

# FIDIC Middle East Contract Users Conference



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**International Federation of Consulting Engineers**  
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## Historical development and use of DBs

- Since 1957 FIDIC has moved from:
  - dispute resolution by the Engineer, then arbitration;
  - to Dispute Board, then arbitration;
  - now back to Engineer, followed by Dispute Avoidance and Adjudication Board, then arbitration.





## Historical development and use of DBs

- The Engineer was criticised because it was:
  - Seen as the Employer's Representative;
  - Regarded as commercially beholden to the Employer;
  - Potentially having a conflict of interest with the Contractor over design and contract administration issues;
  - The Engineer was thought to lack the necessary impartiality to decide disputes;
  - Arbitrations following on from Engineer's decisions lasted years.



## Historical development and use of DBs

- The solution to the disaffection with the role of the Engineer was to introduce Dispute Boards:
  - In 1995, FIDIC adopted DBs in its revised contracts;
  - The process of adoption was encouraged by the World Bank and MDBs' insistence on the inclusion of DBs from 1995;
  - FIDIC MDB COC 2005, 2006 and 2010, by 2010 the COCs required the inclusion of a DB and provided for decisions to be of interim binding effect: « *Disputes shall be referred to a DB for decision in accordance with Sub-Clause 20.4... The Parties shall appoint a DB by the date stated in the Contract Data...* »



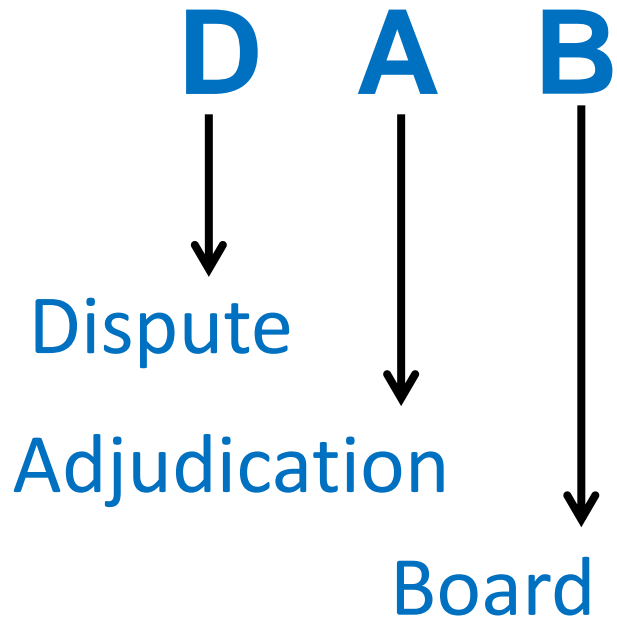
## Historical development and use of DBs

- There were issues about enforcement of Decisions of DBs where the decision was of interim binding effect only.
- 2013 FIDIC Memorandum on Enforcement of DB decisions of which notice of dissatisfaction was given.
- Suggested the replacement of clause 20.7, failure to give effect to DB decisions, whether binding, or final and binding, were immediately referable to arbitration.
- 2017, FIDIC took the opportunity to review the DB process and has made a number of changes.



## Dispute Boards in FIDIC

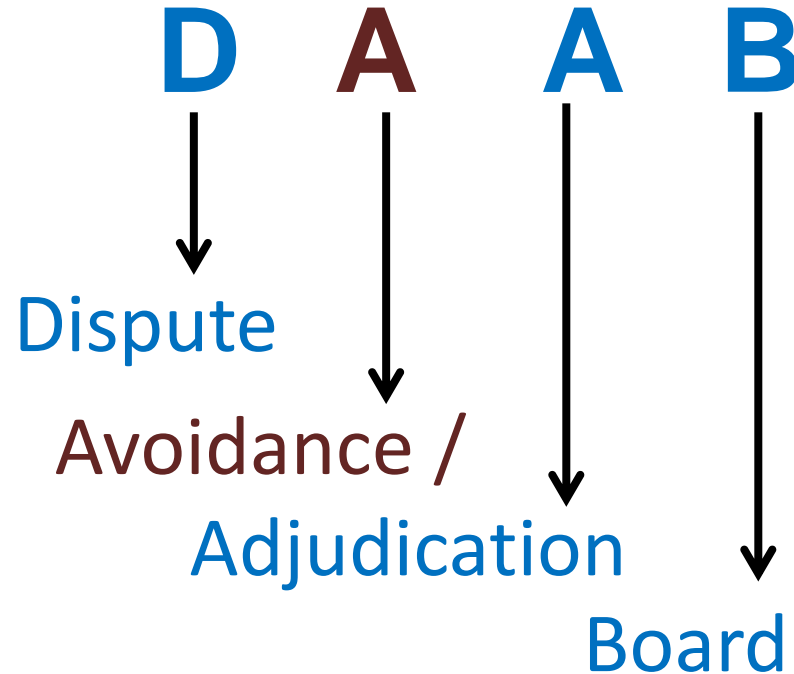
FIDIC 1999:





