



Forum

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Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary

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Introduction

Although Dispute Review Boards (DRBs) and Dispute Adjudication Boards (DABs) share many common characteristics, they also differ in certain important respects. This article briefly summarizes the key features of each approach, explores differences between the two approaches, and offers commentary on the pros and cons of each approach.

What Are The Key Features Of A DRB?

The authors assume that most readers are familiar with how a DRB is established and implemented, so they summarize here only the key features of a DRB:

The three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established.

The DRB members must not have conflicts of interest and must act as objective, neutral third parties under a Three Party Agreement with the Employer and Contractor.

The DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept apprised of the project's progress between site visits.

At the periodic site visits the DRB explores with the parties all open issues and urges the parties to resolve

disputes that may otherwise eventually become formal claims. The DRB can also be asked to give non-binding, very informal "advisory opinions" on issues that have not become formal claims under the contract.

The DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions. The informal hearing process has none of the trappings of a legal process, such as a formal record, swearing of witnesses, or cross-examination.

The DRB issues detailed non-binding findings and recommendations that analyze the parties' arguments, the contract documents, the project records, and the supporting information presented at the hearing.

Because the DRB's findings and recommendations are non-binding, the parties are free to accept them, reject them, or keep negotiating based on the parties' respective risk exposure, taking into account the DRB's analysis.

The DRB's findings and recommendations (but not other records) usually are admissible in subsequent proceedings.

What Are The Key Features Of A DAB?

A DAB established under a FIDIC construction contract is the most common form of DAB in international projects and hence in this article we focus principally on this form of DAB, with occasional references to

other DAB forms such as those operating under International Chamber of Commerce (ICC) or other Dispute Board Rules (e.g., World Bank).

The key features of a DAB established under a FIDIC construction contract are:

1. Under the terms of a tri-partite agreement among the Employer, Contactor and each DAB member, the DAB member confirms that he/she is experienced in the work which the Contactor is to carry out, is experienced in the interpretation of contract documentation and is fluent in the language of communications under the contact.
2. The DAB members must not have conflicts of interest and each member warrants under the tri-partite agreement that they will be impartial and independent of the Employer, Contactor and Engineer. Indeed, the FIDIC tri-partite agreement provides for severe financial sanctions for a DAB member who fails to act in accordance with the terms of the agreement.
3. The standard provision under the FIDIC Red Book, MDB Harmonised Edition and Gold Book is to have the DAB appointed at the beginning of the project (a “full term” or “standing” DAB), visit the project on a periodic basis, and be kept apprised of the project’s progress between site visits. Under FIDC Yellow and Silver Books (where the Contractor designs the works) by comparison, a DAB is appointed only when a dispute arises.
4. At the periodic site visits the DAB explores with the parties all matters of concern and urges the parties to resolve disputes that may otherwise become formal claims. Depending on the type of FIDIC contract, the DAB may have an express duty to assist the parties in avoiding disputes (FIDIC Gold Book and MDB Harmonised Edition). In the absence of such an express duty (FIDIC Red book) the DAB will still normally undertake this role in any event. (Under the ICC Dispute Board Rules, Article 16 makes express provision for the DB to provide “Informal Assistance” to help the parties to avoid disputes.)
5. The DAB may also provide an “opinion” on a matter referred to it by agreement of the parties. This provides an informal way of the parties establishing the DAB

opinion on any issue. The opinion may be given orally or in writing.

6. In the event of a dispute which either the Contractor or Employer considers needs formal adjudication a party may refer it to the DAB for adjudication within an 84 day period. The DAB decides on the procedure and intermediate timetable of adjudication subject amongst other matters to comply with Paragraph 5(a) of the Procedural Rules Annex (requiring the DAB to give each party a reasonable opportunity of putting in its case and responding to the other party’s case).
7. Typically the DAB hearing is less formal than an arbitration or court proceeding. However, a party may still choose to have its lawyer attend the hearing as its representative. It is a matter for the DAB to determine how the hearing will be conducted.
8. The DAB issues a formal decision on the dispute. The FIDIC contracts provide that the parties shall promptly give effect to the decision (Sub Clause (SC) 20.4).¹
9. A party that is dissatisfied with the decision may serve a Notice of Dissatisfaction (SC 20.4) within 28 days of receiving the decision, and thereafter under the terms of the contract the parties undertake to attempt to settle the dispute amicably (SC 20.5). On occasion, both parties serve Notices of Dissatisfaction and then negotiate to achieve a settlement.
10. Ultimately (not less than 56 day after their service of Notice of Dissatisfaction) a party may refer the dispute to international commercial arbitration, administered by the ICC. Thus the arbitration may be commenced prior to or after completion of the works.²
11. The steps that a party can take to enforce a DAB decision is a current issue of debate. There is little legal authority on the matter, since the issue would normally be dealt with by arbitration. The ICC Case 10619 is referred to as an example of enforcement by an arbitrator’s award.³ However the recent Singapore High Court decision *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 has highlighted the difference between the Red Book SC 20.7 and the Gold Book equivalent, SC 20.9. The Red Book provides for arbitration of the failure to comply with the

¹ All Sub-Clause references refer to the FIDIC Red Book and MDB Harmonised Editions unless otherwise stated.

