

**USERS GUIDE TO DISPUTE BOARDS**

**UNDER**

**1999 AND 2017 EDITIONS OF  
FIDIC CONDITIONS OF CONTRACT**

**+**

**2005, 2006 AND 2010  
MDB HARMONISED EDITIONS**

## 1) INTRODUCTION

The use of a Dispute Board is a highly successful and cost effective contractual process for the avoidance and/or resolution of disputes during the course of the construction project.

Dispute Boards have a proven record of resolving disputes expeditiously without recourse to time consuming and costly arbitration or litigation. They are in widespread international use; particularly for infrastructure projects, and continue to grow in popularity. The procurement and bidding requirements of the World Bank, Multilateral Development Banks (MDBs) and many other lending organisations advocate the use of Dispute Boards on their projects.

Dispute Boards are established either as a consequence of a contract provision, or by the Parties agreement at a later stage of the project. The standard FIDIC Conditions of Contract (including the various MDB Harmonised Editions) make it a mandatory requirement for the establishment and use of Dispute Boards. The members of the Dispute Board are impartial and independent from the Employer, Contractor and Engineer.

The establishment and use of Dispute Boards is now included as one of the five **Golden Principles** (GP) that FIDIC deems to be the fundamental and inviolable features of a FIDIC Contract. These Golden Principles are set out in the Guidance for the Preparation of Particular Conditions at the back of the FIDIC 2017 Editions, whereby FIDIC strongly recommends that any modifications made to the Contract in the Particular Conditions Part B – Special Provisions should always still include for the provision of a Dispute Board (unless there is a conflict with the governing law of the Contract). FIDIC states the key consideration for recommending the use of Dispute Boards as sacrosanct in their Contracts is to ensure that disputes are avoided to the extent achievable, minimised when they do arise and resolved efficiently.

Whilst the name given to the Dispute Board may be different under the various editions of the FIDIC Conditions and the MDB Harmonised Editions [eg. 'Dispute Adjudication Board' (DAB), 'Dispute Board' (DB), 'Dispute Avoidance/Adjudication Board' (DAAB)], they all issue a **binding decision** rather than a non-binding recommendation when deciding a dispute.

The main difference under the various forms of contract is whether the stipulated Dispute Board is a '**standing**' Board (full-term) or an '**adhoc**' Board (for a particular dispute). Whether the Dispute Board is 'standing' or 'adhoc' will be determined by the Contract.

## 2) 'STANDING' OR 'ADHOC' BOARDS UNDER DIFFERENT FORMS OF CONTRACT

Contract	'Standing' or 'Adhoc' Board	Relevant Clause
<b>1999 FIDIC Editions:</b>		
Red Book	Standing	20.2
Yellow Book	Adhoc	20.2
Silver Book	Adhoc	20.2
<b>2008 FIDIC Edition:</b>		
Gold Book	Standing	20.3
<b>2017 FIDIC Editions:</b>		
Red Book	Standing	21.1
Yellow Book	Standing	21.1
Silver Book	Standing	21.1
<b>MDB 2005/2006/2010 Editions:</b>		
Pink Book	Standing	20.2

The latest editions of FIDIC Contracts stipulate the use of 'standing' Boards, and the move towards 'standing' Boards is also now endorsed by the vast majority of the main funding banks. Some of these banks deem the cost of the Dispute Board eligible to be financed by the project loan.

### 3) CAN THE DISPUTE BOARD BE AVOIDED BY TAKING A DISPUTE STRAIGHT TO ARBITRATION?

If a provision for a Dispute Board is included in the Contract (as per the FIDIC and MDB Conditions), and a Dispute Board has been established, a Party cannot unilaterally then choose to skip the Dispute Board process and go straight to arbitration. The clear intention of both Parties when they entered into the Contract was to include a Dispute Board decision as part of the dispute resolution process prior to any arbitration, otherwise the Parties would have deleted this provision from the Contract.

Difficulties can occur if the specified Dispute Board is not in place when a dispute arises. The 1999 FIDIC Conditions (sub-clause 20.8), the 2008 FIDIC Gold Book (sub-clause 20.11) and the various MDB Harmonised Editions (sub-clause 20.8) allow a dispute to be referred directly to arbitration "by

*reason of the expiry of the Dispute Board's appointment or otherwise"*. Confusingly, these sub-clauses are under the specific heading of 'Expiry of Dispute Board's Appointment'. The wording in the above Contract Conditions has led to much debate over what circumstances may allow a Party to opt-out from adjudication by the Dispute Board. However, it is clear from recent judgements in the UK and Swiss Courts that the Dispute Board procedures in these Contract Conditions must be treated as a mandatory pre-condition to arbitration, except for limited circumstances applying to 'standing' Boards.