## Dispute Boards in FIDIC

FIDIC 2017:





## OBJECTIVES OF THE DB

- To decide disputes [21.1] as provided for in COC 21.4.
- If the parties agree [21.3]: the parties may jointly request the DAAB to provide advice and assistance; or
- IF DAAB becomes aware of an issue, it may invite the parties to make a joint request for intervention.
- Request can be at any time, save when Engineer is making a determination [3.7]; and
- Assistance can take place during any meeting, Site Visit or otherwise.
- Both parties are to be present, neither parties nor the DAAB are bound by advice.





## OBJECTIVES OF THE DB

- Where a dispute has arisen, see COC 21.4:
  - It is referred to a DAAB within 42 days of notice of dissatisfaction [NOD] from Engineer's COC 3.7 determination.
  - [If no reference to a DAAB within 42 days, NOD is deemed to have lapsed [21.4.1(a)]].
  - NB reference of a dispute to a DAAB is deemed [unless prohibited by applicable laws] to interrupt the limitation period.
  - Parties furnish the DAAB with all relevant information; and unless abandoned or terminated, parties must continue with the Contract.
  - DAAB decision is given within 84 days from receipt of the reference, or as agreed by parties.
  - [But... DAAB entitled to withhold decision until fee invoices paid.]



## OBJECTIVES OF THE DB

- In summary:
  - The DAAB is not to exercise dispute avoidance powers while Engineer's determination is pending.
  - The DAAB primary objective is to make any necessary early intervention to head off potential disputes, by informal advice and assistance to the parties.
  - If a dispute arises, the DAAB is to provide a decision, in writing. The parties must give effect to it, whether a NOD is given or not.
  - Any order for a payment is immediately due and payable without a certificate.
  - The overriding objective of the DAAB is to reach a decision which is accepted by the parties to avoid recourse to further dispute resolution measures.



## DAAB Role/functions

### 1) Disputes Avoidance:

S.C. 21.3 – [*Avoidance of Disputes*]

➤ ***Informal Assistance*** in an *attempt to resolve any issue*

*When?*

- ✓ Request of the parties
- ✓ Invitation of the DAAB for the parties to request
  - Anytime, except carrying duties under S.C. 3.7 [*Agreement or Determination*]



## DAAB Role/functions

### 1) Disputes Avoidance:

*How?*

- ✓ During any meeting, Site visit or otherwise
- ✓ Orally or in writing
- ✓ Condition: Both Parties shall be present at such discussions unless the Parties agree otherwise.



## DAAB Role/functions

### 1) Disputes Avoidance:

*Outcome:*

- ✓ Give views and advice.
  - However, Parties are not bound to act on any such advice given during such informal meetings.
  - The DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process.



## DAAB Role/functions

### 2) Disputes Adjudication:

S.C. 21.4 – [*Obtaining DAAB's Decisions*]

- *Decide on any dispute (Adjudicate)*

*When?*

- ✓ Referred by either Party to the DAAB



## DAAB Role/functions

### 2) Disputes Adjudication:

*Outcome:*

- Decisions within:
  - 84 days after receiving the reference, or
  - Such period as may be proposed by the DAAB and agreed by both Parties.



## DAAB Role/functions

### 2) Disputes Adjudication:

- The decision shall:
  - be giving in writing to both Parties with a copy to the Engineer
  - shall be reasoned, and
  - shall state it is given under S.C. 21.4 – [*Obtaining DAAB's Decision*]
  - be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision.
- The Employer shall be responsible for the Engineer's compliance with the DAAB decision.





