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FIDIC Dispute Avoidance and Adjudication Forum

Practice Note II

Appointment of Dispute Boards



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About the Forum

FIDIC set up a Dispute Avoidance and Adjudication Forum, which convened for the first time at the FIDIC Global Infrastructure Conference in Geneva, in 2022. Since then, the Forum is hosted by FIDIC twice a year: at the FIDIC Global Infrastructure Conference; and the FIDIC International Contract Users' Conference. It is intended to be a regular forum at FIDIC conferences in the future.

About the Practice Note

As part of the Forum, FIDIC set up a working group to prepare a Practice Note on the Appointment of Dispute Boards. The working group consists of Daduna Kokhraidze, General Counsel at FIDIC, and FIDIC President's List members, certified adjudicators, and members of the DAAF Standing Group:

- Yann Schneller, lawyer and founding partner of Darci; and
- Taner Dedezade, Head of Chambers, International Construction Chambers and with contributions from Nicholas Gould, Fenwick Elliott LLP, a member of the FIDIC President's List.

The initial discussion on the appointment of Dispute Board members began at the Dispute Avoidance and Adjudication Forum during the International Contract Users' Conference in London 2023. A draft of the Practice Note was produced for discussion at the forum during the FIDIC Global Infrastructure Conference in Geneva 2024.

The following individuals led discussions on various aspects of the note and provided valuable insights and takeaways that have helped to shape this Practice Note: John Papworth, Martina Hess, Taner Dedezade, Yann Schneller, Daduna Kokhraidze, Stephane Giraud, Nicholas Gould, Chris Seppala, Pablo Laorden, Svetlana Borisova, Henry Musonda, Nina Tsaturova, Enzo de Laurentiis, Vincent Leloup.

At various stages, the Practice Note has been reviewed by Prof Dr Nael G. Bunni, John Papworth, Suzanne Rattray, Patrizia Palmitessa-Savric, Vincent Leloup, with additional comments received from Jeremy Glover. All are experienced Dispute Board members and the latter five are members of the FIDIC President's List. In addition, comments were provided by Chris Seppala, legal advisor of FIDIC.

The Practice Note has been produced under the general direction of FIDIC Dispute Avoidance and Adjudication Forum Standing Group consisting of John Papworth, Suzanne Rattray, Patrizia Palmitessa-Savric, Kok Fong Chow, Lindy Patterson, Taner Dedezade, Yann Schneller, coordinated by FIDIC General Counsel Daduna Kokhraidze.

The Practice Note has been produced with the support of FIDIC Secretariat.

FIDIC very much appreciates the time and effort devoted by all the persons that have contributed to the Practice Note. This Practice Note may be updated or superseded by outcomes of the discussions of future forums.

Purpose

FIDIC has prepared this Practice Note to raise awareness for its contract users and adjudicators on how to choose the right DB for a particular project or dispute.

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Practice Note

Introduction

1. In the context of construction contracts, a Dispute Board (“DB”) is a panel of independent and impartial experts, generally composed of one, three, or sometimes more¹, experienced construction professionals referred to as “Adjudicators” or Dispute Board members.
2. DBs can be standing, appointed to serve throughout the whole duration of the contract, or appointed *ad hoc* to adjudicate a particular dispute or series of disputes.
 - a. A standing DB should be constituted at the beginning of a project, must become familiar with the project and its participants through regular site visits, and remain in place for the duration of the project. The principal role of the standing DB is to seek to proactively avoid disputes, which can be done in a number of ways, including by providing non-binding recommendations and/or opinions, if jointly requested by the parties. Where disputes still arise, and cannot be avoided, the role of the DB is to assist in resolving them promptly by issuing binding decisions.
 - b. An *ad hoc* DB is only constituted after a dispute arises and is tasked with resolving that dispute. Generally, an *ad hoc* DB is not in a position to engage in dispute avoidance because of the timing of its formation, and the fact that its mission usually ends when it issues its decision. However, it may prevent the dispute from progressing to arbitration, saving further costs and time.

The DB’s role, therefore, in the case of standing DBs, is to contribute to dispute avoidance, and, in both *ad hoc* and standing DBs, to dispute resolution.