To provide more clarity, the 2017 FIDIC Conditions (sub-clause 21.8) included a revised heading of 'No DAAB In Place'. The new wording of the sub-clause also refers to the circumstance where no Dispute Board is being constituted, as well as retaining the wording which provides for arbitration in the event of the expiry of the Dispute Board's appointment or otherwise. It seems clear that the intention of the 2017 FIDIC Editions is to permit the Parties to proceed directly to arbitration if the Dispute Board is not in place, for whatever reason, when the dispute arises. However, once the Dispute Board has been established or once the Parties begin the process of setting up a Dispute Board, it will become mandatory and the process will not be able to be discontinued.

#### **4) POWER OF DISPUTE BOARD**

The powers of a Dispute Board, and the rules it must adhere to, are stated in the Contract. For the FIDIC and MDB Conditions the vast majority of rules and procedures are stated in the Appendix, which contains the Procedural Rules and the General Conditions of the particular type of Dispute Board Agreement being used. Although the Dispute Board has wide ranging powers, it must comply with the rules and procedures specified in the Contract. The Dispute Board can only deal with disputes between the Parties to the Contract – under the FIDIC and MDB Conditions this is purely the Employer and Contractor. If the Employer or Contractor has a dispute with the Engineer, or some other agency such as a Subcontractor, then the Dispute Board does not have jurisdiction to consider that dispute. However, if the Engineer was acting on behalf of the Employer, then under the Contract the Employer is responsible for the Engineer's actions. In such circumstances, the dispute is between the Contractor and Employer and can be decided by the Dispute Board.

If a Party considers the Dispute Board has no authority to act, for whatever reason, then any such challenge should be made in writing (with relevant particulars) as early in the process as possible. The Annex Procedural Rules forming part of the Appendix to the General Conditions of Contract give the Dispute Board power to decide its own jurisdiction in the event of any challenge.

## **5) COMPOSITION AND SELECTION OF DISPUTE BOARD**

Typically the Dispute Board comprises either 1 or 3 persons (the required number is stipulated in the Contract). For larger-scale projects it is normally 3 persons, and for smaller projects (generally up to \$50M) it is often just a single member. The members should be experienced, impartial and respected construction professionals, ideally with specific experience in the type of project and with expertise in the interpretation of contract documentation and in the workings of international Dispute Boards. Potential members must also be fluent in the language for communications defined in the Contract. There must be no conflict of interest between the member(s) and the Employer, Contractor and Engineer. For a 3 person 'standing' Board it is often desirable to have members from different disciplines; eg. Engineer, Quantity Surveyor and Construction Lawyer. Composition of an 'ad hoc' Board may depend on the type of dispute; ie. whether predominantly technical, legal or quantum based. To ensure neutrality of the Dispute Board, it is important on international projects that the nationality of the members is different to the country where the Employer and Contractor are based.

The most common ways of choosing a suitable member are by recommendation, or from contacts made during networking events, or from various lists of Dispute Board members maintained by reputable organisations. The most prestigious and widely recognised list of FIDIC approved Dispute Board members is the FIDIC President's List, as those persons have passed the rigorous scrutiny and examination by FIDIC's Assessment Panel in order to gain entry on the List. Selection of the right Dispute Board member(s) is very important, as under the Contract the Parties empower the Dispute Board to reach decisions with which they undertake to comply. It is particularly important for the Chairperson (in a 3 person Board) or Sole Member (in a 1 person Board) to have the appropriate previous experience and expertise.

Selection should be based on quality, competence and experience of the prospective Dispute Board member(s) rather than price. It is well worth paying to ensure the most suitable members are appointed.

## **6) APPOINTMENT OF DISPUTE BOARD**

The timescale for appointing the Dispute Board is stipulated in the Contract, and will depend upon whether a 'standing' or 'ad hoc' Board is required. Although it is normally a contractual obligation for the former to be established within a short period of time from the project 'Commencement Date', it is often the case that this does not happen until much later in the project. The author of this Users Guide considers it is far more beneficial to both Parties to have the Dispute Board in place

as early as possible, rather than waiting until problems and disputes have already occurred on the project.

Ideally, all Dispute Board members should be chosen by agreement of both Parties.