² The 2010 edition of the FIDIC MDB contract at SC 20.5 now states that the party giving a Notice of Dissatisfaction should “move to commence arbitration after the 56th day from the date of the Notice.”

³ See article by Christopher Seppala “Enforcement by an arbitral award of a binding but not final engineer’s or DAB’s Decision under the FIDIC Conditions” ICLR Volume 26, 2009 – Part 4.

DAB decision only where neither party has given a Notice of Dissatisfaction and hence the DAB decision has become final and binding. By comparison, the Gold Book provides for arbitration “in the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding”. Some parties are therefore considering modifying the FIDIC standard contracts wording for enforcing a decision that is binding but not final and binding to that of the Gold Book SC 20.9.

Are There Fundamental Differences Between DRBs and DABs?

DRBs and DABs share much in common; there are more similarities than differences. However the authors believe it is important to consider the nuanced differences so that dispute system designers can take the pros and cons into account in deciding which features of the DRB/DAB process they wish to implement on particular projects where they have the choice to do so.

Commentary

1. Do both systems assist the parties in avoiding disputes or resolving them before they become formal claims subject to the DRB/DAB?

A DRB, in practice, encourages the parties to try to resolve disputes before they become claims. Sometimes DRB specifications or operating procedures will mention this role, but there is no formal requirement for the DRB to facilitate resolution of a dispute or of a formal claim referred to the DRB. Many DRB specifications do, however, provide for what is commonly referred to as an “advisory opinion”, with the DRB serving as an informal “sounding board” for the parties before submission of a formal claim to the DRB.

The DAB approach contemplates more explicitly that the parties should negotiate and try to reach agreement before they refer the matter to the DAB. Indeed under FIDIC SC 3.5 the Engineer is obliged “to consult with each party in an endeavour to reach agreement” between them, before he issues his own determination, which normally are all stages that precede the referral to a DAB. It is also noteworthy to compare the Red Book with the MDB Harmonised edition (i.e., the Red

Book as adapted to meet the requirements of the Multilateral Development Banks including The World Bank) where the MDBs introduced a supplementary sentence into the DAB’s procedures⁴ to give the DAB an express role in dispute avoidance.⁵ Moreover, the parties may still reach an amicable settlement before or after lodging an objection to the DAB decision.

The interesting point in FIDIC SC 3.5 is that in this clause the Engineer takes on a different duty – to act fairly (and, implicitly, impartially).⁶ In all other respects the Engineer acts for the Employer (SC 3.1). Although there has been much discussion about the Engineer’s duty to consult with each party in an endeavour to reach agreement often, in practice, this is overlooked. The authors suggest that there needs to be more focus on the need for Engineers to carry out this role in international contracts. That said, this role is bound to be somewhat restricted since the Engineer is unlikely to broker an agreement that involves an acceptance of its own failure such as a design deficiency or delay in issuance of information.

Like the DRB, the DAB can also be asked jointly by the parties to provide an informal opinion before the Engineer issues a formal ruling – this gives the parties a good indication of which way the Board is likely to determine the issue if a formal claim is referred. So, both DRBs and DABs provide the parties multiple opportunities to avoid a formal claim, but the DAB contemplates a more active role for the Engineer, at least before a formal claim is referred to the DRB.

2. Do both systems assist the parties in resolving claims before they migrate to other, more formal, legal processes?

The DRB issues a non-binding recommendation that the parties can accept, reject or use as the basis for negotiations. An argument can be made that there is benefit to the parties in maintaining, at the project level, ultimate control over the outcome of the claim. This permits the parties to take into account commercial and other considerations and make a business judgment whether a resolution is in the best interests of the parties and the project. This also helps preserve relationships because the outcome is agreed to by the parties.

⁴ Procedural Rules Annex, paragraph 2.

⁵ ICC DB Rules expressly provide that a DAB may meet with only one party while providing Informal Assistance, with the agreement of both parties.

⁶ Also the Engineer has a duty to act fairly in the certification of payment.

In contrast, a DAB issues a decision that the parties are bound to follow, subject to lodging an objection for a later “appeal” through arbitration (where agreed) or litigation. This could be said to be divisive since one party wins and one loses, but in practice it brings clarity and resolution to the dispute, since the dispute has been adjudicated on by a Board of experts whose opinion is respected. Even where a party has served a Notice of Dissatisfaction, the parties are obliged to try and settle the difference amicably – so there is indeed a further chance to reach a consensus. Indeed, it is not uncommon for both parties to serve such Notices and then agree to revised settlement terms.

It is also noteworthy that in the absence of a Notice of Dissatisfaction being served within 28 days of receipt of the decision, the DAB decision becomes final and binding. Where a Notice of Dissatisfaction is served the DAB decision is only temporarily binding – in that the parties have agreed to put the decision into effect unless other agreement is reached or it is overturned by an arbitral or court award.

