

Tunnelling

The international journal for the tunnelling industry

Journal



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Dispute Adjudication Boards

– a preferred mechanism for tunnelling projects?

Tunnelling projects typically go hand-in-hand with uncertainty, as even with a thorough investigation the exact geological conditions are unpredictable and during construction the design has to be adjusted to the actual ground conditions. These adjustments can lead to additional costs and delays, thereby challenging contract administration and project management. As a consequence of the above, tunnelling is prone to disputes. Construction contracts should thus provide a system for resolving claims and disputes on compensation in order to avoid the escalation of the dispute and to maintain good relationships during these long-term projects and beyond. Dispute Adjudication Boards (DABs) are designed to serve this exact purpose. DABs aim to avoid the occurrence of disputes during construction and to promote the early resolution of disputes.

In the tunnelling sector, DABs were first made use of in 1987 in the Anglo-French Channel Tunnel Project and consisted of a

permanent five member Board. With the project having a total value of US\$14bn, only 13 disputes arose, of which 12 were settled pre-arbitration. The use of DAB procedures received a boost in 1995 when introduced in one of the FIDIC Books, which are today considered to be possibly the most frequently used contract forms for international infrastructure projects. Due to the popularity of these standard forms, DABs are now prevalent in construction projects such as tunnelling. According to the (fragmentary) data collected by the Dispute Resolution Board Foundation (DRBF), almost 3000 projects included Dispute Resolution Boards like DABs. This prevalence of DABs in particular can be expected to further increase in the tunnelling sector with the publication of a new FIDIC Book designed specifically for Underground works (see our latest article in the last Tunnelling Journal Issue April/May 2017). DABs are also recognised by the International Tunnelling Association (ITA) for tunnelling projects.

Ulrich Helm and Fabian Bonke of the international law firm Hogan Lovells International LLP here talk us through why Dispute Adjudication Boards could be the preferred dispute settlement mechanism for the underground construction industry

What are DABS?

DABs consist of one or three impartial experts, who are preferably experienced and highly trained engineers. In comparison to the Engineer who has conferred decision-making functions under the FIDIC Conditions of Contract, the DAB acts truly independently. The Engineer, however, is subject to a conflict of interest: he is hired and paid for by the Employer, being his agent in some cases, while still being expected to act impartially when deciding on disputes. This conflict of

interest created an element of scepticism towards the too strong role of the Engineer, eventually leading to a shift of powers from the Engineer to the DAB. The first edition of the FIDIC Red Book still resolved disputes by written decisions of the employer's engineer, whose decision was final and therefore could only be altered by an arbitral award, without an intermediary DAB. The 1996 Supplement to the FIDIC Red Book then introduced the option to reduce the Engineer's role to a – still important – first instance decision-maker while conferring the pre-arbitral role to the DAB.

DABs render temporarily binding decisions that differentiates them from Dispute Review Boards (DRBs) or mediators. DRBs render non-binding advice on disputes and are more

disputes is generally at the discretion of the DAB. It would normally be expected to conduct a hearing and possibly to request written submissions from both parties prior to this hearing. The DAB's decision should briefly describe the matter in dispute, the relevant facts and the basis for its decision, particularly including the applied contractual provisions.

Apart from dispute settlement, regular site visits should form part of the routine work of the DAB. Good knowledge of the site, experienced by actually visualising it, can be a major advantage at a later stage when it comes to disputes. Therefore, regular site visits by the DAB can reduce the works for reconstructing historical events later. The frequency of those routine site visits is highly dependent on the actual project or the state

kinds of disputes conclusively.

One key strength is the focus on dispute avoidance. With the availability of a – often permanent – DAB, disputes can be resolved at an early stage which helps to save money and time and thus to maintain good project relationships. The parties are reluctant to take tenuous or extreme positions in a dispute, as that may result in losing their credibility with the Board members. Also, the reoccurring problem of aggregation of unresolved claims is minimised since the DAB encourages the parties to promptly refer disputes. Critics, however, cast doubt that DABs actually bring these advantages. Parties who are willing to settle amicably would do this without a DAB, and Parties that are not willing to settle will not accept a DAB's decision and will commence arbitration in any event. Without a doubt, DABs do not always make a difference to a dispute. However, from our research and experience, there are a number of cases where DABs provided for an adequate forum to find an acceptable solution to a dispute. Even if parties are generally willing to settle amicably, they can disagree as to the exact conditions of a compromise. Having an unbiased and experienced Board render the decision can ensure that settling is made easier for both sides.