## Question # 1

**From your experience, how many contracts using FIDIC 1999 conditions had the DAB provisions omitted in the Particular Conditions?**

1. More than 75%
2. From 25 to 75%
3. Less than 25%



## Question # 2

**From your experience, how many contracts using FIDIC 1999 conditions did not execute the DAB provisions?**

1. More than 75%
2. From 25 to 75%
3. Less than 25%



## APPOINTMENT OF THE DAAB

- Appointment of the DAAB:
- Time of Appointment: as per Contract Data, or 28 days from receipt of Letter of Acceptance by the Contractor.
- Number of DAAB Members: as Contract Data, generally 1 or 3, if not specified, then 3.
- Selection of DAAB Members: as per Contract Data, or one each by the parties and the chairman by agreement of the parties and DAAB Members.



## APPOINTMENT OF THE DAAB

- A DAAB is deemed to be constituted when the parties and DAAB member[s] have all signed the DAAB Agreement.
- DAAB Members [and any agreed expert] are to be agreed by the Parties when agreeing the terms of the DAAB Agreement.
- Parties are to be responsible for half the DAAB fees each.
- Parties may replace any DAAB Member with a suitably qualified replacement Member if the Member declines or is unable to act.
- Parties may agree to terminate the appointment of any DAAB Member.



## APPOINTMENT OF THE DAAB

- The appointment of the DAAB expires:
  - On the date the discharge becomes, or is deemed to become, effective under COC 14.12, or
  - 28 days after DAAB has given its decision on ALL disputes referred to it under COC 21.4.  
[whichever is the later].
- However, if the contract is terminated, the DAAB's appointment expires 28 days after:
  - The DAAB gives its decision on ALL disputes referred under COC 21.4 within 224 days of the date of termination; or
  - The date the parties reach agreement on all matters.





## APPOINTMENT OF THE DAAB

- IF the Parties fail to appoint the sole Member or, if three Members, do not complete the appointment of the three Members within the date stated in COC 21.1; or
- IF the Parties fail to appoint a replacement Member within 42 days of the date the Member[s] decline[s] or is/are unable to act; or
- IF the appointment of the DAAB Member[s] cannot be completed because a party fails or refuses to sign the DAAB Agreement within 14 days of a request to do so;
- THEN the appointing entity in the Contract Data, after consulting the parties, will make the appointment.
- The appointment is final and conclusive.





## APPOINTMENT OF THE DAAB

IF the appointment of the DAAB is made by the appointing entity, THEN:

- The Parties and the DAAB Members are deemed to have signed the DAAB Agreement, under which
- The monthly service fee and daily fees of the DAAB will have been agreed; and
- The Governing Law of the DAAB shall be the Governing Law of the Contract.
- Each Party is responsible for half of the DAAB fees, if the Contractor pays them in full, the Employer's half share may be added to his payment under the Contract and if the Employer pays the fees, they may be deducted from the Contractor's payment under the Contract [COC 14.6]



## DAAB AGREEMENT

- DAA Agreement (*General Conditions in Appendix*)
- Tripartite Agreement: Employer, Contractor, and the DAB member (*Sole or chairman*)
- Term of the DAAB – starting from signing the DAA Agreement
- The employment of the DAAB Member is a personal appointment
  - *Rights and Obligations cannot be assigned, subcontracted or delegated*





## DAAB AGREEMENT

- Warranties of the DAAB Member to remain impartial and independent of the Employer, Contractor, Employer personnel, and Contractor personnel:
  - *Have no interest (financial or otherwise) in the project*
  - *Was not employed – in the ten years before signing the DAA – as a consultant or otherwise by the Parties*
  - *Have not acted, and shall not act, in any judicial or arbitral capacity in relation to the contract*
  - *Not solicit, accept or received any gift, gratuity, etc...*



## DAAB AGREEMENT

- The Member shall disclose any circumstance which:
  - *might call into question his/her independence or impartiality, and/or*
  - *is inconsistent with his/her warranty*
- The Member shall be:
  - *Experienced and/or knowledgeable in the type of work,*
  - *Experienced in the interpretation of contract documents, and*
  - *Fluent in the language for communications.*



## DAAB AGREEMENT

- General Obligations of the DAAB Member:
  - Comply with the DAAB Rules and the Conditions of Contract
  - Do not give advice concerning the conduct of the Contract, except as required to carry out the DAAB's activities
  - Ensure his availability during the term of the DAAB for all meetings, Site visits, hearing, and to give **Informal Assistance**
  - Become, and shall remain for the duration of the DAAB, knowledgeable about the contract and informed about the ***Parties' performance***, the ***Site and its surroundings***, and the ***progress of the Works***.