For a 3 person Dispute Board, the most common appointment method is whereby each Party nominates one member who is subject to approval by the other Party, and these members in consultation with the Parties then agree the Chairperson. This method is used in the FIDIC and MDB Conditions unless the Contract includes names of potential members, in which case the required number of members are chosen from the listed names.

In the event the Parties cannot jointly agree on the appointment of the Dispute Board member(s), or if one Party fails to respond to any requests by the other Party to agree and/or nominate a member, the FIDIC and MDB Conditions provide a default provision whereby at the request of either or both Parties the appointment is made by the appointing official or entity named in the Appendix to Tender or Contract Data. This is usually the President of FIDIC. The appointment is then final and conclusive, and the appointed member(s) has authority to act as the Dispute Board.

Once the required number of members have been nominated and agreed by both Parties, the FIDIC and MDB Conditions require both Parties to enter into a contractual relationship with each Dispute Board member via a Dispute Adjudication Agreement, or a Dispute Board Agreement, or a Dispute Avoidance/Adjudication Agreement depending upon the particular Contract Conditions used. This Three-Party Agreement details the terms and conditions for acting as the Dispute Board. This Agreement incorporates by reference the General Conditions and the Annex Procedural Rules, which are contained in the Appendix to the General Conditions of Contract. The Agreement takes effect when it is signed by the Employer, Contractor and Member. Each Agreement is personal to the individual Dispute Board member – it is not an agreement with the whole Dispute Board.

An example Three-Party Agreement is found in the 'Forms' section at the back of the FIDIC and MDB Conditions.

To address one of the problems often encountered under the 1999 FIDIC Conditions, the 2017 Editions provide for the appointing official or entity named in the Contract to appoint a member in the event one Party refuses or fails to sign a DAAB Agreement with a person the Parties have previously agreed to the appointment of. This should serve to prevent one Party by their intransigence from derailing a process they had previously agreed to when executing the main Contract.

## **7) APPOINTING REPLACEMENT MEMBERS OF THE DISPUTE BOARD**

If an existing member declines to act or is unable to act as a result of death, illness or injury, resignation or termination of appointment, it will be necessary to appoint a replacement member.

The FIDIC Editions and the MDB Conditions stipulate that any replacement member shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon; ie. as described in Sub-Clause 20.2 for the 1999 FIDIC Editions and MDB Conditions, and as per Sub-Clause 21.1 for the 2017 FIDIC Editions. If the Parties fail to agree on the replacement, then the default provision can be utilised whereby the named appointing entity or official will make the appointment.

## **8) WHO PAYS FOR A DISPUTE BOARD?**

Under FIDIC and MDB Conditions, the costs of the Dispute Board are shared equally between the Parties. This equal sharing of costs is regardless of the outcome of any disputes that are decided by the Dispute Board. Members fees should be agreed by both Parties during the appointment process. After commencing duties, each member submits their invoices to the Contractor for payment. The Contractor includes 50% of the invoiced amounts in the Applications for Payment for reimbursement by the Employer. If the Contractor fails to pay, the Employer has a duty to pay the amount due. In such circumstances, the Employer is then reimbursed by the Contractor for 50% of the invoiced amount, plus any financing charges and costs of recovering the fees. As each Party is effectively responsible for half the cost of the Dispute Board, the Contractor will need to include an allowance in the tender to cover 50% of the likely Dispute Board costs, and similarly, the Employer would need to allow in the project financing for his 50% share. Generally a provisional sum is included in the Bills of Quantity for the cost of the Dispute Board – if not, then the cost would normally be covered by the issue of a Variation Order.

## **9) COSTS OF A DISPUTE BOARD**

Costs will vary considerably depending on such factors as the location and duration of the project, frequency of visits, number and experience of Dispute Board members, home location and required fees of members, how many disputes are referred to the Dispute Board and the complexity of such disputes.

There are no 'standard' fee levels for acting as a Dispute Board member, so each member will have their own fee requirements. Fees for a Chairperson and a member acting as a sole person Dispute Board may well attract a premium rate to reflect the additional volume of administrative work they undertake.

In a 3 person Board, the two members who are not the Chairperson will often be paid the same fees, but this does not have to be the case.