3. In both standing and *ad hoc* DBs, the parties are contractually obliged to promptly give effect to the DB’s decision²: the decision is binding on both parties unless and until it is revised in an amicable settlement or arbitral award.
4. DB members are appointed by agreement of the parties. If the parties fail to appoint a DB member, he or she is appointed by a qualified appointing authority, an entity, or a person designated by the parties in their contract.
5. A sole-member DB, sometimes referred to as a “sole Adjudicator”, is usually appointed jointly by the parties. In the case of a three-member DB, normally, each party appoints a member of the DB subject to the other party’s approval, and the two parties, in consultation with the appointed members of the DB, appoint a third member who serves as chair. However, it is not because a DB member is appointed by a party that he/she becomes the advocate of that party within the DB. Rather, a party shall nominate a

¹ Always an odd number, in order to always allow for at least a majority decision, if no unanimity can be reached within the DB.

² For example, the 4th paragraph of Sub-Clause 20.4 of the 1999 Red Book states that the parties shall promptly give effect to the DAB’s decision. The 4th paragraph of Sub-Clause 21.4.3 of the 2017 Red or Yellow Book states that the parties shall promptly comply with the DAAB decision.

DB member based on its trust in the DB member's skills, experience and relevance for the project at hand. A DB member's primary duty is to be and to remain independent and impartial.

6. This Practice Note focuses on how to choose the right DB for a particular project under FIDIC contracts.

DBs in the FIDIC Forms of Contract

7. This section provides an overview of DBs in the FIDIC Forms of Contract.
8. A standing Dispute Adjudication Board ("DAB") was first introduced in the FIDIC Forms of Contract in the 1995 Orange Book³ and the following year the 1996 Supplement to the 1987 Red Book was introduced to give the parties an option to "*replace the Engineer as the decision maker by a Dispute Adjudication Board*"⁴. At the time it was thought that a standing DAB consisting of independent and impartial members would be a good additional step to the two-tier dispute resolution process by introducing the added advantage of being able to potentially avoid/resolve disputes within the currency of the project.
9. The first edition of the 1999 Red, Yellow, and Silver Books provides for mandatory DABs. The 1999 Red Book provides for a standing DAB and the 1999 Yellow and Silver Books provide for *ad hoc* DABs. The rationale for assigning an *ad hoc* DAB to these design-build projects was that it was perceived that the additional expense of a standing DB was not justified in circumstances where most design and fabrication activities would take place offsite. The perception was that in such circumstances disputes would be less likely to arise⁵. Experience has, however, shown that in both the 1999 Yellow and Silver Books disputes may still arise in the early stages of the project, notwithstanding the design and fabrication functions being carried out offsite.
10. The 1999 Green Book⁶ provides for a single *ad hoc* Adjudicator⁷. The rationale was that a three-member DB and/or a standing Adjudicator was not considered to be required or justified for engineering and building work of relatively small capital value that concerns simple or repetitive work, or work of a short duration, as well as economic reasons given that the costs of a three-member DB would become prohibitive compared to the contract price. As can be seen below, the 2021 Green Book substituted the *ad hoc* Adjudicator of the 1999 edition for a standing Adjudicator.
11. The 2005 Pink Book⁸, updated in 2010, is a harmonised version of the 1999 Red Book developed by multilateral development banks. It does not use the FIDIC 1999 term DAB but uses the generic term of DB, although its role is the same as in the 1999 Red Book⁹ albeit with a slightly reinforced dispute avoidance role¹⁰.

³ Conditions of Contract for Design-Build and Turnkey (1st Ed., 1995) (1995 Orange Book).

⁴ Section A – Dispute Adjudication Board Sub-Clause 67.1.

⁵ The 1999 FIDIC Contracts Guide (1st Ed., 2000), p. 304 (a).

⁶ The Short Form of Contract (1st Ed., 1999) (1999 Green Book).

⁷ Sub-Clause 15.1.

⁸ Conditions of Contract for Construction Multilateral Development Bank Harmonised (1st Ed., 2005 Pink Book).

⁹ Sub-Clauses 20.2–20.4. of the 1999 Red Book.

¹⁰ DB procedural Rule No. 2 in the Pink Book provides, in addition to the same in the 1999 Red Book, that the purpose of DB Site visits is to endeavour to prevent potential problems or claims from becoming disputes.