## DAAB AGREEMENT

- General Obligations of the Parties:
  - Comply with the DAAB Rules and the Conditions of Contract
  - Cooperate with the other Party in constituting the DAAB without delay
  - Shall not request advice from or consultation with the DAAB Member regarding the Contract, except as required to carry out the DAAB's activities
  - Shall not compromise the DAAB's warranty of independence and impartiality
  - Ensure that the DAAB Member remains informed as necessary



## DAAB AGREEMENT

- The Employer and Contractor undertake to each other and to the DAAB Member that the DAAB Member:
  - Shall not be appointed as an arbitrator, or be called as a witness in any arbitration under the Contract
  - Shall not be liable for anything done or omitted in the discharge of the DAAB Member's functions (except in case of fraud, gross negligence, ...)
- The Employer and Contractor shall jointly and severally indemnify and hold the DAAB Member harmless against and from all damages, losses and expenses resulting from any such claim.





## DAAB AGREEMENT

- Confidentiality clause
- Fees and Expenses:
  - A monthly fee
  - A daily fee
  - All reasonable expenses (travel, telephone calls, courier charges)
  - Any taxes in the Country on payments made to the DAAB Member
- If fees not agreed, either Party or the DAAB Member may apply to the appointing entity to set the amount of the non-agreed fee



## DAAB AGREEMENT

- Resignation and Termination:
  - DAAB Member may resign any time with 28 days notice
  - Parties may jointly terminate the DAA Agreement with 42 days notice
- Challenge:
  - In case of lack of independence and impartiality
- Disputes Resolution: Arbitration under the rules of ICC by one arbitrator



## DAAB POWERS AND OBLIGATIONS

- COC 21.3 and DAAB Procedural Rules [PRs]: provide advice and assistance to the parties to aid the avoidance of disputes.
  - During discussions at any meeting, or Site Visit or in writing.
- To convene meetings with the Parties and regulate the procedure of the DAAB: face-to-face; telephone, or video conferencing, as agreed with the Parties.
- Adopt an inquisitorial style of investigation, request documents from the Parties.





## DAAB POWERS AND OBLIGATIONS

### DAAB AGREEMENT

#### Clause 3:

- DAAB Member's warranties regarding impartiality and independence.
- DAAB Member's duty to disclose conflicts of interest.
- DAAB Member's Representation as to capacity/qualifications and experience.

#### Clause 4:

- particulars of DAAB Member's obligations to maintain independence and impartiality.

#### Clause 5:

General obligations of DAAB Members.





## DAAB POWERS AND OBLIGATIONS

In addition to powers deriving from the COC, GC of the DAAB Agreement and elsewhere in the PCs:

### PROCEDURAL RULE NO. 5

- Establishes procedures for Site Visits, giving informal assistance and making decisions.
- DAAB has power to decide its own jurisdiction; and
- To appoint experts, decide if a hearing is required for a dispute, decide about and conduct meetings, settle its own procedures.
- Take the initiative in ascertaining the facts and matters necessary for its decision.





## DAAB POWERS AND OBLIGATIONS

- PROCEDURAL RUL NO. 5 .../
- DAAB may use its own specialist knowledge to decide:
  - on the payment of finance charges,
  - On any provisional relief – interim or conservatory measures.
- It has power to open up, review and revise the acts of the Engineer.
- To proceed in the absence of a party.
- To use all or as many of the powers available to it, as it sees fit.



## DAAB POWERS AND OBLIGATIONS

### PROCEDURAL RULE NO. 6

- The DAAB is under an obligation to act fairly and impartially and to decide according to the rules of natural justice, without unnecessary delay or expense.

### PROCEDURAL RULE NO. 7

- In respect of hearings, the DAAB will:
  - Decide on the date, place and duration of any hearing.
  - Decide on the procedure and conduct of the hearing.



## DAAB POWERS AND OBLIGATIONS

### PROCEDURAL RULE NO. 7.../

The DAAB is empowered to:

- Request documents or the attendance of such witnesses as may assist it.
- Limit persons attending a hearing, proceed in the absence of a party, adjourn to further investigate any issue.
- But must refrain from expressing any opinion on the merits in the hearing; and
- Refrain from giving informal assistance during a hearing, but may adjourn for that purpose if requested, and resume promptly thereafter.