**For a 'standing' Dispute Board, each Member is paid** (normally in the agreed currency of the Contract):

- a retainer fee per calendar month (which reduces by 50% in 1999 FIDIC Conditions and by one third in MDB Conditions from the date of taking over of the whole Works). Under the 2008 FIDIC Gold Book and 2017 FIDIC Editions, the monthly fee remains the same for the full period the Dispute Board is in place, unless otherwise agreed by the Parties and Dispute Board.
- a daily fee whilst working or travelling;
- all reasonable expenses – generally includes business class air travel;
- any taxes properly levied in the Country where the project is located on payments made to the Member (unless a national or permanent resident of the Country).

Under the 1999 and 2008 FIDIC Editions and the various MDB Conditions, fees are fixed for 2 years and thereafter adjusted annually by agreement between the DB Member and Parties. No such adjustment of the fees is mentioned in the 2017 FIDIC Editions – if the DB Member and Parties wish to make provision for a fee adjustment, this should be included in the signed DAAB Agreement.

### **Example costs**

The cost illustration overpage is based on a 'standing' Dispute Board appointed for a 2 year project in a country 1 day's travel from each Member's home location, and visiting the site every 4 months during the construction works. An average daily fee rate of US\$ 2,500 has been used for this example, and a retainer fee of 1 day per month has been assumed.

The figures are only an approximate guide to costs and must be adjusted for the actual situation and details of each project.



	<b>1 person DB</b>	<b>3 person DB</b>
Monthly Retainer	\$2,500 x 24 months = \$60,000	\$180,000
Site Visits (daily fee)	\$2,500 x 6nr x av 4 days = \$60,000	\$180,000
Visit Expenses	est. \$3,500 x 6nr = \$21,000	\$63,000
Monthly Retainer during Defects Notification Period	\$1,250 x 12 months = \$15,000	\$45,000
<b>Total</b>	<b>\$156,000</b>	<b>\$468,000</b>

If a dispute is referred to the Dispute Board, depending on the complexity, the Member may well spend 20-25 days (including the time for a hearing). The additional DB costs (based on 25 days) are thus:

	<b>1 person DB</b>	<b>3 person DB</b>
Daily Fees	\$2,500 x 25 days = \$62,500	\$187,500
Expenses	est. \$5,000	\$15,000
<b>Total</b>	<b>\$67,500</b>	<b>\$202,500</b>

A much simpler dispute will clearly require much less time.

Whilst the costs of a Dispute Board can seem high; in comparison to the overall cost of a major infrastructure project they are in fact a small proportion, often in the region of 1%. It should also be remembered that each Party is only responsible for half of the costs. For the benefits in avoiding and resolving disputes without the need for prohibitively expensive and time-consuming arbitration, the establishment of a 'standing' Dispute Board is widely recognised as the best and most cost-effective form of dispute avoidance and resolution.

## **10) MAIN FUNCTIONS OF A DISPUTE BOARD**

**Full-term 'Standing' Dispute Board** ... ideally in place soon after the Commencement Date of the project, and remains in place for the full duration of the project. It has the capacity for dispute avoidance as well as dispute resolution.

The members become conversant with the Contract, normally by requesting at an early stage after executing the Three-Party Agreement, a full set of the Contract Documents including Drawings and a copy of the Contractor's initial works programme. The Dispute Board member(s) periodically visit

the project site (typically every 3-4 months), and are kept informed with what is happening on the project between visits by being sent documentation such as Monthly Progress Reports, revised programmes, notices of claim, variations, etc.

The Dispute Board should take a proactive role and encourage the Parties to resolve issues before they become disputes. If required, the Dispute Board can informally assist the Parties in trying to resolve any disagreements before they escalate into adversarial disputes by giving advice and opinions when requested. In the event a dispute does arise and is referred to the Dispute Board, the dispute is decided by issuing to the Parties a written decision with reasons.

**'Adhoc' Dispute Board** ... it lacks one of the most important features which is the ability to prevent disputes from occurring. It is merely established as and when necessary to deal with a specific dispute, and its function is purely to decide a referred dispute. It is normally disbanded when the decision is issued, unless other disputes have been referred to it in that time or both Parties wish to keep the Dispute Board in place to deal with further disputes. It has no jurisdiction for preventing disputes, so cannot give opinions or informal assistance to the Parties.