12. The 2008 Gold Book¹¹, which is a design, build and operate form of contract¹² based on the 1999 Yellow Book for the design-build elements, provides for two types of DABs:
 - a. during the Design-Build period: a standing DAB with a default composition of three members, as in the 1999 Red Book with the same dispute resolution role through the issuance of binding decision, and a new dedicated dispute avoidance clause in the General Conditions¹³ enabling the DAB to provide informal assistance to the parties in reaching an amicable settlement of disagreements arising. This is a token of recognition of the growing importance given to the dispute avoidance role for the DAB;
 - b. during the Operation Service period: a second separate one-member standing DAB referred to as the “Operation Service DAB”, appointed for a period of five years (renewable) at the time the Commissioning Certificate is issued, to which the parties may refer disputes arising during the Operation Service period¹⁴.
13. The 2017 Rainbow Suite¹⁵ replaces *ad hoc* DBs with standing DBs across all forms. This preference for standing DB can be explained by the fact that FIDIC considers “*it is generally accepted that engineering and construction projects depend for their success on the avoidance of Disputes [...]*” and that standing DBs are better suited than *ad hoc* DBs to achieve this¹⁶. Therefore, the DABs have been renamed as DAABs, the additional “A” referring to “Avoidance” emphasising the dispute avoidance role of DAABs. Further expanding on the dispute avoidance approach adopted in the 2008 Gold Book, a Sub-Clause 21.3 is now entirely dedicated to dispute avoidance, the General Conditions of DAAB Agreement introduce “Informal Assistance” as a defined term which is expressly stated to be part of the DAAB’s activities, and one of the stated objectives of the DAAB Procedural Rules is to facilitate the avoidance of disputes.
14. In 2019, FIDIC published the Emerald Book, which was drafted based on the 2017 Yellow Book.
15. The 2021 Green Book¹⁷ provides for a standing Adjudicator, with a flexibility of options regarding his/her role since he/she will engage in dispute avoidance, through informal assistance from time to time; or regular informal assistance (as in the 2017 Rainbow Suite, including through regular Site visits) if jointly requested by the parties; and/or issuing binding decisions¹⁸. The choice of a standing Adjudicator, as opposed to an *ad hoc* Adjudicator as provided for in the 1999 first edition of the Green Book, is justified due to the increasing importance given since then to the dispute avoidance role of the Adjudicator, and also because the 2021 Green Book can be used for projects of more significant capital value than the 1999 edition.

¹¹ DBO Contract (1st Ed., 2008) (2008 Gold Book).

¹² For use on greenfield rather than brownfield sites.

¹³ Sub-Clause 20.5 Avoidance of Disputes.

¹⁴ Sub-Clause 20.10.

¹⁵ Construction Contract (2nd Ed., 2017 Red Book); Conditions of Contract for Plant and Design-Build (2nd Ed., 2017 Yellow Book) and Conditions of Contract for EPC Turnkey Projects (2nd Ed., 2017) (2017 Silver Book).

¹⁶ The 2017 FIDIC Contracts Guide (2nd Ed., 2022), p. 522.

¹⁷ The Short Form of Contract (2nd Ed., 2021 Green Book).

¹⁸ Sub-Clause 14.1. of the 2021 Green Book, Adjudication.

16. As can be seen from the above, under FIDIC Forms of Contract:
 - a. the standing DB is the default form of DB for the 1995 Orange Book, 1999 Red Book, MDB Pink Book 2005, 2006 & 2010, 2008 Gold Book, 2017 Red, Yellow and Silver Books, 2019 Emerald Book and 2021 Green Book; and
 - b. the *ad hoc* DB is the default in the 1999 Yellow, Silver, and Green Books.

Tasks for Selecting and Appointing the Right Dispute Board for Projects

FIDIC has identified a series of tasks that, if followed, are likely to lead to the successful formation of the most suitable DB for a given project.

Task 1: Decide between a standing or *ad hoc* Dispute Board

17. The first step is to determine whether a standing DB or an *ad hoc* DB is the most appropriate for the project. In all the forms that FIDIC has produced since 1999, FIDIC has opted for standing over *ad hoc* DBs. FIDIC considers that standing DBs are generally preferable to *ad hoc* DBs and *ad hoc* DBs are generally preferable to no DBs at all.
18. The main advantages of standing DBs are as follows:
 - a. A standing DB commits to make itself available to assist the parties for the duration of the project. A retainer, or a monthly fee, secures that commitment.
 - b. Where the DB is present throughout the project, it has an up-to-date knowledge of the project progress, and a live understanding of all issues affecting the project and can accordingly promptly step in to provide dispute avoidance – a function not available to an *ad hoc* DB or arbitral tribunal.
 - c. Dispute avoidance is the core function of a standing DB. Dispute avoidance saves time and costs and preserves the parties' relationship. It is in the best interest of the parties and the projects. For this reason alone, the parties should strongly consider opting for a standing DB.
 - d. Being already up to speed with the project details and developments at the time any dispute arises, the DB can also deliver its dispute resolution role in a more efficient manner than an *ad hoc* DB or arbitral tribunal.
19. The main advantages of an *ad hoc* DB are as follows:
 - a. The ability for the parties to pick the skill sets of the DB based on the nature of the dispute. So, for example, if the dispute is about unforeseeable ground conditions with complex quantum calculations, it might lend itself to having a three-member DB consisting of an engineer with geotechnical skills and experience, a quantity surveyor with experience of valuing claims and variations, and a construction lawyer.

