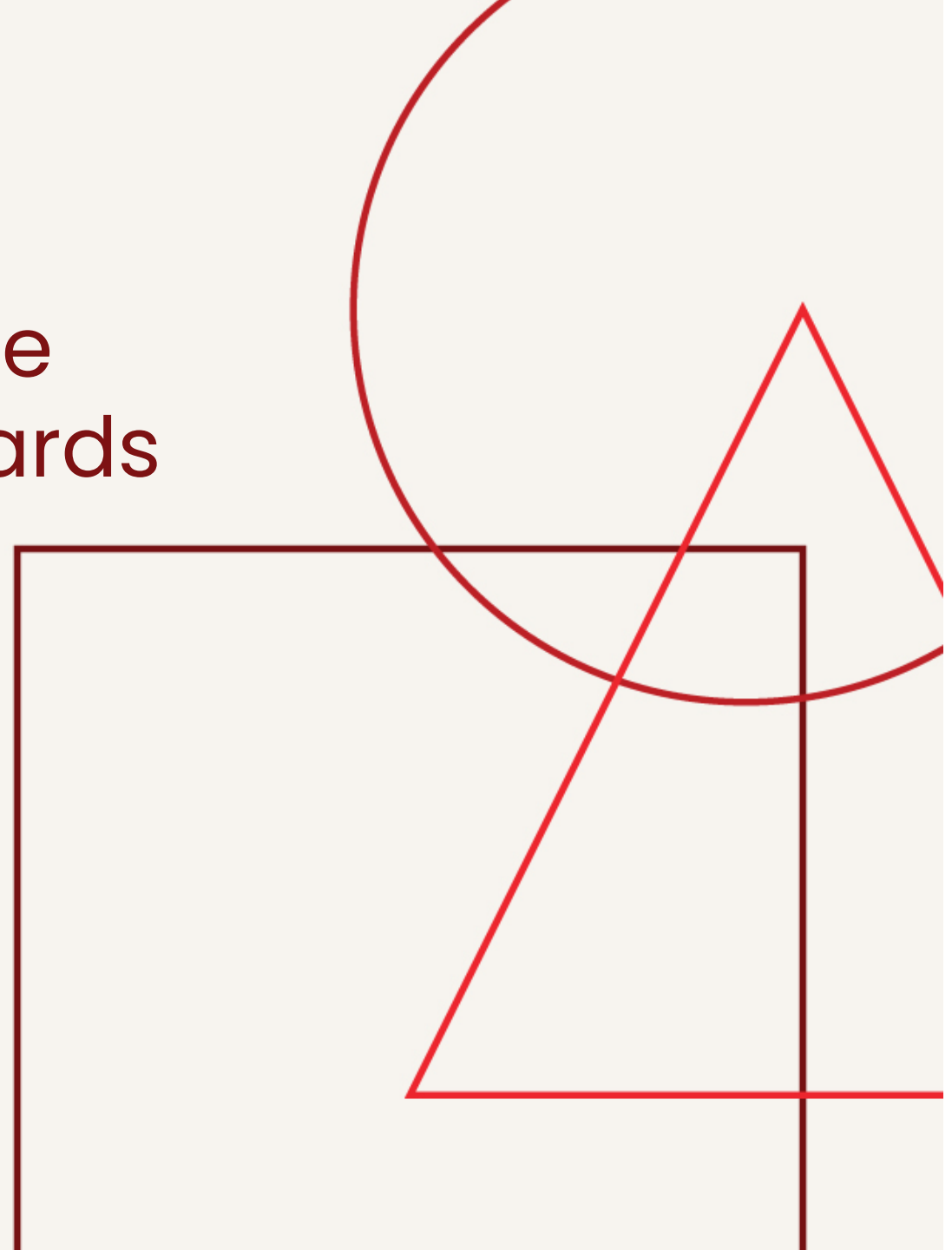




The Law & Practice of Dispute Avoidance/Adjudication Boards (DAABs)

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Overview of FIDIC contract forms.



Straightforward project

No

Employer's Design

Yes



Yes



Discuss in detail

Employer's requirements with the Contractor, and negotiate a modified FIDIC Contract.

Fixed price - lump sum

Little employer involvement.
No major unforeseen risks.

No

Contractor Design

Plant and/or high unforeseen risks.

No

Yes

Maintenance

Yes

No



New FIDIC Books 2017



FIDIC Golden Principles

GP5 – DAAB Before Arbitration

- Unless restricted by law, all formal disputes must first be referred to the DAAB before arbitration.
- Maintain the mandatory DAAB step for dispute avoidance and quick decisions.
- Don't bypass the DAAB by sending disputes directly to arbitration.

