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Unpacking the Adjudication Procedure in the 1999 FIDIC Forms of Contract

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ABSTRACT:

This paper examines the Dispute Adjudication Board (DAB) mechanism in the 1999 FIDIC Forms of Contract, highlighting its role in resolving construction disputes efficiently. The research explores the legal framework, jurisdiction, and procedural aspects of the DAB, emphasising the distinctions between standing and ad hoc DABs. A key focus is on Subclause 20.4, which governs dispute referral and decision-making processes, ensuring contractual compliance while maintaining project continuity. Additionally, the study analyses jurisdictional challenges in defining disputes and the enforceability of DAB decisions under international construction law. By examining case law and industry practices, this research provides valuable insights for contractors, legal professionals, and project managers on optimising dispute resolution within FIDIC contracts.

Keywords: Dispute Adjudication Board (DAB), FIDIC 1999 Contracts, Construction dispute resolution, Standing vs. ad hoc DABs, Subclause 20.4 adjudication, Contractual compliance and enforcement.

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INTRODUCTION

The Dispute Adjudication Board (DAB) is a cornerstone of the dispute resolution framework under the FIDIC 1999 Forms of Contract providing an effective mechanism for addressing disputes that arise during the execution of construction projects. Governed primarily by Subclause 20.4, the DAB is designed to deliver timely, binding, and impartial decisions, ensuring that projects proceed without undue delays caused by unresolved disputes.

The DAB operates in two models, namely standing and ad hoc, each suited to different contractual contexts. While a standing DAB actively participates throughout the project to facilitate dispute avoidance, an ad hoc DAB is convened only when disputes arise focusing solely on adjudication. This dual approach ensures flexibility in addressing disputes while promoting the uninterrupted execution of works.

With its jurisdiction encompassing both contractual and non-contractual claims, the DAB offers a comprehensive resolution platform. From handling claims related to breach of contract to addressing broader issues such as tortious claims or restitution, the DAB plays a vital role in maintaining the contractual balance and fostering compliance with FIDIC's dispute resolution provisions. This sets

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the stage for a detailed examination of the DAB's role, processes, and its significance in the broader construction dispute resolution landscape.

THE ROLE OF THE DISPUTE ADJUDICATION BOARD (DAB)

Disputes that arise under the 1999 FIDIC Forms of Contract are initially adjudicated by a Dispute Adjudication Board (DAB), which can consist of one or three members as outlined in Subclause 20.4 [*Obtaining Dispute Adjudication Board's Decision*]. The main features of the DAB include:

1. A decision rendered within a relatively short period, specifically 84 days from the referral of the dispute in the Red, Yellow, and Silver Books according to Subclause 20.4.

2. The DAB's decision is binding and final unless a notice of dissatisfaction is issued by either party within 28 days of receiving the decision.

The DAB operates in two models: a "standing DAB" in the Red and MDB Books, and an "ad hoc" DAB in the Yellow and Silver Book, as specified in Subclause 20.2 [*Appointment of the Dispute Adjudication Board*] and 20.3 [*Failure to Agree Dispute Adjudication Board*] in the Red, Yellow, and Silver Books. These provisions require additional information to be detailed in the relevant contract document, such as the Appendix to Tender in the Red and Yellow Books, the Contract Data in the MDB and Gold Books, and the Particular Conditions in the Silver Book. Notably, a standing DAB can be adopted for a Yellow Book and an ad hoc model for the Red Book, depending on the project.

Remuneration for DAB members is outlined in Subclause 20.2, with each party responsible for half of the payment, and further detailed in Clause 6 of the General Conditions of the Dispute Adjudication Agreement.

A "standing DAB" is appointed by the parties at the beginning of the contract and remains active throughout its duration. This model allows for dispute avoidance through the DAB's active involvement in the project including site visits and discussions with the parties, which can help resolve potential disputes amicably. Conversely, an "ad hoc" DAB is appointed only when a dispute arises and its sole role is to adjudicate the dispute referred to it without playing a significant role in dispute avoidance.

OBTAINING THE DISPUTE ADJUDICATION BOARD'S DECISION

Subclause 20.4 [*Obtaining the Dispute Adjudication Board's Decision*] of the FIDIC Red Book outlines the procedure and requirements for referring a dispute to the Dispute Adjudication Board (DAB) and governs the parties' right to do so. This subclause ensures that disputes are addressed in a structured manner, promoting efficiency and minimizing project disruptions.