One other great strength of DABs is the vast technical expertise of its members. DAB members are typically experienced engineers, who are familiar with both the technical issues and best practice in the construction sector.

prevalent in North America. Mediation is common across the globe and its use is not limited to only construction cases. A neutral mediator attempts to identify and resolve the disagreement between the parties, acts as a communication channel between the parties and may propose settlement solutions. If the parties, however, are not capable of reaching an agreement the mediator is not entitled to make a binding decision.

DAB appointment and routine operations

The parties of a FIDIC Yellow Book-contract can choose between a DAB consisting of one or three members. FIDIC recommends three members when the project volume exceeds US\$25M. In this constellation, each party will normally select one member and the chairman will be appointed by these two appointed members. Sometimes the contract will contain a list of people who can be appointed for the DAB. In this case the parties are obliged to choose a person from that list.

The DAB should be appointed as early as possible, thus at the commencement of construction, and should remain in existence throughout the lifespan of the project. Early appointment is key in order for the members to detect problems on site and to become conversant with the project.

The main task of a DAB is to resolve the disputes that the parties refer to it. The exact procedure for making a decision on these

of it. As a guideline, the FIDIC Red Book provides for visits in intervals between 70 and 140 days and additional visits during critical phases of construction. During these site visits the DAB should be informed about the progress of the project, as well as existing or potential difficulties. Additionally, the parties would have the opportunity to bring forward issues that they consider as important to them.

Strengths and limits of DABs

Without a doubt, DABs have their strengths but cannot be a forum to resolve all different

One other great strength of DABs is the vast technical expertise of its members. DAB members are typically experienced engineers, who are familiar with both the technical issues and best practice in the construction sector. Limits, however, can be reached when it comes to legal and contract interpretation issues. These issues are preferably resolved by legal experts who are specialised in construction law cases. The dispute settling mechanism that the FIDIC contracts provide takes advantage of the respective organ's abilities and considers those limitations. The Engineer works as a first filter for disputes that do not inherit legal but technical problems. Many of these technical and/or less contentious issues can already be resolved in this first step, when both parties are satisfied with the Engineer's determination following the claim. Disputes arising from the determination might then be resolved by a DAB's decision. Thanks to the qualification of the Board members and their close involvement in the project there is a high chance the dispute can be settled conclusively at this stage.

Furthermore, DABs are said to be relatively inexpensive. There have been surveys on the costs of DABs reaching the conclusion that they only make up for 0.05 % to 0.3 % of the total project costs. Usually costs of the



Figure 1: Comparison of the current and new FIDIC books

CURRENT YELLOW AND RED BOOK



**NEW YELLOW BOOK AND UNDERGROUND BOOK
(Differences To Current Book In Green)**



DAB will be shared equally by the parties. These costs seem particularly low when compared to those expected in arbitration or litigation and the loss of productive project time. In some cases, there is, however, no alternative to arbitration or litigation and any additional work by a DAB might cause unnecessarily incurred additional costs. As set out, this might be the case if legal and contract interpretation issues arise. Or the dispute escalates to such an extent that the parties aim to reach a binding decision that is also immediately enforceable against the other party.

DABS IN THE FIDIC BOOKS

Current FIDIC Yellow and Red Book

In the widely used FIDIC Yellow and Red Book DABs hold key role in their tiered dispute resolution mechanism. In short, the DAB is deployed after a determination by the Engineer and before arbitration commences. A typical procedure would be as follows: One party considers itself entitled to additional payment due to altered conditions and gives notice of this to the Engineer. If he approves

of the claim, the Engineer makes an appropriate determination. When a party is dissatisfied with the determination, it gives notice to the other party of its intention to refer the dispute to a DAB, without being bound by a time limit. After its appointment, the DAB then renders a decision within 84 days. In case of disagreement with the DAB's decision, the party has to give a Notice of Disagreement (NOD) to the other party within 28 days. The Red and Yellow Books then provide for a period of 56 days for a last attempt at dispute avoidance and amicable settlement. Arbitration can subsequently be commenced under the rules of the International Chamber of Commerce (ICC), without any time limits. Hereby, a party is not entitled to bypass the DAB by directly initiating arbitration proceedings but the DAB proceedings are rather a necessary precondition.

