DAABs: Dos and Don’ts

Introduction and Context

This short guide to DAABs in construction is an elaboration upon a presentation made by the author at the Riyadh International Disputes Week 2024.[1]

What is a DAAB in construction?

A Dispute Avoidance/Adjudication Board (“**DAAB**”) is part of a multi-tiered dispute resolution procedure.

A Dispute Adjudication Board (“DAB”) was first introduced by FIDIC into its 1999 suite of contracts. It was designed to promote the prompt payment to the Contractor. It was intended to provide a rapid decision, temporarily binding on the Parties unless and until it was varied or overturned by a final dispute resolution process (typically in the international marketplace, arbitration).

This was in no sense new. In the United Kingdom, statutory adjudication had been introduced in 1996[2] , had by 1999 already been given its first major backing by the English courts[3], and was - despite initial scepticism (primarily by the legal profession, which saw little future in it and appeared intent largely to ignore it) - in due course to prove profoundly successful.[4]

In the FIDIC 2017 suite of contracts, the DAAB replaced the DAB. It seems that FIDIC had decided that dispute avoidance should become a primary focus. Sub-Clause 21.3 of the Red Book provides:

> *‘If the Parties so agree, they may jointly request… the DAAB to provide **assistance** and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement it may invite the Parties to make such a joint request…*

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[1] More specifically, the RICS/HKA Event on 7 March 2024, Session 1: **The Beginning of the Journey – Conflict Avoidance, Dispute Boards and the Use of early ‘Technical’ Dispute Resolvers**.
[2] By the Housing Grants, Construction and Regeneration Act, 1996 (‘the HGCRA’) (as amended by Part 8 of the Local Democracy, Economic Development and Construction Act, 2009).
[3] Macob Civil Engineering Ltd. v. Morrison Construction Ltd. [1999] BLR 93, in which, Dyson J (as he then was), said:
‘The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement’.
[4] There is a separate and serious shortcoming associated with enforceability in connection with international projects where no statutory adjudication applies to the contract in question and the losing paying party in the adjudication fails (or more often with impunity, refuses) to implement the DAB decision. In those circumstances, enforcement can currently be achieved only through the New York Convention (if it has relevantly been acceded to). This means in turn that an arbitration award in its favour has first to be obtained by the winning party, which is then obliged to issue Convention enforcement proceedings, thereby undermining the unique advantage of speed heralded by the protagonists of adjudication.

*The Parties are not bound to act on any **advice**, and 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…'* (Emphasis supplied).

First, questions arise over scope: what assistance, informal advice, advice and/or views, and how/in what form should they be expressed? These matters are developed in more detail below.

Second, a question may arise over consequences.

Thus, suppose that an issue has arisen over the quality of the work, such that leaks appear in the partially completed works during periods of inclement weather. The Employer contends that the Contractor has failed to carry out the work specified properly (and thus points to an allegation of poor workmanship), whilst the Contractor says that the issue is one of poor detailing (and so points to an issue of poor design). Asked for advice, the Dispute Advisory Board suggests that changes be made to the remainder of the works. The Parties act on that advice and defer arguments over responsibility for the originally leaking work to another day. The Contractor thereafter removes the offending work and continues with the work in accordance with the advice received from the Dispute Advisory Board. Whilst there is some improvement, the leaks are not entirely removed.

Although it might be said that the Parties are not bound by the assistance, advice and/or views received from the Dispute Advisory Board they may well feel aggrieved - having followed it. Worse still, one of them is likely to feel even more dissatisfied if in due course, in discharge of its adjudicatory function, the Board concludes that it is not bound by its own earlier advice or views (as Sub-Clause 21.3 permits it to do). Indeed, if the additional expenses incurred to rectify the work once more are deemed attributable to one of the Parties due to its initial shortcomings, tensions could easily exacerbate.