- b. The perceived lower costs than with a standing DB. However, often an *ad hoc* DB will have to spend a lot of time familiarising itself with the contract and project documents to get up to speed on the dispute referred to, whereas a standing DB gradually gains or accumulates knowledge. Proportionately, therefore, the costs of an *ad hoc* DB can be substantial when comparing it to a standing DB.
- c. The possibility of selecting the members of the DB taking into account the nature of the particular dispute.

Task 2: Decide on the number of Dispute Board members

- 20. The next step is to determine whether the DB should consist of one or three members. Where cost of the DB is not a critical consideration, FIDIC considers that three DB members are generally preferable to one; however, one DB member is generally preferable to none.
- 21. In the Appendix to Tender¹⁹ or Contract Data²⁰, the parties to a FIDIC contract are encouraged to fill in the number of DB members that they wish to appoint. If the parties fail to do this, the default position under all contracts since the 1995 Orange Book is that the DB comprises three members, with the only exceptions being the 1999 and 2021 Green Books where the default position is one member.
- 22. The advantages of three members might include the following:
 - a. Three members, particularly when combining differing skill sets, are normally better than one. In other words, collegiality normally reduces legal and technical uncertainty.
 - b. With three DB members, the DB has the opportunity to discuss amongst themselves the issues, whether to assist the parties in dispute avoidance or to reach a reasoned decision, and to confront and challenge their respective viewpoints in a rational manner thereby increasing the chances of delivering opinions and decisions which – after having considered an issue under a wider number of angles – are likely to be more robust and authoritative.
 - c. Higher sustainability – it is possible to maintain project knowledge if any of the DB members is replaced, and to continue and preserve the DB operation, whereas a fresh new sole-member DB would otherwise have to be appointed, with all the learning curve efforts and costs that this entails.
 - d. The opinions and decisions of three members can be more persuasive to the parties than the opinions and decisions of one member.
 - e. With three DB members, the individual DB members might be able to bring knowledge of different languages and cultures, including those of the parties.
- 23. The advantages of a sole member are:
 - a. The main advantage of a sole-member DB over three members is cost. Paying the fees of a sole member is obviously less than paying the fees of three DB members.

¹⁹ 1999 Forms of Contract.

²⁰ Pink Book and 2017/2022 Forms of Contract.

- b. Organising and coordinating the schedule of one DB member will obviously be less challenging than for three members.
 - c. The constitution of the DB is quicker, in particular when it comes to agreeing on the fees and terms of the DB.
 - d. It can be more efficient, notably when the parties need the DB to act quickly or at short notice to assist them in avoiding disputes.
24. Ultimately, it is a question for the parties to determine when or whether one member, rather than three, might be considered to be adequate for a given project. The most commonly cited factors to help inform the parties of such a decision include:
- a. the size of the project and the value of works – the larger the value, the lower the proportional costs of the DB, and the easier for a project to absorb the costs of a three-member DB;
 - b. the complexity of the works and the fields of expertise involved;
 - c. the duration of the project; and
 - d. any specific requirements of the project.
25. It is suggested that none of these factors can be taken in isolation, with it being neither appropriate nor desirable for a mandatory threshold, whether financial or related to the complexity of the works for when one member is preferable to three.
26. By contrast, it is possible to stipulate, as the World Bank²¹ has done, to set a mandatory financial threshold for when three members should be appointed. Setting such a financial threshold is, however, difficult but it is helpful to note that the World Bank has opted for a figure of US\$50m.
27. For small, less complex and low-value projects, a sole-member DB may be sufficient. However, for large, high-value or more complex projects, a three-member DB is often preferred, as it brings together a broader range of expertise and can provide a more balanced process.