A key principle of this referral process is the "*keep working*" provision, which requires the parties to continue performing their contractual obligations while the DAB adjudicates the dispute. This provision is essential for maintaining project continuity and preventing unnecessary delays due to disputes. It underscores the temporary binding nature of the DAB's decision, meaning that the parties must comply with the decision unless and until it is revised through amicable settlement or arbitration.

Additionally, Subclause 20.4 sets out the timelines for the DAB to issue its decision, typically within 84 days from the date of the referral, unless the parties agree otherwise. The decision must be reasoned and in writing thereby ensuring transparency and accountability in the dispute resolution process.

Failure by a party to comply with the DAB's decision can lead to enforcement measures including referral to arbitration under Subclause 20.6. This structured approach reinforces the principle that disputes should not hinder project execution while ensuring that contractual disagreements are addressed fairly and efficiently.

THE ADJUDICATOR'S JURISDICTION: CRYSTALLISATION OF THE DISPUTE

The opening words of Subclause 20.4 [*Obtaining the Dispute Adjudication Board's Decision*] are:

"*If* ***a dispute (of any kind whatsoever)*** *arises between the Parties* ***in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer****, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board]and 20.3 [Failure to Agree Dispute Adjudication Board], either Party may* ***refer the dispute in writing*** *to the DAB for its decision, with a copy to the other Party.* ***Such reference shall state that it is given under this Sub-Clause.***"

From this, it is evident that Subclause 20.4 sets preconditions which have to be met before a party can refer a dispute to adjudication. It grants a party the right to refer disputes arising from and related to the contract and the execution of the Works. Consequently, the adjudicator would lack jurisdiction initially if a dispute has not crystallised. The referral must be in writing and follow the provisions in Subclause 1.3 [*Communications*].

The question then is how "dispute" is defined in the context of Subclause 20.4 [*Obtaining the Dispute Adjudication Board's Decision*]. The courts have severally tried to answer this question in different cases. In *Beck Peppiat Ltd v Norwest Holst Construction Ltd* [1] it was held that a narrow approach to the meaning of "dispute" for adjudication purposes should be avoided and that it should instead be given its ordinary English meaning. In *Fastrack Contractors Ltd v Morrison Construction Ltd* [2] it was held that a dispute arises only after a notified claim has been considered, admitted, modified, or rejected by the opposing party Building on the reasoning in *Fastrack* [2], Judge Lloyd in the case of *Sindall Ltd v Abner Solland* [3], emphasised that a dispute exists when a point has emerged from discussions or negotiations that have ended, necessitating a decision. In the leading case of *Amec Civil Engineering Ltd v The Secretary of State for Transport* [4], Jackson J, among his seven propositions, held that the mere notification of a claim by one party does not automatically and immediately give rise to a dispute. Furthermore, there is a distinction between a dispute and a claim, as explained in the case of *Edmund Nuttall Ltd v R G Carter Ltd* [5].

Building from this, a dispute materialises when a contractor's claim under Subclause 20.1 [*Contractor's Claim*] is not admitted, either explicitly by the Engineer under Subclause 3.5 [*Engineer's Determination*] or implicitly through discussions or silence, not simply when the claim is made. Additionally, only one dispute can be referred to adjudication at a time, though a single dispute may encompass multiple issues under various claims, as shown in *Michael John v Golledge* [6].

DISPUTE ARISING "UNDER AND IN CONNECTION" WITH THE CONTRACT

The right to adjudicate under the 1999 FIDIC Forms of Contract pertains to disputes arising from and related to the Contract and Execution of Works. In *Ashville Investments v Elmer Contractors* [7], it was established that a clause covering disputes under the contract, including the words "in connection with," should be interpreted broadly to encompass related claims such as rectification and negligent misstatement.

Disputes arising under the contract are those where the cause of action stems from the contract, such as a party failing to honor a term by non-performance or interfering with the other party's performance. This includes issues like delayed access to the site, claims for an extension of time or costs for specific works.

