define the day to day procedures of the board. Many routine matters are to be conducted utilising procedures which the DAB may establish from time to time and the parties specifically empower the DAB to establish the procedure to be applied in deciding a dispute. The guidelines for the routine operation of the DAB should be regarded as flexible in order to meet the varying circumstances that may arise during the life of the project.

In any event the board is constrained by two principle factors:

- To act fairly and impartially as between the Employer at the Contractor, giving each of them a reasonable opportunity of putting its case and responding to the others case, and
- To adopt procedures suitable to the dispute, avoiding unnecessary delay our expense

The above principles are to be considered within the context of the very confined time tables defined within the contract for the consideration of referred disputes and the necessity to establish procedures which are most appropriate to the circumstances of each particular dispute.

The standard procedure of the DAB's operation will include becoming familiar with the details of the project and the construction methods to be adopted and becoming conversant with the contract documentation. Normally the DAB convenes a first meeting privately, solely with its own members. At that meeting it discusses the practicalities of its own operation and administration. It ensures that its members are fully briefed on the details of the project and discusses its

standards of conduct and the principles of its communications with the parties and between themselves.

The DAB members agree between themselves their own operating procedures which will include such routine matters as:

- standard agendas
- standard format of meeting minutes
- scheduling of future meetings
- travel arrangements
- meeting room arrangements
- invoicing arrangements with the parties
- facilities required for the site visits and meetings to be provided by the Employer.

The DAB chairman arranges to convene a first meeting at the site with the DAB members together with the parties. At the first meeting the chairman encourages discussion regarding the operations of the DAB and solicits suggestions as to the frequency of DAB meetings. Regular site meetings are to be held at a frequency of about 3 months depending upon the complexity of the works. It may become prudent to alter the frequency of site visits in the case possibly of key activities being undertaken at the site or during periods where only routine non problematic activities are scheduled.

At the first meeting routine communications and administrative issues will be discussed and agreed which will include :

- Travelling and accommodation arrangements as necessary
- Meeting room and secretarial service arrangements
- Agreement of attendees
- Agenda format
- Format of meeting minutes
- Conduct of site visits and meetings
- Format and frequency of standard reporting to the DAB
- Format of reporting from the DAB to the parties
- Procedure for claims administration and tracking
- Procedure for disputes referral
- Confirmation by the parties of their own administration procedures

The purpose of any DAB visit to the site is to enable the members to become familiar with and remain acquainted with the progress of the works and to become aware of any actual or potential problems or claims. The board needs to be proactive. It does not undermine the authority of any of the parties or employees but rather takes positive steps to ensure that a climate of co-

operation exists in which problems may be discussed and resolved prior to becoming escalated into a dispute.

The attendees at such site visits and meetings will normally be the members of the DAB together with one or two representatives from each of the parties and the Engineer. If it is decided to make a submission to the DAB to solicit advice or opinion then further attendees may be required in order to conduct such presentations. Sub-contractors are not normally represented at such meetings, however their attendance at relevant meetings may be beneficial in order that the board members may become familiar with the specific details of the sub-contractor's involvement.

All standard routine documentation from the parties to the DAB is copied to the other party and to each member of the DAB. All communications from the DAB is copied to each of the parties.

The routine site visits and meetings take the form of an arrival and "check in" at the site of all visit and meeting delegates. Initially a tour of the site is made with the Engineer acting as guide. The DAB members are accompanied by representatives of the parties. During the site tour the progress of the works is shown and the impacts of any particular circumstances are brought to the attention of the DAB members. Any changes to the planned progress of the works or to the resources of the Contractor are highlighted during the tour. Construction problems or the impact of any particular influence on the works are brought to the attention of the DAB members.

Upon the conclusion of the site tour the meeting is convened. The chairman of the DAB chairs the meeting. The meeting is opened by the chairman with his opening remarks which confirm the previous meeting minutes and in which he describes any activities of the DAB since the last site meeting.

The Contractor presents a report and makes a statement on its progress and status of its work schedule. It outlines any potential problems together with any proposed solutions. The contractor also provides a progress report on any discussions with the other party regarding any potential claims issues. The contractor discusses the status of any claims made and outlines any potential claims to be made. The Engineer then provides his views of the contract and also makes a statement of its views regarding the progress and further comments upon the status and progress of any claims or discussions potentially leading to problems.

Presentations and discussions as necessary are also made with specific regard to the works programme, contract value, variations, claims and problems.

Upon the conclusion of the site meeting with the parties the DAB meets in private and prepares its meeting report to the parties. The report is normally issued to the parties prior to the departure from the site of the DAB members. The report outlines the activities undertaken during the visit to the site and gives its observations on the presentations made by the parties. Unless specifically requested by the parties the DAB shall not give any opinion or advice regarding any particular issue raised at the meeting or visit.