Task 3: Follow the appointment process

28. The processes for appointment of sole-member DB and three-member DB are as follows:
- a. **Sole Adjudicator:** the first paragraph of Sub-Clause 20.2 1999 Rainbow Suite provides that the parties shall jointly appoint the DAB. Aside from the mechanism in the fourth paragraph of Sub-Clause 20.2 which mandates the parties to select members from any “*list of potential members ... included in the Contract ... other than anyone who is unable or unwilling to accept appointment to the DAB*”, there is no further guidance on how the sole Adjudicator should be chosen. In the template Appendix to Tender, there is no suggestion to include a list of members. In the 2017 Rainbow Suite, Sub-Clause 21.1 provides that: “*The sole member ... shall be selected from those named in the list in the Contract Data, other than anyone who is unable or unwilling*”

²¹ The World Bank states in their Standard Procurement Document for Works (July 2023) that “For contracts estimated to cost more than US\$50 million (including contingency allowances), it will be mandatory to refer disputes in the first instance to a three-member Disputes Review Board (DRB) rather than to the Engineer. For contracts estimated to cost less than US\$50 million, Employers will have the option of (i) providing for a DRB or (ii) referring disputes to one Disputes Review Expert (rather than to the three-member DRB).”

to accept appointment to the DAAB” and the template Contract Data form suggests that a list of three proposed members is to be given by each party.

b. **Three-member DAB:** the third paragraph of Sub-Clause 20.2 1999 Rainbow Suite²² provides that:

- i) [agreement of the “wing” members] “... each party shall nominate one member for the approval of the other party”;
- ii) [agreement of the chair] “The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman”.

29. This appointment process ensures that each member of the DB has been agreed by both parties. An alternative procedure for agreeing the chair often used in practice is for the parties to request the wing members to propose the chair for the agreement of the parties. This process enables a separation between the parties and the chair. The list procedure set out above also applies to the appointment of a three-member DB if the parties agree on lists.

Task 4: Appoint Dispute Board members within the contractual timelines

30. It is essential to appoint the DB members within the timelines specified in the contract. Timely appointments help maintain compliance with contractual obligations and support smooth execution of the project.

31. Under the 1999 Red Book, unless otherwise agreed by the parties, the default position is that a standing DAB should be appointed within 28 days after the Commencement Date. In the absence of agreement on a date that is to be stated in the Contract Data, the 2017 (Reprinted 2022) Rainbow Suite provides a default position of 28 days after the contractor receives the Letter of Acceptance. For an *ad hoc* DAB, in the 1999 Yellow Book, the appointment should take place 28 days after a party gives notice to the other party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.

32. Parties who have agreed to the provision of a standing DB are encouraged to constitute the DB as soon as possible so that the parties can benefit from the dispute avoidance function of the standing DB. Agreement on the constitution of the DB will inevitably be more difficult if the parties defer the decision to constitute the DB, particularly if the deferment happens after the first dispute arises, when the parties have potentially already formed their entrenched opinions on the issues pertaining to that dispute.

33. A failure to constitute the DB within the contract time limits does not, however, mean that the DB can no longer be constituted as the mandatory wording: “Disputes shall be adjudicated by a DAB”²³ or “Disputes shall be decided by a DAAB”²⁴ requires a dispute to be adjudicated/decided by a DB. Such a delay could, however, disrupt the timing of various contractual provisions in FIDIC contracts, which stipulate specific actions to be taken

²² The equivalent provision in the 2017 Rainbow Suite which has very similar wording is Sub-Clause 21.1(4).

²³ Opening words of Sub-Clause 20.2 FIDIC 1999.

²⁴ Opening words of Sub-Clause 21.1 FIDIC 2017/2022.

by the parties and the DB at different stages. Hence, when a standing DB is appointed at a later stage, consideration should be given to any claims that have already been submitted, to ensure the DB is mandated to address them.

Task 5: Find the right DB members and propose to the other party for agreement

34. The parties need to determine where to locate the prospective DB members. Often DB members will be recommended by the parties' counsel or consultants.
35. The starting point could be the FIDIC President's List of Approved Dispute Adjudicators²⁵. This list, which is expanding, consists of DB members from different regions, with different skills and language capabilities. Each member on the FIDIC President's List has gone through a rigorous assessment process to demonstrate their skills and capability to act as DB members and are required to maintain their practice to keep their credentials with FIDIC's independent credentialing body, FIDIC Credentialing Limited ("FCL").
36. There are alternative lists available worldwide. When opting for any of these lists, the parties should make sure that the institution is knowledgeable about the work of the DB and has used sufficient and reliable processes to develop its list.