## Effect of reference to DAAB

- Disputes may be referred to the DAAB for its decision even if no informal discussions have been held under S.C. 21.3
- Reference shall:
  - be made within 42 days of giving or receiving NOD under S.C. 3.7.5 [*Dissatisfaction with Engineer's determination*], other NOD shall be deemed to have no longer valid,
  - state that it is given under S.C. 21.4 [*Obtaining DAAB's Decision*],
  - be in writing, with copies to the other Party and the Engineer, and
  - Be deemed to be received on the date its is received by the chairperson



## Effect of reference to DAAB

- The reference of a Dispute to the DAAB under S.C. 21.4 [*Obtaining DAAB's Decision*] shall be deemed to interrupt the running of any applicable statute of limitation or prescription period, unless prohibited by law.



## Effect of reference to DAAB

- The Parties Obligations after the reference (S.C. 21.4.2):
  - Promptly make available to the DAAB all info, access to the Site, and appropriate facilities.
  - Continue to perform their obligations in accordance with the Contract unless the Contract has already been abandoned or terminated.





## Effect of reference to DAAB

- The DAAB shall complete and give its decision as per the provisions of the Contracts.
- However, if at the end of this period,
  - ✓ the due date for payment of any DAAB member's invoice has passed but such invoice remains unpaid,
  - ✓ the DAAB shall not be obliged to give its decision until such outstanding invoice have been paid in full,
  - ✓ in which case the DAAB shall give its decision as soon as practicable after payment has been received.



## Effect of reference to DAAB

- If the decision requires a payment of an amount by one Party to the other:
  - Subject to the paragraph below, **the amount shall be immediately due and payable without any certification or Notice.**
  - The DAAB may, as part of the decision, at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under the Arbitration, **require the payee to provide an appropriate security in respect of such amount.**



## Dissatisfaction with the DAAB's Decision

- If the dissatisfied Party is dissatisfied **with only part of the DAAB's decision**:
  - This part shall be clearly identified in the NOD.
  - This part, and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and
  - The remainder of the decision shall become final and binding on both Parties as if the NOD had not been given.



## Question # 3

**Why do you think DAB provisions are omitted or not executed?**

1. Adding complication to the dispute resolution process
2. Cost issues
3. Lack of awareness / doubt of its benefits
4. Absence of qualified and experienced adjudicators



## Failure to comply with DAAB's Decision

- In case a Party fails to comply with any decision of the DAAB, whether binding or final and binding, the other party may refer the failure itself to arbitration.
- The arbitral tribunal shall have the power to order the enforcement of that decision.
- In case of a binding but not final decision of the DAAB, the interim or provisional measure shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.
- Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with may also include an order or award of damages or other relief.



## DAAB PROCEDURAL RULES 1999

### 1999 PROCEDURAL RULES [2 pages]

- Rules 1, 2 and 3: Meetings and Site Visits, timing and agenda tba; parties to co-ordinate.
- Rule 4: Simple provisions for communications and documentation.
- Rule 5: The DB must to decide disputes referred under COC 20.4; act fairly and impartially; and adopt suitable procedures, avoiding unnecessary delay and expense.
- Rule 6: Makes provisions for hearings, time, date and place tba.
- Rules 7 and 8: Comprise further general powers of the DB.
- Rule 9: Prohibits the DB from giving opinions; includes a process for making decisions.





## DAAB PROCEDURAL RULES 2017

OTHER PROCEDURAL RULES [ The 2017 Rules are 7 pages]

- Rule 3: Detailed provisions for Meetings and Site Visits.
- Rule 4: Communications and Documentation.
- Rule 8: Regulation of the DAAB decision-making process.
- Rule 9: Provisions regulating termination of a DAAB Member's appointment.
- Rule 10: Objection Procedure.
- Rule 11: Challenge procedure.



# CONCLUSIONS

Something different or more of the same?

If different, is it better or worse?

How is it likely to be viewed by Contractors, Employers and Engineers?





## Question # 4

**Do you think the revisions of the DAAB provisions in FIDIC 2017 will:**

1. Encourage parties to use the DAABs.
2. Make parties more sceptical or reluctant to use DAABs.
3. Not make any difference.



# **THANK YOU FOR LISTENING**

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