Since the adjudicator's power is derived from the contract, they can also determine whether a particular term has been incorporated into the agreement as seen in *Edmund* [5], and handle disputes related to variations made to the original terms as in the case of *Ballast plc v The Burrell Company (Construction Management) Ltd* [8]. The adjudicator can also decide on which of two separate sets of contract conditions applied to the parties (provided that both sets gave him jurisdiction to do so) as in *Dalkia Energy and Technical Services Ltd v Bell Group UK Ltd* [9], or the entitlement to an award of damages if the breach of contract is proved as in *Gillies Ramsay Diamond and Gavin Ramsay and Philip Diamond v PJW Enterprises Ltd* [10].

However, given the drafting of clause 20.4, it goes beyond handling claims for breach of contract but also encompasses non-contractual claims like tortious claims like professional negligence as held in *Gillies Ramsay Diamond v PJW Enterprises Ltd)* [11], or an order for rectification as held in *Christiani & Nielsen Ltd v The Lowry Centre Development Company Ltd)* [12], restitution as held in the case of *ISG Retail Ltd v Castletech Construction Ltd)* [13] and specific performance as held in *Multiplex Constructions (UK) Ltd v Mott MacDonald Ltd)* [14].

A key question in the construction industry is whether there can be a dispute under the contract if the contract is terminated or deemed void. If terminated, disputes remain "under" the contract, allowing for adjudication, as was held in *A&D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* [15]. However, if the contract is void, it is considered never to have existed, eliminating the possibility of disputes under it.

REFERRAL OF THE DISPUTE AND DECISION OF THE DAB

The Dispute Adjudication Board (DAB) becomes involved in a dispute when one party submits a written referral to the DAB, with copies to the other party, as specified in Subclause 20.4. This referral must clearly state that it is made under the relevant Sub-Clause. Typically, no formal dispute notice is required under the FIDIC forms, so the dispute is defined by the contents of the referral.

Both “standing” and “ad hoc” DABs in the Red, MDB, Yellow, and Silver Books have no general time restrictions for when a dispute can be referred. However, for standing DABs, the referral must occur before their appointment expires. The DAB generally has the authority to determine the procedure for resolving the dispute, except for certain matters agreed upon by the parties.

All communications and documents must be shared with all DAB members and the other party throughout the process, following Procedural Rule 4. The DAB can proactively request documents and written arguments before any hearing, as per Procedural Rules 4 and 6. Hearings, though not mandatory, are typically less formal than those in arbitration or litigation.

Under Sub-Clause 20.4, the DAB's decision must be issued within the specified time, in writing, reasoned, and stating that it is given under that Sub-Clause. The timing differs based on whether it is a standing or ad hoc DAB:

1. Red Book and MDB: within 84 days of receiving the referral.

2. Yellow and Silver Books: within 84 days of receiving the referral or the advance payment of estimated expenses and daily fees, whichever is later, according to Clause 6 of the General Conditions of Dispute Adjudication Agreement.

The DAB's decision is binding on the parties "unless and until it is revised in an amicable settlement or arbitral award," according to Subclause 20.4 in all books. To prevent the DAB decision from becoming final and binding, a party must issue a notice of dissatisfaction to the other party. This notice is a prerequisite for initiating arbitration under Sub-Clause 20.6 [*Arbitration*]. Therefore, a party that is dissatisfied must strictly adhere to the provisions in Sub-Clause 20.4 regarding the notice and the formalities outlined in Sub-Clause 1.3 [*Communications*].

CONCLUSION

The Dispute Adjudication Board (DAB) plays a pivotal role in resolving disputes under the FIDIC 1999 Forms of Contract. Its effectiveness lies in its ability to deliver timely and binding decisions, fostering continuity of project execution through the "keep working" principle while disputes are adjudicated. The structure and operation of DABs—whether standing or ad hoc—are tailored to meet the specific needs of different contracts with a strong emphasis on dispute avoidance and efficient resolution.

The framework outlined in Subclause 20.4 underscores the importance of crystallisation of disputes before referral and provides comprehensive jurisdiction for the DAB to address contractual and non-

contractual claims. This broad mandate ensures that the DAB can handle a wide range of disputes including those related to breach of contract, tortious claims and other equitable remedies.

The DAB's decisions serve as a critical step in the dispute resolution process ensuring that unresolved issues can transition seamlessly to arbitration or amicable settlement if necessary. This robust dispute resolution mechanism supported by the procedural rigor of the FIDIC forms strengthens the contractual relationships between parties and enhances the overall efficiency and integrity of construction projects.

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