The author of this User Guide would generally not recommend using an adhoc Dispute Board. Apart from the major disadvantage of not being able to assist the Parties to avoid formal disputes, it also has no familiarity with the Contract or the Works and is not familiar with the development of the dispute. There is also likely to be a significant delay prior to being able to refer the dispute for a decision – this is because the Parties will have to wait whilst the adhoc Dispute Board is appointed and for its members to be paid their advance fees. Its only benefit compared to standing Boards is the cost saving, but it is widely recognised that there are far more benefits from standing Boards, which more than justifies the additional expense

## **11) SITE VISITS BY A STANDING DISPUTE BOARD**

Site visits are an integral and vital part of the functions of a standing Dispute Board. They will comprise a combination of a site tour and a meeting with the Parties and Engineer.

The main purpose of a site visit is for the Dispute Board to be updated on progress of the Works and of any actual or potential problems or claims, view the site, review the performance of the contract and to endeavour to prevent any disputes from arising. The visit also provides an opportunity for the Parties and Engineer to discuss with the Dispute Board any difficulties or matters of concern relating to the project.

The FIDIC and MDB Conditions stipulate the recommended minimum and maximum periods between site visits, and the Dispute Board Chairperson will normally arrange for the 1<sup>st</sup> visit to take place soon after the Dispute Board is established.

The logistics of the site visit including preparation of required documents and presentations, reserving venue and meeting rooms, refreshments, transportation for site tour, transfers of members to/from airport, hotel accommodation and assistance with entry visas is typically done by the Parties and Engineer in liaison with the Dispute Board Chairperson. Flights are normally booked by the members.

An agenda for the site visit should be prepared by the Chairperson and sent to the Parties and Engineer in advance of the meeting. It is also good practice for the Dispute Board to request that each Party and the Engineer give advance notification in writing of the name and job title of the persons from their respective organisations who will be attending the visit. In this regard, it is very beneficial if senior management personnel can attend as well as the appropriate site based staff.

Parties and the Engineer will need to be adequately prepared for the Dispute Board site visits. Most Dispute Boards will request in advance of the visit a written summary of each Party's presentations concerning progress of works and difficulties/problems encountered and potential problems in the future. It is also common for the Dispute Board to require an advance copy of schedules of issued variations and submitted claims. The latter schedule is particularly important and normally includes a brief description of each claim, the amount claimed (time and money), date formally submitted and the current status of the claim.

The site visit is conducted in an informal and friendly manner.

During the site visit, the Dispute Board will hold an extensive meeting with the Contractor, Employer and Engineer and tour the site to see 'first hand' the works carried out and any problems or potential problems. The site tour should include major active sections of the works, and any areas where potential difficulties exist or have existed. The site meeting will follow the previously submitted agenda and discuss such matters as works progress, resourcing, critical path and delays, plans to accomplish the remaining works, any problems and matters of concern with the Contractor, Employer and Engineer, and also discuss the status of any claims and variations with actions required. This will include asking the Parties and Engineer many questions during the site visit to gain a proper understanding of any problems, difficulties or claims. It is far better for the Dispute Board to adopt a proactive approach.

There is no set period as to the duration for site visits, but typically 2 days is sufficient. This allows for the meeting to be held on one day with the site visit on the other day. On some projects where it is not so time-consuming to conduct the site tour, it may be possible to combine the site tour and meeting to a single day, albeit this would certainly entail a long working day.

## **12) OBTAINING AN OPINION FROM A DISPUTE BOARD**

This function plays an important role in helping to prevent or avoid disputes and can be of much value to the Parties. Whilst supplementing the dispute resolution facility of the Dispute Board, an advisory opinion does not replace the dispute resolution process. If the matter is already a dispute, it cannot be referred to the Dispute Board for an opinion. An opinion can be jointly requested at any time; albeit the FIDIC 2017 Editions prohibit this when the Engineer is carrying out a determination under Sub-Clause 3.7.

Advisory opinions are typically requested soon after the Parties find they have a disagreement or difference and have considered and formed their positions and held preliminary discussions on the matter, but before a further hardening of the Parties' positions. It is a way of obtaining the experienced and expert views of the Dispute Board member(s) without the time and expense of obtaining a binding decision. Whilst an opinion can be requested for any matter that is relevant to the Contract, they should not be overly complex in nature. Typically, opinions are more suited to matters such as interpretation of a specific provision in the Contract, measurement issues, the contractual right or obligation of a Party or the merits of a particular issue. The Dispute Board will generally have the power to decide whether the matter is suitable for an opinion.

The power of the Dispute Board to give opinions will depend upon the particular Contract and type of Dispute Board. If there is no provision in the Contract for giving opinions, it can only be included with the subsequent agreement of both Parties. An 'ad hoc' Board has no power to give opinions. Under the FIDIC 1999 and 2017 Conditions, and under the various MDB Harmonised Editions, it is only 'standing' Dispute Boards that have the power to give opinions as well as decisions.

