

THE ROLE OF THE DAB

By

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Introduction:

The fundamental role of the DAB is to provide independent expert assistance on disputes, at a time and in a manner which will enable resolution without resort to arbitration.

The unique feature of the DAB is that it is established at the outset of the contract, before any disputes have arisen, and works with the Parties throughout the performance of the contract. No other dispute resolution mechanism has these characteristics.

FIDIC's DAB is a variant from the Dispute Review Board, which has been in use for a long time, particularly in the USA, and with remarkable success in avoiding arbitration or litigation. One of the reasons for the success of Dispute Boards is that they are created by consensus at a time when the Parties to the Contract are focused on agreement. The first element of consensus is that each Member of the Dispute Board is to be agreed by both Parties, and it is understood that the Members will be impartial and independent of both Parties. Another of the reasons for success is that by such joint selection, both Parties are assured that the Members have the particular technical expertise appropriate to the Contract, and that the Members have the experience and professional standing to assure the Parties of a high quality of opinion.

You will be aware that these elements of consensus are not comparably available in arbitration or litigation.

Gaining the trust of the Parties:

The major element of trust in the Dispute Board arises from the fact that both Parties have

discussed and agreed that each Member is eminently suitable for service. Typically, the Parties will know of, or even know directly, the Dispute Board Members and will consider them to be eminent in their fields. (This has been observed to lead to an unwillingness to expose frivolous claims to persons of such status, thus benefiting both Parties.)

Further trust is created by the behaviour of the Board Members during their service on the DAB. The behaviour which characterises a successful DAB includes: cordiality without familiarity; demonstrated respect for both Parties and their representatives; avoidance of socialising with a Party without the presence of the other Party; abstention from comments or suggestions relating to the design or methods of construction of the Works; informality without becoming casual; respect for customs in the country of the Contract; and in general giving the impression of being part of the team working for successful completion of the Contract and not "outsiders" making occasional visits.

It is particularly important that the DAB evidence professional respect for the Engineer and the Engineer's staff. Under all of the FIDIC Conditions, the Engineer (or as he becomes in some of those Conditions, the "Employer's Representative") continues to have a direct involvement in claims of each Party against the other, even though he no longer is responsible for the quasi judicial "written decisions" regarding disputes. The successful DAB will have a good relationship with the Engineer; indeed, it is not unusual for the Parties to agree that the DAB and the Engineer can discuss potential disputes, at a stage when there has not been any formal referral of a dispute to the DAB.

One attitude which is important for a DAB to project is the attitude of being a careful listener, and one who may ask questions for clarification but never for the sake of argument.

Becoming acquainted with the project:

Immediately upon appointment, the DAB Members each should have a copy of the entire Contract for study, and retention at their respective home offices. It also is useful for a further copy to be kept available at Site for the use of the DAB when they are on Site. Working through the DAB

Chair, clarifications can be obtained from the Parties on any aspect of the Contract Documents, to assure that they are correctly understood by the DAB.

Any amendments, including variations, should be copied to each DAB Members, so that all Members are kept informed of the current status of the Contract Documents. Typically, the DAB works with the Contract Drawings without receipt of all construction Drawings, except when particular Drawings are relevant to a dispute.

It is important that DAB Members arrange to receive copies of all program revisions, so that they are aware of the actual progress compared to the planned progress. Usually such program updates are included in the monthly reports on progress which are prepared by the Contractor and furnished to the Engineer, which also should be copied to the DAB. On some projects, the Engineer prepares a separate monthly report to the Employer, and if that is done on the project, it too should be copied to the DAB Members.

Of course, one of the most important ways of becoming and remaining acquainted with the project is by tours of the Site at the times of Site visits. These tours are made in the company of the Parties and the Engineer and are informal, the intention being for the DAB to "see with its own eyes" the developments of the project. These tours are typically times for questions from the DAB on various matters observed; equally important, they are invaluable opportunities for the Parties to point out areas of potential difficulties.

It is important that Site visits be made at appropriate intervals, generally quarterly.

Sadly, there are projects on which the Parties, in an "effort to economise" have tried to reduce frequency of Site visits (or even halt them completely) and nothing could be more ill-advised.

It is also important that the DAB attend the Site in the event of a significant problem, such as a tunnel collapse, or difficulty in finding suitable foundation for a dam, so that the DAB can assess the problem first hand. Availability for such unexpected Site visits is one of the reasons for the monthly retainers paid to the DAB Members.

To opine or not to opine:

Some persons are apprehensive about giving opinions. Their concern is that it may cause them to be seen as prejudiced if the question becomes an integral part of a dispute. Such concern reflects the sort of "remote" approach which some arbitrators and judges adopt, in which no questions are asked, and no attitudes are hinted.

However, a DAB is not an arbitral tribunal, and certainly not a court of law. It is an informal body, retained by the Parties to help to resolve disagreements amicably. The best DABs make themselves available to give views on potential disputes, provided both Parties have requested that the DAB do so. A typical situation would be a disagreement between the Contractor and the Engineer on the interpretation of a provision in the Technical Specifications, where the view of the DAB would be helpful to avoid the disagreement developing into a dispute. Without knowing all details (such as the amount of cost involved, or what view of the language of the Specification is held by which person, the DAB can give an experienced and objective interpretation, couched in language such as "Based upon what you have told us at this point, we think that it would be read to mean that...."

The expression of such views on potential disputes does not bar the DAB from adopting a different view if the matter becomes the subject of a formal dispute on which the DAB has to make a decision binding on the Parties (subject to possible revision in arbitration).

While remaining receptive to such consultations by the Parties, nevertheless the DAB must confine its "opining" to matters related to potential disputes, and has no role at all in resolving design dilemmas, or selecting construction methods or equipment.

Also, here as in written decisions, the DAB must never make derogatory comments, or in any way ridicule viewpoints put to it.

Formal adjudication:

Here I must be careful not to impinge on Geoffrey Hawker's coverage tomorrow morning on "Formal Adjudication". My intention is simply to contrast the informal "opining" with the formal DAB decision, immediately binding on the Parties..

The "opining" is the exercise of the authority of the DAB which stems from its collective experience and professional standing, but it is persuasive and not coercive.

It should be noted that in the traditional Dispute Review Board, of the type in common use in the USA, the Board never makes an immediately binding decision. The DRB makes "Recommendations" which only become binding upon the Parties if one or both of the Parties give a written notice of dissatisfaction within a stated time, typically 14 days. If such dissatisfaction is notified, the Parties may continue to negotiate, or they may resort immediately to arbitration or litigation, and in either case, typically the DRB Recommendation is stipulated in the Contract to be admissible in evidence in such subsequent arbitration or litigation.

The DRB focuses on "persuasion", and is a less confrontational process than the DAB which will issue a determination with which the Parties are obliged to comply immediately, even if the dispute is to be referred to arbitration. The DAB approach stems from FIDIC's traditional view that a binding determination is needed to progress the construction, and you will recall that under GC 67 of the Fourth Edition of the FIDIC

Red Book, it was the Engineer's written decision which was a binding determination, with which the Parties had to comply, unless and until that determination was altered by an arbitral tribunal (or the Parties negotiated an amicable settlement of the dispute).

Since the Fourth Edition of the FIDIC Red Book, the FIDIC Conditions have included a period of "amicable settlement" efforts. This establishes a minimum period for such efforts before either party can initiate arbitral proceedings. The rationale given by the Guide for introducing this provision was that in some countries, such authorisation for amicable settlement was needed or the Government entity would not be able to negotiate a settlement. However, the provision for this "amicable settlement" effort remains an effort carried out while the DAB decision is binding on the Parties.