Task 6: Carefully consider the contractual list of potential DB members before entering a contract

37. To facilitate the appointment of the DB, the contract²⁶ may include an agreed list of potential DB members, named by the parties before entering a contract. In this case, at the time of appointment, the parties must select DB members for appointment from this list.
38. Therefore, the persons named in the list must be carefully selected. When selecting the candidates for the list, consideration should be given to ensure that the individuals possess relevant knowledge, skills, and experience to act as DB members under specific contracts and that they are independent from the parties. All requisite criteria of the prospective DB member shall be looked at prior to their inclusion in the contractual list. Any potential DB member who is not sufficiently qualified, or does not possess relevant skills, or who could be rejected due to lack of independence, impartiality, or availability, must not be included in the list of potential members.
39. The importance of this list should not be underestimated, and the parties should take it seriously when entering into a contract. Once the list is included, the DB members will be selected from it. If the parties fail to carefully consider the list during contract negotiations and later find that they lack trust in the potential members, it can lead to disputes from the very beginning. It may also delay the DB appointment process.
40. If the parties are unsure who to name in their contract as potential DB members, FIDIC can recommend potential members. This recommendation will not be binding on the parties.

²⁵ Available on FIDIC Website www.fidic.org.

²⁶ See 1999 and 2017/2022 Suite of Contracts.

Task 7: Ensure that the potential DB members meet the contractual requirements

Independence, impartiality, and availability

41. The first two matters that need to be established are whether the potential DB member is sufficiently available to take on the appointment; and if so, whether any potential conflicts of interest might prevent him/her from taking the appointment.
 - a. **Availability:** if a potential DB member has a prohibitively busy work schedule that prevents him/her from being able to devote sufficient time to the project in question, the potential DB member should decline the appointment. Parties should not hesitate to ask the potential DB member(s) the question. A good indicator of availability is the number of standing DB in which the prospective DB member currently serves. Given that site visits generally occur between every 70 to 140 days, this fact alone inherently limits the number of standing DBs in which a DB member can operate, also taking into consideration the need to be available to deal with dispute avoidance and dispute resolution requests which may emerge between site visits.
 - b. **Independence and impartiality**²⁷: the General Conditions of DAB in the 1999 Rainbow Suite indicates²⁸ that prospective DB members must be independent and impartial and provide express obligations²⁹ to give effect to this requirement. The 2017 General Conditions of the DAAB Agreement maintain and enhance this sacrosanct requirement³⁰. Independence and impartiality are continuous obligations and DB members must remain independent and impartial throughout their appointment. Although each party nominates one member in a three-member DB, all three members are appointed by both parties and have the same obligations of independence and impartiality to both parties. In other words, parties should therefore not expect the member they nominate to be their advocate or representative within the DB, and shall refrain from attempting to enter into any ex-parte discussion with that member once the DB is constituted.
42. Over and above the requirements under the contract, it is good practice that any prospective DB member discloses any fact or circumstance that may give rise to reasonable doubts in the mind of the parties as to his/her independence and impartiality as this is necessary to build trust and allow the parties to make an informed decision at the outset, rather than at a later stage of the project.

²⁷ There is a distinction between "independence" and "impartiality". Independence is a matter of fact, which can be established; and impartiality is a state of mind, which is notoriously difficult to establish.

²⁸ Clause 3: Warranties.

²⁹ Clause 4: General Obligations of the Member.

³⁰ Clause 3: Warranties and Clause 4: Independence and Impartiality.

43. In addition to the above criteria, the FIDIC contract defines that the DB member must:
- a. be experienced and/or knowledgeable in the type of work which the Contractor is to carry out under the Contract; thus, he/she must have an understanding of technical matters and the discipline of the project, e.g. road, rail, water, energy sector;
 - b. be fluent in the language for communication stated in the contract; and
 - c. be experienced in the interpretation of construction and/or engineering contract documentation.

Task 8: Consider other non-contractual criteria and soft skills for the right DB member

44. In addition to contractual requirements, it will be implied that any appointed DB member will also have extensive knowledge of FIDIC and how the clauses interact with each other, the knowledge and skills required by the DB process and, on larger projects, there may also be additional criteria. Other non-contractual criteria to keep in mind when selecting a DB member include:
- a. Location of the project and of the prospective DB member(s) to avoid unnecessary cost of travel and differences in time zones. Long-distance travel will increase the costs and will be likely to reduce the chances of frequent in-person site visits from the availability perspective.
 - b. Nationality of the prospective DB member(s) and the parties. It might be an added value to a three-member DB if one member is a national of the country where the project is located and has knowledge and understanding of local customs and law.
 - c. Profession of the prospective DB member(s). A combination of engineers, quantity surveyors, architects, and lawyers may make a good composition of a three-member DB.
45. Generally, the success of the DB depends on the trust and respect it develops with the parties. It is therefore suggested that a DB member should have a number of soft skills to conduct its function properly. Those skills include:
- a. Communication/social skills to communicate with the parties properly.
 - b. Skills to engage in dispute avoidance, including mediation skills, active listening, the ability to engage parties in a discussion of any issues, and the ability to ask relevant questions and to facilitate agreements.
 - c. Skills to engage in dispute resolution, being capable of conducting a hearing, expressing empathy to both parties, identifying and asking relevant questions, identifying issues, listening, and analysing without jumping to conclusions.
46. In addition to the above, the chair of the DB must have the requisite managerial skills to organise DB processes effectively; give both parties a reasonable opportunity to present their case; and give the wing members the ability to ask relevant questions and make appropriate comments. Language capabilities and drafting skills are important to draft informal opinions, express them clearly and provide reasoned decisions.