The parties furnish to the DAB members one copy of all standard performance related documents. The initial submission includes the contract documentation, copies of the contract, drawings, specifications and the works programme. The regular submission of documents to the DAB are normally made monthly and will include progress reports, variation instructions, certificates and other performance related documents. The DAB may also request specific documents at times other than the normal monthly submissions. In such cases the documents are to be provided with copies sent to the other party.

If a dispute is to be referred to the DAB then the procedures at Clause 20.4 are to be followed.

The general powers of the DAB are noted to include:

- The establishment of any procedure
- To decide on jurisdiction
- To adopt an inquisitorial role
- To proceed ex-parte

The issue of a Referral Notice to the DAB should not be hampered or delayed by restrictive or cumbersome contractual provisions. Some particular conditions call for all claims documentation to be submitted and referred to an initial process prior to formal submission to the DAB. Such procedures may add to the cost and time of the dispute resolution process. Where such draconian clauses exist within a contract there may be occasions when the DAB is called upon to decide whether a dispute is capable of submission directly to the board for its consideration. Any supplementary or interlocutory provisions negate the concept of the DAB process.

When the Referral Notice is served it should be accompanied by all the relevant documentation and supporting materials. The wording of the Referral Notice should be concise and clearly state what the Claimant is asking the DAB to decide. The referral Notice should confirm the contractual provisions under which the claim is made and provide all the arguments to support the claim. The Referral Notice will define the scope of the dispute and hence the jurisdiction of the DAB.

The DAB chairman is the person who receives the Referral and then circulates copies to the other DAB members. The board then decides how to proceed. The DAB is under a duty to give each party a reasonable opportunity to put his case and to respond to that of the other. The DAB will study the referral notice and the chairman will issue the procedural directions for the conduct of the reference.

The DAB has the authority to:

- Conduct any hearing it thinks fit
- Take the initiative in ascertaining the facts and matters required for a decision
- Make use of its own specialist knowledge
- Decide upon the payment of financing charges
- Decide upon any provisional relief
- Open up and review and revise any certificate, determination, instruction, opinion, or valuation of the engineer relevant to the dispute.

Normally the Procedural Directions will include provision for the following :

- A time table for the submission of a response and defence to the Referral Notice
- Preliminary Issues
- Reply to Response (if required)
- Reply to Reply to Response (if required)
- Conduct a Hearing or proceed with Documents Only
- Hearing Dates
  - Hearing Format
  - Translation of documents
  - Attendees
  - Witnesses
  - Hearing Agenda
  - Opening / closing statements in writing
- Decision date

A provision within the procedural directions may also need to be made in the event that the parties wish to make alterations to the procedure or to extend any time provided for the provision of documents.

The DAB may alter the time table of the procedure but will not under normal circumstance alter the decision date. The DAB chairman must be aware of the necessity for an adequate time period for DAB members to deliberate and exchange decision drafts prior to the agreement of the final decision. In the event that the procedural time is not sufficient to adequately make deliberations

then the chairman may request the parties to agree an alternative time table or may limit the issues under referral or may propose to issue staged decisions.

The matters referred may be capable of decision without the need for a hearing. In such cases the decision will be made on a documents only basis. In most international contracts this is not considered to be an ideal basis of conduct. Parties from differing backgrounds and cultures may wish to have a hearing in order to ensure that the DAB members are fully aware of the facts and background of the matters at issue from their own point of view. Often parties are translating documents and are concerned that no meaning is lost in the translation, or that they have not misunderstood the relevance of any points made in the submissions of others.

## **19.0 DAB HEARING**

The hearing should be conducted in a manner that encourages openness, candour and a thorough disclosure of all pertinent information bearing on the matters in dispute. The meeting should include a number of basic stages:

- Registration
- Procedural Issues
- Preliminary Issues
- Jurisdictional Issues
- Referring Party
  - Opening
  - Witness submissions
  - Respondent questions
  - Witness re-submission / clarification
- Responding Party
  - Opening
  - Witness submissions
  - Referring Party questions
  - Witness re-submission / clarification
- Respondent summing up
- Referring Party summing up

It is normally prudent for the chairman of the DAB to ensure that the hearing does not end until both parties have confirmed that they have nothing further to add.

The hearing will be convened at a convenient location for the parties. This is not always at the job site. The presence of witnesses and advocates may determine

that a location other than at the job site will be more convenient or more economical. The hearing rooms should be equipped with any necessary presentation equipment needed by the parties and must provide adequate seating, table space and ventilation or air conditioning. Adequate refreshment facilities are essential for any successful hearing.