3. Do the timetables for the DRB/DAB process assist or hinder the process?

The DRB process timeline may be spelled out in the DRB specifications and operating procedures, but generally the exact timing is set in consultation between the DRB and the parties. Typically, the practice is that, absent exigent circumstances, DRB hearings are conducted during or in conjunction with a regular site visit. This generally means that the DRB claim process start to finish is between 90 to 180 days, depending on the frequency of site visits.

In contrast, the FIDIC DAB process must be completed in 84 days start to finish⁷ unless otherwise agreed. The advantage to the parties and the project of a pre-set 84 day period is to achieve a decision on the dispute that is rapid and relatively low cost. A rapid decision is beneficial in allowing the parties to know their position under the contract; and a short duration of dispute resolution process tends to limit the scope for running up extensive costs. A disadvantage of hav-

ing an 84 day period tends to be the difficulty of accommodating the availability of the parties and the DAB to convene for a hearing if necessary, at short notice.

4. How do DRBs and DABs assist in a local market where maintaining long-term relationships is considered to be important by both Employer and Contactor?

A DRB issues a recommendation only, so the parties themselves (not the Engineer) have to decide whether to implement it or to negotiate a different settlement. This typically results in an agreed resolution that helps maintain good working relationships. This suits very well a market such as in Florida or California⁸ where there is a pool of contractors wanting to maintain good relations with the road authority, and the road authority wanting to continue to get keen tender prices and be seen as a good source of work and a good employer. A contractor may be prepared to take a hit on a project on the basis that over the next years they will have more projects from the same employer and will make it up and more.

In contrast, the international market is different in that while contractors are still keen to maintain relationships with national governments, they may only do one project in that country for that employer. Similarly the employer has an international pool of contactors from which to choose. So internationally there is less need to compromise and potentially more need for a DAB that determines the entitlement of the parties unequivocally. It must also be noted that in some countries, international companies want the comfort of knowing that disputes will be resolved one way or the other by outside, neutral experts, not by the employer governmental agency.

5. Do DRBs/DABs vary in discouraging or encouraging the participation of legal counsel in the process?

Historically, DRBs have discouraged the participation of legal counsel in the process, except in limited

⁷ The ICC DB procedure is similar at 90 days from the Date of Commencement

⁸ It should be noted, however, that even in the U.S. not all recommendations are followed. For example, Owners who are major users of DRBs on road contracts have stated that they follow approximately 75% of recommendations.

⁹ Note, however, that the admissibility of the DRB findings and recommendations in subsequent proceedings may cause parties to have more legal counsel involvement because of the potential “downstream” effect of the DRB process. See Kurt Dettman, “To Admit or Not to Admit: That is the Question” in DRBF Forum (November 2010).

circumstances where there is a narrow legal issue in question, or where legal counsel's observation of the process would be beneficial for later party review of the DRB's findings and recommendations. Suffice it to say, however, it is very rare for legal counsel to take the lead in managing the DRB process or "orchestrating" the parties' presentations as would be the case, for example, in an arbitration proceeding.⁹ The basic view of DRB practitioners is that it should remain a party-driven process that leaves ultimate control of the proceedings and the outcome in the hands of the parties' business decision makers.

In contrast, because the DAB process results in a "temporarily binding" decision that the parties are bound to follow, there may be a greater need for legal counsel involvement in marshalling and presenting the case. In addition, on international construction projects, there may be more legal issues raised by the nationality of parties and locus of the project, resulting in the potential application of both international and domestic law(s) to the matter in dispute. However, most DABs seek to have the parties themselves present the case, with legal advisers present only where necessary.

Conclusions

Both the U.S. DRB model and the FIDIC contract (full-term) DAB process provide for, mainly in sequence:

The presence of a DRB or DAB on a project encourages the parties and the Engineer to conduct the contract in a co-operative manner. Thus to achieve a 'win-win' outcome.

DRB: Periodic meetings to identify issues and encourage party-resolution. DAB: Periodic site visits to identify issues and encourage party-resolution; also an initial attempt by Engineer to reach an agreement between the parties: A 'win-win' objective.

DRB: Parties can request Advisory Opinions. DAB: Parties can ask the DAB to provide informal assistance to avoid a dispute; or can request an Advisory Opinion: Also a 'win-win' objective of the parties maintaining control of the resolution of their differences.

DRB: Provides non-binding, reasoned findings and recommendations. DAB: Provides a formal decision on the issue that parties must follow: potentially 'win-lose' but provides resolution.

DRB: Parties can accept or reject the findings and recommendations or negotiate a resolution. DAB: An amicable settlement may be reached after the DAB decision: Maintains the potential of a 'win-win' settlement.

DRB: Non-binding findings and recommendations are admissible in later proceedings. DAB: Decision may be re-visited in arbitration or litigation: Potentially win-lose.

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