The standard FIDIC and MDB Conditions contain no procedure for obtaining such an opinion. This is left to the Dispute Board to establish, and each Dispute Board is likely to have their own views on the most suitable procedure. Common practice is for the Dispute Board to propose procedures to the Parties at an early stage of the project, and these are then discussed and agreed (or modified as necessary) before being formally adopted.

A request for an opinion of the Dispute Board can only be made with the agreement of **both** Parties. A Dispute Board has no authority to consider a matter which has been referred unilaterally by one Party.

The adopted procedure is normally relatively simple and quick. The matter referred for an opinion is often dealt with at the next site visit of the Dispute Board, either on a 'documents only' basis or by also holding a short meeting where the Parties can make oral submissions to the Dispute Board. If the matter is more urgent, a special meeting or visit may be held, or alternatively, the matter may be dealt with by the Dispute Board in the period between site visits.

Submissions are generally in writing (but can be purely oral) **and are short and limited in content**. It is common for the Parties' contentions to be a maximum of 2-3 pages. Supporting documentation (if any) should also be limited and specific to the matter in question.

When making a written request for an opinion of the Dispute Board, the Parties should include:

- what exactly the Dispute Board should give its opinion on;
- a concise summary of the nature and background to the disagreement;
- the contentions of each Party, and the contractual or legal provisions relied upon;
- any facts agreed between the Parties on the matter;
- any relevant supporting documentation.

The opinion of the Dispute Board is generally given in a very short timescale. It is not uncommon for this period to be 5-10 days, or even at the end of the site visit if the matter has been considered during the normal scheduled visit of the Dispute Board.

**Any opinion given by the Dispute Board is purely advisory.** It is not binding on anyone. Either Party is free to disregard the opinion if they so wish. If the matter later becomes a dispute, it can still be referred to the Dispute Board for a decision. In such a circumstance, the Dispute Board is not precluded from subsequently changing its views.

### **13) REFERRAL OF A DISPUTE FOR A DECISION OF THE DISPUTE BOARD**

Both 'ad hoc' and 'standing' Boards are given power under the FIDIC and MDB Conditions to issue a decision on a dispute that is referred to the Dispute Board. Whilst the Dispute Board is in existence, each Party has a **unilateral** contractual right to refer a dispute to the Dispute Board – the referring Party does not need the agreement of the other Party in order to refer the dispute.

The referred matter **must** be a dispute, and not merely a disagreement. In this regard, the submission of a claim does not automatically give rise to a dispute. For a dispute to arise, there

must be express or implied rejection (in whole or in part), and the rejection is not acceptable to the Party making the claim. The dispute between the Parties can be of any kind whatsoever in connection with, or arising out of, the Contract or the execution of the Works. The submitted referral defines the scope of the dispute – the Dispute Board can only decide the issues which have been referred to it.

Under the 1999 FIDIC Editions and the MDB Conditions, there is no specified timescale for referring a dispute to the Dispute Board. This is somewhat different in the 2017 FIDIC Editions, which require a dispute to be referred within 42 days of a Notice of Dissatisfaction given in connection with an Engineer's determination.

The FIDIC and MDB Conditions contain limited procedural rules for dealing with disputes. Generally the Dispute Board will submit proposed procedures to the Parties, which are then discussed and agreed (or modified as necessary) before being formally adopted. The Dispute Board is given power to adopt suitable procedures by the Contract. Typically there will be an exchange of submissions by the Parties, and a subsequent factual enquiry by the Dispute Board prior to issuing the decision. Depending on the complexity and nature of the dispute, a hearing will often be held. A site visit may also sometimes be undertaken. However, for many disputes, a decision can be made on a 'documents-only' basis.

The Dispute Board is required to act fairly and impartially between the Parties, giving them each a reasonable opportunity of putting their case forward and responding to the other Party's case.

The referring Party generally refers the dispute to the Dispute Board by submitting a written statement of its case. Copies should also be simultaneously sent to the other Party and Engineer.

The Statement of Case shall ideally include at least the following:

- a clear and concise description of the nature, scope and circumstances of the dispute;
- a list of the issues referred to the Dispute Board for a decision, and the referring Party's position on each issue;
- the contractual, legal or other basis for the claim;
- the redress sought from the Dispute Board;
- relevant calculations for any quantum;
- all supporting particulars and evidence that is relied upon; and
- a copy of any Engineer's determination on the dispute.