47. A mix of skills, experience, and cultural background of DB members can provide a valuable combination for dispute avoidance and decision-making, enabling the DB to assess the issue from different perspectives.

Task 9: Agree the DBs fee

48. The parties and the DB member are to agree the fees to be paid to the DB member. FIDIC considers that a reasonable fee (or a range thereof) for a DB member is in line with the ICSID Memorandum on Fees and Expenses for arbitrators. To this end, the FIDIC website refers to the World Bank website.

Task 10: Approach the appointing authority in case of failure to agree an appointment

49. Both the 1999³¹ & 2017/2022 Rainbow Suite³² allow the DB to be constituted by an appointing entity in the absence of agreement by the parties in certain specified scenarios, such as the failure by one of the parties to nominate a DB member. The 1999 Rainbow Suite leaves it open to the parties to agree on that appointing entity and relies on them specifying that entity in the Appendix to Tender³³. In the 2017/2022 Rainbow Suite, a default appointing entity, the President of FIDIC, or a person appointed by the President, has been introduced.
50. In both the 1999 & 2017/2022 Rainbow Suite, the appointing entity has an obligation to consult with the parties prior to making its appointment. In the 2017/2022 Rainbow Suite, the consultation has been extended to include the member(s) already appointed. For example, the parties, or in the 2017/2022 Rainbow Suite, the DB member(s), may wish to indicate their preference of the background of the DB member(s) required. The appointing entity is not bound by these representations but will normally take the parties' representations into account. In the 2017/2022 Rainbow Suite, the appointing entity is not bound to select any of the individuals contained in the agreed list of potential members included in the Contract Data. In the 2017/2022 Rainbow Suite, the appointing entity has also been given the power to set the fees and the terms of appointment of any DB member. The normal practice of FIDIC is to consult the DB member about the fees he/she wishes to propose to the parties. FIDIC will also consult the ICSID Scale of Fees. Should the DB member agree his/her fees with FIDIC, then those fees will be proposed to the parties.
51. That being said, FIDIC encourages the parties to try to agree upon the DB members between themselves and, notably, to refrain from turning down the other party's nominee without good reasons. This allows the parties to remain in control of the appointment process, to have the DB members they choose rather than DB members nominated by the appointing entity.

³¹ Sub-Clause 20.3.

³² Sub-Clause 21.2.

³³ Many parties opt for FIDIC as the appointing entity, although some appoint other entities such as the ICC or other institutional arbitral bodies. Good practice dictates that the appointing entity should be experienced in making independent and impartial appointments. FIDIC maintains the FIDIC President's List of Approved Dispute Adjudicators for this purpose and makes appointments from this list.

Task 11: Sign the DAB/DAAB Agreement

52. In the 1999 Rainbow Suite, Sub-Clause 20.3 allows the appointing entity or official named in the Appendix to Tender to appoint a DB if the conditions in Sub-Clause 20.3 apply. The appointment made is “final and conclusive”. Under the same form, the nominating body does not have the power to decide the fees and the terms of the appointment. Therefore, the parties are required to agree on the terms of the appointment with the DB.
53. Under the 2017/2022 Rainbow Suite, the parties and the member(s) so appointed shall be deemed to have signed and be bound by the DAAB Agreement following an appointment.