Role of DAABs in modern
infrastructure development.

What is a Dispute Avoidance/Adjudication Board?

- Experienced and impartial.
- Standing DBs are set up at the Commencement of the Construction Project.
- Parties shall provide DB with key documents, including the contract and progress reports.
- The DB becomes familiar with the projects and the participants.
- Updated in relation to project progress and developments by the parties.
- Joint meetings at regular site visits with senior representatives from: Employer; Contractor; and the Engineer.

Development of DBs Worldwide

- 1975 First domestic DRB in the USA (Eisenhower Tunnel)
 - 1981 First international DRB (El Cajon Dam, Honduras)
 - 1992 FIDIC issues DRB Supplement to the 4th Ed. Red Book
 - 1995 The World Bank (IBRD) makes DRB mandatory for all IBRD-financed projects in excess of US\$50 million
 - 1996 [UK – HGCRA 1996, part II implied right to adjudication in defined construction contracts]
 - 1997 Asian Development Bank (ADB) & the European Bank for Reconstruction & Development (EBRD) adopt DBs
 - First introduced in FIDIC 1995 Orange Book.
 - 1998 [HGCRA becomes effective law from May]
 - 1999 DABs adopted in FIDIC Suite (Standing for Red Book and ad hoc for Yellow and Silver).
 - 2017 DAABs adopted in the FIDIC Suite as standing for Red, Yellow and Silver Books.
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Global adoption trends and African context.

- 2004 ICC introduces DB rules (DAB/DRB/CDB)
- 2006 Nine Multilateral Development Banks adopt DBs
- 2014 CI Arb DB rules launched
- 2020 World Bank Strengthening Prevention of Gender-Based Violence (GBV): Contractor Accountability and Disqualification.
- In 2020, FIDIC signed an agreement with the African Development Bank (AfDB) that will see the international funding organisation include the use of seven FIDIC standard contracts for the next five years.
- FIDIC granted the bank a non-exclusive licence to refer to the seven major FIDIC contracts (1999 and 2017) for projects they finance, and the documents may be used as part of the bank's standard bidding documents.
- The move by AfDB is another significant endorsement for FIDIC contracts from a multilateral development bank, following similar agreements signed with the World Bank, Inter-American Development Bank, Caribbean Development Bank, the European Bank for Reconstruction and Development and the Asian Infrastructure Investment Bank in recent months.

Impact of Dispute Boards

- DRBF Statistical Database (1988 to 2005)
- 1,300 projects worldwide.
- Total construction value US\$95 billion.
- Average number of disputes per project: 1.3.
- 60% of projects with a DB had no disputes.
- 99% of the projects with DB recommendations had no subsequent arbitration or litigation (DRBF Statistical Database 1975–2016 related to 2,800 projects valued at US\$275 bn with 85%–98% resolved without arbitration or litigation).

Role of the DAAB

- Encourages discussion in relation to key issues such as;
- Time for Completion
- Money claims
- Contractual interpretation.
- Quality of Works.
- Encourages resolution of issues and disputes at the “job site level” before escalation.
- Advisory opinions upon joint request by the Parties.
- Holds informal meetings as necessary to:
- Gives advisory opinions on potential issues or disputes; and
- Makes Decisions on formal disputes.

Legal Foundations and Jurisdiction of the DAAB

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Jurisdiction of DAABs

Learning Objectives

- Understand the contractual and legal basis of the DAAB.
- Define the scope and limits of DAAB jurisdiction.
- Identify key procedural requirements under FIDIC 2017 Clause 21.
- Review case law and practical guidance on enforcement and compliance.

Jurisdiction of DAABs

- The Legal Foundation of the DAAB is Contractual.
- The DAAB exists purely by contract — its authority flows from Sub-Clause 21.1 and the DAAB Agreement.

FIDIC Principle:

- “The DAAB’s decision shall be binding on both parties, who shall promptly comply with it whether or not a Notice of Dissatisfaction (NOD) is given.”

Legal Nature:

- Quasi-judicial but not an arbitral tribunal.
- Decisions are contractually binding until revised by settlement or arbitral award.
- Supported by the doctrine of contractual obligation to comply (specific performance or debt)

Jurisdiction of DAABs

- FIDIC 2017 Clause 21 – Dispute Avoidance/Adjudication Board
- DAAB Agreement (Appendix) – Forms part of the contract documents
- National Contract Law – Enforces the contractual promise to comply

Practice Notes (FIDIC 2023–2024):

- Appointment & independence of members
- Role in dispute avoidance and early intervention.