The other Party will then be given time to submit a written response (typically this is in the region of 21-28 days). As a minimum, the Response should ideally include:

- a clear presentation of the responding Party's position with regard to the dispute;
- the contractual, legal or other basis for the response;
- answer all material points made by the other Party in the Statement of Case (including quantum);
- all supporting particulars and evidence that is relied upon; and
- the redress sought from the Dispute Board.

If the Responding Party also contends the Dispute Board lacks jurisdiction to decide the dispute, any such challenge should be detailed in the Response or separately prior to submission of the Response.

If the complexity and/or scope of the dispute so warrants, each Party are generally allowed a second round of submissions, which would have to be submitted in far shorter timescales. The Dispute Board normally specifies that the second round of submissions should only deal with matters previously raised, and must not include any new claims or contentions.

When making submissions to the Dispute Board, they should ideally be clearly expressed, set out in a logical manner, well substantiated, have numbered paragraphs and avoid unnecessary repetition. The Statement of Case and Response should be 'stand-alone' submissions, and thus contain all documentation and exhibits upon which a Party relies to make its case.

During the process of deciding the dispute, the Dispute Board may at any time request clarifications, ask questions or request additional information from the Parties.

If a hearing is required, the place and date of the hearing and duration is determined by the Dispute Board after consultation with the Parties. Generally two days are sufficient for a typical Dispute Board hearing. If possible, it is often more convenient to hold the hearing at or near the site. As a guideline, any hearing will probably be held about 30 days before the latest date for the decision. An agenda for the hearing, and directions as to the organisation and conduct of the hearing, will be issued to the Parties by the Dispute Board in advance of the hearing. The Dispute Board may, as it deems necessary, take an inquisitorial role during the hearing and ask questions, seek clarifications and test any witnesses. To ensure that both Parties have an equal opportunity of presenting and defending their respective cases at the hearing, the Dispute Board may allocate specified times for the various presentations. A Dispute Board hearing is far more informal than an arbitration or court hearing. Whilst the Dispute Board will take notes for their own benefit of relevant matters in the

hearing, it is not usual for minutes to be taken and circulated, or to allow a Party to make a recording of the hearing.

Unless otherwise agreed by the Parties and the Dispute Board, the FIDIC and MDB Conditions stipulate that a written and reasoned decision shall be given to the Parties within 84 calendar days. For a 'standing' Board, this time period starts when the Statement of Case and supporting particulars (which comprise the referral) are received by the Dispute Board chairperson. For an 'ad hoc' Board, the time period starts upon receipt of the referral or receipt of the stipulated advance payment by the Dispute Board member(s), whichever date is later. In the 1999 FIDIC Edition of the Yellow and Silver Books, the giving of the Dispute Board decision may be withheld until any outstanding invoices of the Dispute Board member(s) have been paid in full. A similar provision is included in all the 2017 FIDIC Editions.

During the period the Dispute Board is deciding the referred dispute, the Parties remain entitled to settle the dispute by agreement between themselves.

Under the FIDIC and MDB Conditions, the decision can include the payment of financing charges.

There is no provision for the Dispute Board to award costs of either Party unless both Parties agree to this. In the absence of any such agreement, each Party is responsible for its own costs (including any external costs such as legal fees) and for paying 50% of the fees and expenses of the Dispute Board. This is regardless of the outcome of the dispute.

In a 3 person Dispute Board, although a unanimous decision is clearly preferable, the FIDIC and MDB Conditions do allow for a majority decision to be reached.

When making a decision, the Dispute Board members are acting as adjudicators and not as arbitrators. They are not subject to the constraints of arbitration law and procedures.

The decision of the Dispute Board is admissible in evidence in any future arbitration or litigation on the matter.

The Dispute Board members cannot be called as a witness to give evidence for any arbitration under the Contract unless both Parties and all members of the Dispute Board agree otherwise.



#### **14) IMPLEMENTATION OF THE DISPUTE BOARD DECISION**

Under the FIDIC and MDB Conditions, the Parties have contracted to comply with the Dispute Board decision. The decision is binding and the FIDIC and MDB Conditions stipulate it must be implemented 'promptly', even if either (or both) of the Parties ultimately wish to refer the dispute to arbitration or litigation.