Task 12: Think outside the box when considering project-wide DBs

54. Where there is a single project utilising a single construction contract, there will ordinarily be a single DB.
55. Where there are multiple low-value projects to be carried out in one jurisdiction by the same owner, it might be possible for the parties to appoint a DB that oversees some or all of those projects, with different or related contractors and one employer. For example, when carrying out multiple waste site projects in one country over multiple years it might engage a sole DB. Such a scheme might be more efficient and economic as the DB could visit multiple sites over a number of days. The costs of the regular site visit could then be distributed pro-rata across the various projects.
56. Where there is a megaproject with several complex high-value contracts, an alternative to constituting a DB in each of those contracts would be to establish a project-wide DB which could be formed using a panel of more than three adjudicators established at the outset allowing for complimentary skill sets, from different professions, for example an architect, a quantity surveyor, and a lawyer.
57. There are several specific issues which should be addressed in order to make these various adjudication processes work effectively which may include, but are not limited to, the matters below, and in respect of each professional advice should be sought:
 - a. Particular amendments to the FIDIC contract will be required. Care should be taken to keep the amendments to a minimum and also to follow the FIDIC Golden Principles.
 - b. The employer most likely will need to nominate the adjudicator or adjudicators at the outset before all of the parties are known. The nominations should be made after reviewing a predetermined selection of adjudicators and then narrowing the selection based upon skill set and availability before conducting interviews and then making a final appointment.
 - c. The DB can then be included within the tender documents thus allowing any contractors to comment as part of their tender on the acceptability of the adjudicators, and also to clear conflict at that point.

- d. The DB can therefore be selected on the basis of its diversity, skill set, availability and location. For example, an international chairperson might be selected, whilst two locally available DB members, again with varying skill sets, could be appointed. This helps to efficiently manage the costs, availability, but also ensure that there is sufficient procedural and managerial knowledge by the chairperson.
- e. Conflicts will need to be dealt with initially, but might also need to be managed during the execution of the project. A panel of five adjudicators provides flexibility on larger projects with multiple contracts and often will be sufficient to ensure that at least three are available and conflict free should any potential issues arise during the course of the project. A sole DB member may prove cost effective for a collection of lower value projects.
- f. Management procedures are important. It is important to have an initial meeting once the packages are let in order to conduct an initial site visit, but more importantly for all of the parties and DB members to meet and discuss how the DB will work, its benefits, the focus of the projects and for the individuals to have an understanding of each other's roles. Site visits might comprise a range of face-to-face physical meetings on site as well as virtual site meetings using drones if necessary.
- g. Sub-contract packages could also be included in this process, remembering that the FIDIC Sub-Contract already contains inter-related stepdown provisions for dispute resolution including the use of a DB.
- h. On some projects it might be helpful to have a project dispute resolution agreement or protocol which sits across all of the individual contracts and therefore covers the entire project in an open and transparent manner. This will mean that all of the individual contractors and engineer(s) involved on the project will know that there is one dispute resolution procedure providing the same rules and powers to the DB that are applicable, not just for the employer, but all of the contractors and potentially the engineer.
- i. The DB process can also apply to the engineer's consultancy agreement(s) thus tying all of the important project participants into one dispute resolution procedure. This makes more effective and efficient use of the DB, particularly on high-value, complex, multi-contract projects.
- j. Informal assistance can be particularly helpful in relation to these complex projects, with the DB bringing to individual contracts its overall knowledge of the project, whilst of course being aware of and respecting individual contract confidentiality.
- k. Consideration should also be given to the final forum. Assuming that this is arbitration, joinder and consolidation provisions should be considered. It may be more effective to allow a number of parties under separate contracts in relation to a substantial project to be brought together under one arbitration. This can provide for a consistent approach to any review of DB decisions or deal with specific cross-contract issues.

Conclusion

Appointing the right DB is essential for successful execution of construction and engineering projects. Choosing the right type of DB, determining the appropriate number of members, checking their availability, impartiality, and independence, and ensuring their timely appointment can facilitate avoidance and resolution of disputes.

FIDIC

FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide. Founded in 1913, FIDIC is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its Member Associations and to disseminate information and resources of interest to its members.

Today, FIDIC membership covers over 100 countries of the world. FIDIC Member Associations operate in over 100 countries with a combined population in excess of 6.5bn people and a combined GDP in excess of \$30tn. The global industry, including construction, is estimated to be worth over \$22tn. This means that FIDIC Member Associations across the various countries are worth over \$8.5tn.



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FIDIC President's List of Adjudicators

FIDIC maintains a list of approved adjudicators: The FIDIC President's List of Approved Dispute Adjudicators. Members of the President's List are suitably qualified individuals holding a valid FIDIC Certified Adjudicator Certification issued by FIDIC's independent credentialing body, FCL. The list is publicly available for consultation by the parties to select a Dispute Board member, or when they fail to agree the appointment of the adjudicator, FIDIC acts as appointing authority and makes a selection from this list. The profiles, language capabilities and expertise of the members are set out in their profiles. To access the list, please visit: <https://fidic.org/president-list>. To make a request to FIDIC to appoint an adjudicator or to recommend a short list of potential Dispute Board members, please visit: <https://fidic.org/node/2552>.

FIDIC Credentialing Limited

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