

Cairo Regional Centre for International Commercial Arbitration

Dispute Adjudication Boards

هيئات فض النزاعات

FIDIC Contracts

عقود الفيديك

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Disputes, Why?

Claims, Why?

Claims provisions

For whose benefit?

FIDIC Silver Book

Introductory Notes

For such projects it is necessary for the **Contractor to assume responsibility for a wider range of risks than under the traditional Red and Yellow Books.**

The Employer must also realize that asking responsible contractors to price such risks will increase the construction cost and result in some projects not being commercially viable.

DAB Effectiveness

The DAB has 4 main functions:

1. Visit the site periodically & become familiar with project
2. Keep up to date with progress & problems
3. Encourage the resolution of disputes
4. Prepare Decisions on disputes in timely manner.

DB Effectiveness

Cases

The existence of a readily available **mutually**
acceptable impartial board promotes agreement.

Participants do not want to lose their **credibility**
with the DAB by taking extreme positions.

Accumulation of claims is minimized

The process encourages a **win-win** rather than a **win-lose** philosophy.

Decisions not implemented may form the basis for negotiated settlements.

DAB Decision is a **condition precedent** to the commencement of arbitration proceedings.

The **Decision is admissible** in evidence in **arbitration**.

The Reasoning

Reasoning is an essential part of the decision.

May persuade the parties that the DAB studied all relevant matters & reached a conclusion similar to that which may be expected from an arbitrator.

FIDIC Red Book, 4th Edition

1987 (1988) (1992)

A Dispute Must Exist

ICC Case No. 6535 [1992]

The case dealt with the question of *whether a "dispute" must exist* as to a matter *before* such matter is referred to the engineer (DB) for a decision under clause 67.

The contractor had sent letters to the engineer claiming relief under FIDIC Conditions, **Clause 44** (extension of time) and **Clause 52** (payment for variations).

The contractor asked the tribunal to consider these letters as amounting to referrals of disputes to the engineer for his decision under Clause 67.

Quite properly, the tribunal refused to do so, stating that:

"before a claim or contention can constitute a dispute to be referred under Clause 67, it must first have been submitted under the contract."

It follows that if the matters submitted to the Engineer are claims which have not previously been rejected, *they cannot be regarded as submitted under Clause 67 whatever language is used in the submission.*"

As the claims had not been submitted to the engineer and been **rejected** (thereby **constituting** **"disputes"**), before the contractor had invoked Clause 67,...

...the tribunal held that **the contractor had not complied with Clause 67** and that, therefore, **the tribunal had no jurisdiction** over the claims advanced.

The consequence of this decision was fairly dramatic for the contractor, as it resulted in the **dismissal of 216 claims** which the contractor had sought to refer to arbitration.

Nothing would prevent the contractor thereafter from complying with Clause 67 in relation to its claims.

Constructing the Team

Sir Michael Latham

Adjudication was given major boost following Sir Michael Latham's attention to **two serious problems**:

- 1. poor cash flow due to delays in payment.**
- 2. arbitrary withholding of monies due on the often flimsy pretext of alleged set off or counterclaim.**

Latham's recommendations resulted in **action by government** to address those problems in the **Housing Grants Construction & Regeneration Act of 1996**.

The Act, which is **mandatory**, entitles a party to require that a dispute be immediately referred to adjudication.

Decision within 28 days or longer if the parties consent.

The decision is **not final but is binding** until finally determined by some other legal process or by agreement.

The Act says nothing about enforcement of the decision.

Adjudication

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graph TD; A[Adjudication] --> B[Statutory]; A --> C[Contractual];
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Statutory

Contractual

Statutory Adjudication

The Scheme for Construction Contracts

2. Where a construction contract does not comply with the requirements of section 108(1) to (4) of the Act, the **adjudication provisions** in Part I of the Schedule to these Regulations **shall apply**.

23.

- (2) **The decision of the adjudicator shall be binding ... until the dispute is **finally determined** by legal proceedings, by **arbitration** or by **agreement between the parties**.**

There have continually been endeavours by some parties to construction contracts to frustrate the adjudication process.

Most have been unsuccessful thanks to the robust and extremely prompt reactions by the Courts.

Statutory adjudication has been successful in preventing the party to a contract which is in the stronger position from abusing that position.

Contractual Adjudication

Dispute **B**oard (**DB**) concept originated in the
1960's in the United States → **D**ispute
Review **B**oard (**DRB**).

1996 → **FIDIC** 4th edition adopted the mechanism in the form of a **D**ispute **A**djudication **B**oard (**DAB**) → replaces the Engineer's **quasi-arbiter** traditional role.

1995 → the **World Bank** produced the 1st edition of its standard bidding documents for the procurement of works of civil engineering construction & included as one of its **mandatory** provisions the use of **DRB**.

Types of Dispute Boards

- Dispute **R**eview **B**oard → **DRB**
- Dispute **A**djudication **B**oard → **DAB**
- **C**ombined **D**ispute **B**oard → **CDB**

Dispute Review Board (DRB)

The DRB issues '**Recommendations**' with respect to any dispute referred to it.