If a Party is dissatisfied with the Dispute Board decision, then it is required to issue a Notice of Dissatisfaction within the specified timescale of 28 days from receipt of the Dispute Board decision. Reasons for the dissatisfaction must be stated. Under the MDB Conditions and the 1999 FIDIC Editions, the Notice of Dissatisfaction only has to be given to the other Party – a copy is not required to be sent to the Dispute Board. This was changed in the 2017 FIDIC Editions, which require the Notice of Dissatisfaction to be copied to the DAAB and Engineer. After issue of a valid Notice of Dissatisfaction, the FIDIC and MDB Conditions then specify a period which provides for the Parties to attempt to resolve the dispute by amicable settlement. If this fails, the dispute can be referred to arbitration for a final decision. As stated above, even if a valid Notice of Dissatisfaction is issued, the Dispute Board decision still has to be promptly complied with unless and until it is revised by amicable settlement or arbitration.

If both Parties accept the decision, or if neither Party submits a timely Notice of Dissatisfaction, then the Dispute Board decision becomes final and binding – in which case it cannot subsequently be referred to arbitration or litigation for a further decision.

#### **15) TERMINATION OF A 'STANDING' DISPUTE BOARD**

Unless there is early termination, a 'standing' Dispute Board remains in place under the 1999 FIDIC Editions and MDB Conditions until the discharge referred to in Sub-Clause 14.12 of the Contract becomes effective. Generally, this date is when the Contractor has received back the Performance Security and received the outstanding balance from the total of the Final Statement. In the 2017 FIDIC Editions, the expiry of the Dispute Board is either the discharge under Sub-Clause 14.12 or 28 days after the DAAB has given its decision on all referred disputes, whichever is the later date.

The appointment of any Dispute Board member may be terminated early, for whatever reason, by mutual agreement of both Parties. However, a Party cannot unilaterally choose to remove a Dispute Board member early. Any joint termination by the Parties would be subject to compliance with the written notice period stipulated in the Contract. Notwithstanding this, if the member fails to comply

with the Dispute Adjudication Agreement or Dispute Board Agreement, the Parties may jointly terminate the member's appointment with immediate effect by giving written notice.

The Member can also terminate the appointment early, for any reason, by giving both Parties not less than the stipulated written notice period in the Contract (the 2017 FIDIC Editions require notice to also be given to the other Dispute Board members, if any). If the Contractor or Employer does not comply with the Dispute Adjudication Agreement, or Dispute Board Agreement, or Dispute Avoidance/Adjudication Agreement (depending upon the Contract Conditions used), then the member can terminate immediately upon giving written notification to the Parties.

In the event of termination or resignation of a Dispute Board member, the member is normally entitled to full payment of any outstanding fees and/or expenses incurred up to the effective date of the termination or resignation. The exception to this under the 1999 FIDIC Editions and MDB Conditions is if the member acts in bad faith and fails to comply with the specified General Obligations of the Member, and such failure renders an earlier decision of the Dispute Board void or ineffective. Similarly, under the 2017 FIDIC Editions, if a Challenge to a DAAB member is successful, then that member would not be entitled to any payment of fees or expenses from the date of the notification of the Decision on the Challenge.

It should also be noted that the Dispute Board member can suspend their services in the event they do not receive payment of a submitted invoice within the time period stated in the Contract. The 1999 FIDIC Editions and the MDB Conditions do not require any notice for such suspension, but in the 2017 FIDIC Editions the suspension can only take place not less than 7 days after giving notice to the Parties and other Dispute Board members (if any). Such suspension may continue until full payment is received.

In the event the main Contract between the Contractor and Employer is terminated, the 'standing' Dispute Board would survive the termination and remains in place to decide any subsequently referred disputes. The 2017 FIDIC Editions stipulate a maximum time limit before expiry of the Dispute Board in such circumstances; namely 28 days after the DAAB has given its decision on all disputes which were referred to it within 224 days after the date of termination of the main Contract. If a dispute is referred after this period, the DAAB has no jurisdiction to decide the dispute. The FIDIC 1999 Editions and the MDB Conditions have no such maximum time limit, so the Dispute Board would expire when the discharge under Sub-Clause 14.12 becomes effective.

**This Users Guide has been written by Nigel Grout FCI Arb, FCIHT, DipICArb.**

**If you wish to appoint a qualified and experienced Dispute Board member (including as Chairperson or Sole Member) on any worldwide infrastructure projects, please contact Nigel Grout with details of your requirement. Nigel has been included on the FIDIC President's List of Approved Dispute Adjudicators since 2012.**

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