The conduct of the hearing should be such that hearing days are limited in ideal conditions to some 6 hours. The format of the hearing should also include adequate breaks and that meals are provided for attendees in private locations, convenient for the hearing location but within the same building. It is normally convenient for side rooms to be provided for each of the parties, and for the DAB members, in which private discussions may be held.

A normal DAB hearing will not provide for the transcript of the meeting to be taken. On occasion recesses may be necessary for the parties to consider their positions and to consider the evidence put to the DAB and the DAB may need time to deliberate on what inquisitorial line needs to be taken.

Witnesses are not normally questioned under oath. The DAB process should be no more formal than necessary. The terms "*examination*" and "*cross examination*" are not utilised when referring to witnesses and it is the function of the chairman of the DAB to act fairly and impartially and to put at ease as much as possible the parties and the witnesses.

The parties must agree to what extent they wish their witnesses to be present during the hearing. The DAB has the authority to refuse admission to hearings or audience at hearings of any persons other than the representatives of the parties and the Engineer. This provision is more relevant in jurisdictions which may insist that all meetings relating to disputes involving public funding should be open to the public. It is contrary to the spirit of the DAB to have the press or any third party recording the procedures for any purpose.

The DAB may proceed with the hearing in the absence of any party who the DAB is satisfied had received adequate notice of the hearing. The procedural rules allow the DAB discretion to decide whether and to what extent this power is exercised. It is within the policy of natural justice to allow parties to know what the claims are against them and for them to be given an opportunity to reply and defend themselves. Where parties and their representatives originate from differing parts of the world problems with travel arrangements may exist and may well be created outside the control of those travelling. It is therefore 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 why not to attend and that all possible attempts to ensure attendance have been made.

During the hearing further documentation may be provided or requested by one of the parties. The DAB should discourage the production of volumes of new documents and submissions at hearings. These generally lead to more time required by the parties to consider the documents and any necessary replies. More time will also be required by the DAB to consider such documents.

Any original documents provided in copy format in the submissions should be provided at the hearing for scrutiny, should either party so require. The DAB members may also require sight of such materials. This provision should only be necessary in cases where the authenticity of documents is questioned. The parties have provisions in Clause 20.1 to inspect contemporary records and to receive copies at the time of the event in question and as such the necessity for such disclosure is limited.

The DAB members must develop a protocol for their conduct at the hearing. It is normal for the DAB chairman to chair the meeting and control the participants, procedure and time table. They should decide between themselves such matters as questioning format, whether through the chair or in open forum, but should not be reluctant to actively participate in the procedure. It is not normal protocol to interrupt the questioning of witnesses by advocates but certain circumstances may dictate that this is necessary. The normal format may be that DAB questioning may be undertaken after the questioning by the other party but before any resubmission questioning.

Having heard the parties and asked any necessary questions the DAB chairman brings the hearing to a close. The DAB members shall not express any opinions during the hearing concerning the merits of the arguments put forward by either of the parties nor must they show favour to either party at any time. They then meet in private after the hearing in order to have discussions and prepare the decision.

It may be convenient to locate the initial private meeting of the DAB at the location of the hearing and immediately after the hearing itself. This will enable the members to have access to any documents of the parties exhibited at the hearing but not submitted.

The initial meeting of the members has three primary objectives:

- To develop a schedule and time table for the conclusion of its deliberations
- To decide if any further submissions are required
- To achieve unanimous agreement
- To develop a format and compose the Decision

The procedural rules state that the members shall endeavour to reach a unanimous decision. No mention is made in the contract conditions of any consequence of not reaching a unanimous decision. If it cannot reach a unanimous decision then a majority decision will become applicable. In such a case the reasoning of both the majority and minority should be included in the decision. It is normally considered necessary by the majority members to require that the minority member specifies any aspects of the decision with which he disagrees together with his analysis for the disagreement. The minority member should also state what decision he would have made had he been acting as a sole member.

The presentation of the decision should be in a short form. In such a procedure as the DAB protracted and over lengthy decisions are not in keeping with the spirit of the process.

The format of the decision will be such as to contain the following data:

- A statement of the FIDIC clause under which the Decision is published
- The identities of the Parties
- The identity of the Contract
- Outline of Dispute
- The issues
- The remedies sought
- The positions of each of the parties
- Outline of the procedure adopted for the resolution of the dispute
- The reasoning of the DAB and a review of its opinion on the principles involved
- Unanimity statement
- The Decision
- Signature
- Place and date of Decision
- Confidentiality and circulation statement

The reasoning is an essential part of the decision. When properly written it may persuade the parties that the DAB has fully studied all relevant matters and has reached a conclusion similar to that which may be expected from an arbitrator. It may be the case that one of the parties may have been unaware of the strength or weakness of any particular argument before the publication of the reasoned decision. The general Conditions of Contract state that the decision is admissible in evidence in arbitration. Arbitrators may regard a well reasoned decision as persuasive.