New FIDIC Yellow Book and FIDIC Book for Underground Works

In particular the DAB procedure in the FIDIC Yellow book has been criticised for different reasons, which will be addressed in the new edition of the FIDIC Yellow Book (release expected in September 2017) and the new FIDIC Book for Underground Works (release of test edition expected in 2019/2020).

One point of criticism has arisen from the fact that the DAB is appointed ad hoc, when disputes have already arisen. Thus, the challenging task of appointing the Board members appears in the midst of a dispute and the Board members cannot assist in avoiding disputes in the first place. Taking account of these concerns, the new Books now set a greater focus on dispute avoidance. This is illustrated by the addition of "Dispute Avoidance" to the name of the Dispute Adjudication Board. As has been proven to be successful in the FIDIC Red Book and FIDIC Gold Book of 2008, the DAB is now constituted as permanent instead of ad hoc and, therefore, remains in place until the works are completed. This is expected to have a positive effect on dispute avoidance, as prevention is only possible before a claim is made. The availability of informal assistance by the DAB to resolve disputes at an early stage also supports dispute avoidance.

Furthermore, it has been critically raised that the DAB procedure would take too long. The FIDIC Books now provide for tighter deadlines for the whole dispute resolution including the procedure in front of DABs. This will very likely apply to the upcoming Yellow Book and the upcoming Book for Tunnelling and Underground Works. Hereafter, a party who is dissatisfied with a determination by the Engineer, now has to give a first NOD to the other party within 28 days. No longer than 28 days after this, the dispute has to be referred to the – already appointed, as it is permanent – DAB. If this period of time

expires, the NOD is deemed to have lapsed and be no longer valid, leading to the irrefutable presumption that both Parties have conclusively accepted the determination. Also new is that Arbitration can only be commenced within 182 days after the NOD following the DAB's decision, but not before the 28th day after the day the NOD was given (even if no attempt at amicable settlement was made). The parties will on the one hand benefit from streamlining the procedure. On the other hand, the parties will have to make sure that they respect the time limits in order to preserve their own rights. The parties thus require a well-organised contract management also while working with a DAB.

Conclusion

In summary, DABs provide no "one-size-fits-all" solution. Especially complex legal issues call for the expertise of contract lawyers and cannot be solved by a Board of technical experts. The elaborated system provided by FIDIC with a tiered dispute resolution mechanism partly avoids these limits by combining the DAB procedure with other forms of dispute settling such as arbitration.

Despite this limitation, the merits of the FIDIC's DAB procedure are notable. The Board members provide for high technical expertise allowing for an early resolution of a high amount of disputes and even their avoidance at relatively low costs. Because of its close involvement in the construction process, a permanent DAB can anticipate contentious issues and ideally resolve them without much expenditure. Only few, legally complex disputes are brought to arbitration, saving time and resources. Therefore the DAB procedure was implemented in the FIDIC standard forms as a crucial part of the provided dispute resolution mechanism. It has already proven to be successful in the current FIDIC Books and considering the improvements in the new FIDIC books will have even more positive effects. It is however important to note that the tight deadlines for the assertion of claims and complex procedural rules require the parties to set up a well-organised contract management throughout the entire project.

ACKNOWLEDGEMENTS

Ulrich Helm is Partner and Fabian Bonke is an Associate in the Frankfurt Office of the international law firm Hogan Lovells International LLP. They are part of the Infrastructure, Energy, Resources and Projects Group and frequently advise on tunnelling and other large infrastructure projects. The authors particularly thank Ms Nora Stumpf for providing valuable support in drafting the article. The views expressed in this article are solely those of the authors.