Jurisdiction of DAABs

Primary Jurisdiction:

- “Any dispute of any kind whatsoever arising out of or in connection with the contract may be referred to the DAAB.” (Sub-Clause 21.4.1)
- Covers contractual, factual, and sometimes quasi-tortious matters linked to performance.

Conditions Precedent:

- Proper appointment of DAAB standing or ad hoc, in writing or deemed appointment.
- Existence of a “Dispute” – defined by disagreement after the Engineer’s determination under Sub-Clause 3.7.
- Notice of Referral within contractual timelines.

Limits of DAAB Jurisdiction.

DAAB cannot:

- Decide outside contract-defined disputes (Mubiru J; Kobusingye v Roko).
- Vary the contract terms.
- Act after its mandate expires, unless parties agree to reconstitute.

Jurisdiction lapses if:

- Appointment not validly made.
- Decision rendered after expiry of DAAB or without a valid referral.

Enforcement and Legal Effect

- Binding nature confirmed by courts (e.g., *Persero v JGC Corp*, *Tubular Holdings v DBT Technologies*).
- Non-compliance constitutes a new dispute—“Failure to pay = Dispute.”
- Arbitration tribunal empowered to summarily enforce DAAB decisions under Sub-Clause 21.7 (2017 edition).
- Enforcement resembles debt recovery under a Summary Suit, not re-adjudication on the merits.

Interaction with Arbitration

- DAAB → Amicable Settlement → Arbitration (Clause 21.6).
- Arbitration jurisdiction triggered only after NOD and the cooling-off period.

Arbitrator's powers include:

- Reviewing DAAB's decision de novo.
- Enforcing compliance pending review.

The Practice of Dispute Avoidance

The background features several abstract geometric shapes in a light orange color. In the top right corner, there is a square with a triangle on top of it. In the bottom right, there is a large semi-circle. A thin orange line runs diagonally from the top right towards the bottom right, crossing through the semi-circle and the square/triangle shape.

Dispute Avoidance

- A standing DAAB attends regular site visits, builds trust, and issues informal opinions when jointly requested.
- The goal is to identify early warning signs before they crystallise into disputes.

Techniques of Dispute Avoidance

- Task 1: Raise awareness early.
- Task 2: Build trust and neutrality.
- Task 3: Determine when and where avoidance occurs.
- Task 4: Identify matters suitable for avoidance (payment delays, design ambiguities).
- Task 5: Choose appropriate form—opinion, workshop, or joint meeting.

Dispute Avoidance

Principles of Effective DAAB Avoidance

- Proactive Engagement: Regular contact prevents escalation.
- Neutral Facilitation: DAAB acts as a bridge, not a judge.
- Transparency: Open communication builds trust.
- Confidentiality:
- Timeliness: Early warnings prevent cost/time blowouts.

Tools and Methods for Dispute Avoidance

- Site meetings and progress reviews.
- Early warning systems (Clause 8.4).
- Non-binding advisory opinions.
- Facilitated negotiation sessions.
- Joint risk registers monitored by DAAB.

Dispute Avoidance

- The DAAB complements, not replaces, the Engineer's role under Sub-Clause 3.7.
- The Engineer determines claims; DAAB intervenes where issues persist, ensuring consistency and collaboration.

The Human Element

- Soft skills matter: communication, empathy, cultural sensitivity. DAAB members must be impartial yet approachable and maintain independence throughout their term.
- Pay now, argue later principle, emphasising the importance of complying with DAAB decisions and maintaining procedural integrity for enforceability. See: **Persero v JGC (Singapore)**

Dispute Avoidance

Best Practices for Parties

- Constitute DAAB early (within 28 days of Commencement).
- Budget for DAAB activities.
- Share information transparently.
- Jointly request informal assistance.
- Treat DAAB recommendations seriously.

Common Causes of Failure

- Late constitution of DAAB.
- Treating DAAB as an arbitral tribunal.
- Lack of trust or perceived bias.
- Non-compliance with procedure or site visits.
- Ignoring DAAB advice.

The Future of DAABs.



The Future of DAABs

- FIDIC and Funding Agencies emphasise mandatory standing DAABs.
- Dispute avoidance is now a governance tool, integrated with ESG and digital project management.
- Regional DAABs are encouraged for complex programs.
- DAABs safeguard relationships, cash flow, and performance. Their preventive influence reduces arbitration and litigation costs.
- Effective DAABs embody FIDIC's ethos: 'disputes avoided are disputes won.'



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