The rules do not empower the DAB to amend its decisions and it would be inappropriate for the DAB to enter into any form of debate with either the

Claimant or the Respondent on the details of its Decision. Essentially the DAB will have reached a decision with which the parties have undertaken to comply. If either of them is dissatisfied, it must comply but may give the required notice entitling it to arbitrate after attempting amicable settlement.

It is possible that the DAB's decision may include an erroneous statement. In such a case a party may wish to bring the error to the DAB's attention. Although the DAB may be inclined to respond, because it is not empowered to amend its decision, it may consider it appropriate to issue a proposed amendment for the agreement of the parties. Either party may withhold agreement, but may not achieve much by so doing. In practice the parties may be prepared to agree that the DAB amend its decision, particularly if the amendment is beneficial in terms of settling the dispute and in avoiding unnecessary expense.

## **20.0 ENFORCEMENT**

The parties have contracted to comply with any decision of the DAB properly given.

Clause 20.7 states that in the event that neither party has served a notice of dissatisfaction and the decision has become final and binding then any failure to comply with the decision may be referred to arbitration. This will enable a party to pursue enforcement through the normal procedures associated with arbitral decisions.

The alternative method of enforcement by a contractor, during the course of the contract, is by the inclusion of the decision within an interim payment application in accordance with Clause 14.3 of the contract. The Engineer is obliged to include the decision within his evaluation in terms of Clause 14.6 and the Employer is then obliged to pay the sum so certified. Any further failure by the Employer to comply will leave the Contractor remedies of suspension or termination in accordance with Clause 16.1 and 16.2.

## **21.0 DAB CHAIRMAN**

The role of the DAB chairman is mentioned but remains undefined within the FIDIC Conditions of Contract.

The chairman undertakes an important role within the procedure which may determine the success or failure of the process. He must retain the confidence and respect of the parties and his fellow board members and must ensure that

the administration of the DAB runs smoothly and the ethics of the board remain unchallengeable.

The chairman co-ordinates, whenever necessary, between the parties and the board members and is responsible for any administration of the board.

At the instigation of the board it is the responsibility of the chairman to co-ordinate the definition and establishment of the internal administrative procedures of the Board. He advises the other board members on the organisation of its rules and procedures which the members will adopt and takes control of the administration of the activities of the board. He also co-ordinates communications between the board and the parties.

In many cases he also needs to educate the other board members in the expected behaviour and ethics of DAB membership. In many cases the chairman may be the only experienced DAB member. The remaining board members often chosen by the parties are occasionally unfamiliar with the requirements and responsibilities of DAB members. It is often the case that DAB members need to be reminded that their role entails independence and impartiality. The perception of impartiality by members needs to be seen as well as understood. The example of a party appointed member arriving and departing from DAB meetings in a vehicle supplied by one of the parties is a prime example of how not to behave. Direct contact by members with one of the parties in private should be avoided at all costs.

The chairman provides draft documentation, for the agreement of the other members, regarding such matters as meeting agendas and time tables. He takes a leading role in the production of meeting minutes and ensures the attendance of the other board members at meetings and site visits. He also often co-ordinates the provision of accommodation arrangements for members during visits with the parties.

His other responsibilities include the provision and circulation between board members of copies and translations of documents as required. He is not required to administer the remuneration and payment of members, as each tripartite agreement is personal to the individual member.

The main procedural function of the chairman is to chair meetings and site visits and ensure that any jurisdictional issues are dealt with without any undue delay. He takes the lead role in the drafting of decisions and ensures that the viewpoints of the other members are taken into consideration during all discussions of the board. He ensures that the composition of any recommendations and decisions of the board are procedurally correct and reflect all the viewpoints of members. In the case of a majority decision he ensures that

the reasoning of both the majority and minority view comply with the requirements of the contract.

The chairman ensures that the formal requirements of a decision are embodied in the document. He signs and executes the Decision on behalf of the DAB.

The ultimate responsibility for the success of any DAB rests with its chairman who may be in a position to encourage the parties to the contract to adopt a consensual and cooperative attitude which will ultimately ensure the success of any project.

## **22.0 ACKNOWLEDGEMENTS**

- FIDIC : Conditions of Contract for Construction 1999 Edition
- FIDIC : The FIDIC Contracts Guide : 2000
- ECV : Conditions of Contract for Construction : 2002
- Brian Totterdill : FIDIC Users Guide : Thomas Telford 2001
- DRBF : Construction Dispute Review Board Manual : McGraw Hill 1996