If no party expresses dissatisfaction with a Recommendation within a stated time period, **the parties contractually agree to comply** with the Recommendation.

If a party does express dissatisfaction with the Recommendation within such time period, that party may refer the dispute to arbitration or the courts.

Pending a ruling by the arbitral tribunal or at the court, **the parties may voluntarily comply with the Recommendation** but are not bound to do so.

Dispute Adjudication Board (DAB)

The DAB issues **'Decisions'** with respect to any dispute referred to it.

By contractual agreement, **the parties must comply with a Decision** without delay (**Binding**).

If a party expresses dissatisfaction with a Decision within a stated time period, **it may refer the dispute to arbitration** or to the courts; **the parties meanwhile remain contractually bound to comply with the Decision unless and until** the arbitral tribunal or the court rules otherwise.

If no party expresses dissatisfaction with a Decision within the stated time period, **the parties contractually agree to remain bound by it. → Finality**

Combined **D**ispute **B**oard (**CDB**)

The CDB introduced by the **ICC** offers **an intermediate approach** between the DRB and the DAB → give the parties **flexibility of choice** between a DRB recommendation & a temporarily binding DAB decision.

The CDB issues Recommendations with respect to any dispute referred to it **but may issue a Decision** if a party so requests and no other party objects.

If a party objects, the CDB will decide whether to issue a Recommendation or a Decision on the basis of the criteria set forth in the Rules.

1. Selection

2. Appointment

3. Qualities Required

Selecting the DAB

- Like arbitration, it is the quality of the DRB Members that makes or breaks the process.
- The reputation & acceptability of the adjudication process depends upon the quality of the members themselves.

- An arbitrator/adjudicator, like a judge, must act impartially and may be removed from his appointment if he fails so to act.
- An arbitrator/adjudicator should not act as the advocate, still less as the servant, of the party who appointed him.
- At least one member of the **tribunal/board** should be specifically qualified as an arbitrator.

FIDIC 1999 Suite

Multi-tier Dispute Resolution

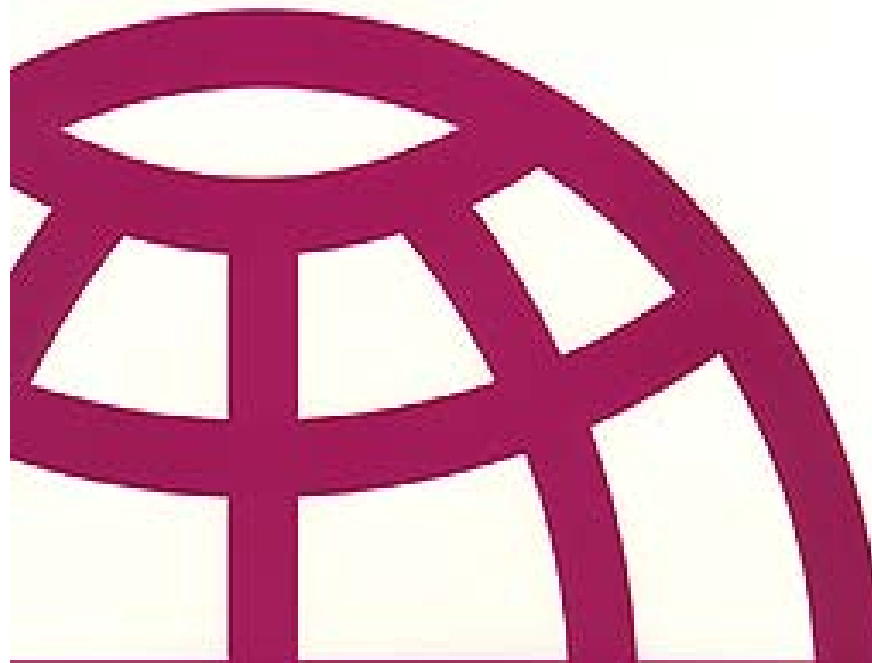


Fédération Internationale des Ingénieurs-Conseils
International Federation of Consulting Engineers
Internationale Ingenieurgesellschaft Beratender Ingenieure
Federación Internacional de Ingenieros Consultores

Conditions of Contract for **Construction**

FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER

GENERAL CONDITIONS
GUIDANCE FOR THE PREPARATION OF THE PARTICULAR CONDITIONS
FORMS OF TENDER, CONTRACT AGREEMENT AND
DISPUTE ADJUDICATION AGREEMENT



ISBN 2 - 88402 - 417 - 2

TEST EDITION 1994

1. *Engineer endeavours to reach agreement*
(*mediation*)

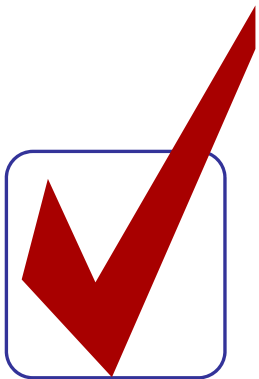
2. *Engineer's Fair Determination*

3. *Adjudication*

4. *Amicable settlement*

then, if necessary,

5. *Arbitration*



Thank

You