These grievances are likely to be harboured notwithstanding the immunity afforded to the DAAB by way of Sub-Clause 8(c) of the standard FIDIC General Conditions of Dispute Avoidance/Adjudication Agreement which removes liability for all but the most egregious of failings by the DAAB.[5]

DAABs Dos

Pausing there, it seems to the author that the **Dispute Avoidance Board** can/should usefully do the following things:

Be aware of and familiarise itself with:

1. progress on the project against programme. More particularly, the Dispute Avoidance Board should familiarise itself with:
    a. project delays experienced and the likely impact on the date for completion.
    b. localised delays and the likely impact on performance.
    c. the alleged/likely **causes and extent** of those delays.
    d. the Parties' proposals if any to mitigate/recover those delays including any **re-programming**, **acceleration**, the **introduction of additional resources**
2. **disruption** to the progress of works and the likely causes and extent of such disruption
3. issues over **quality of work** and the Parties' proposals to remedy those defects
4. the extent of variations and their potential valuation

Express views/advise the Parties on its interpretation/and anticipated likely application of the contract provisions to particular scenarios, which the Parties can consider/adopt in seeking to agree an incipient dispute.

[5] I.e. fraud, gross negligence, deliberate default or reckless conduct.

DAABs Don'ts

By contrast, it seems to me ill-advised for the Parties to ask the **Dispute Avoidance Board** (and if so asked I suggest that the Board should reject) to volunteer, suggest, or otherwise involve itself in/offer advice on/make proposals on the following:

1. prequalifying, tendering, or awarding any service contracts, subcontracts, or supply contracts,
2. planning the Works,
3. procuring the Works,
4. quality assuring/quality controlling the Works,
5. recording progress of the Works,
6. varying the Works,
7. preparing budgets, estimates, interim payments, final accounts and/or closing out final accounts for any of the Works,
8. determining whether the Works or any part thereof are complete, are ready for or have satisfied any tests, or are ready for taking over,
9. providing/approving design for the Works or any part thereof,
10. health and safety matters,
11. otherwise designing/administering/managing the Works.

Thus, it would be inappropriate the author suggests, for the DAAB - in the absence of the Parties' express agreement as to allocation of risk and responsibility as between them - to offer advice on/make proposals on/promote for example:

a. the introduction of a consultant Project Manager when the original contractual arrangements for the Works did not envisage the employment or presence of such a Project Manager,

b. on a management contracting or construction management original contractual arrangement for the Works the repackaging of work,

c. the introduction of a fixed preliminaries regime on a cost-plus original contractual arrangement for the Works.

The reasons for these suggested strictures are that

- these are matters for which the Parties should retain the contractually allocated risk and responsibility, which should not be removed, diluted, or confused in any way by the Dispute Advisory Board's attempts to assist, and

- the Dispute Advisory Board will have nothing approaching the Parties' own knowledge and grasp of the particular project detail.

Useful analogies in the Board's involvement in this advisory role and its approach to discharging it seem to the author to be to the **Peer Review process** associated with the production of an expert report, or the **Reality Testing** role of a party's case by a Mediator. Assistance, informal advice, advice and/or views should, it is suggested, be limited to prompts to the Parties' own deliberations, such as raising relevant questions – for example: 'have the Parties addressed/explored/considered…'

Dispute Adjudication Board Dos

By way of preliminary, it should be noted that FIDIC 2017 provides generally that if either party is dissatisfied with the Engineer's determination it must give a Notice of Dissatisfaction in the required form within 28 days after receiving Notice of the determination. Failing this, it will be deemed to have accepted that determination as final and binding (Sub-Clause 3.7.5).

It is suggested that the DAB should provide timely interim or final decisions/declarations by applying the interpretations/applications that it may previously have shared with the Parties, or adjusted in responses to their feedback, typically on:

1. defects claims
    a. are there such defects?
    b. which of the Parties is responsible for the defects?
    c. how should they be evaluated?
2. variations claims and their evaluation: typically will the evaluation be value or cost driven?
3. prolongation claims and their evaluation: typically this will involve the proper identification and valuation of **project** time-sensitive costs.
4. localised delay claims and their evaluation: typically this will involve the proper identification of **localised** time-sensitive costs.
5. disruption claims and their evaluation: typically this will involve locating efficiency that would have been achieved absent the disruption and efficiency achieved consequent upon the other party's interference.
6. acceleration claims and their evaluation: typically this will involve elements of both delay and disruption and (challengingly) incremental costing.
7. the identification and removal of duplication of recovery - a commonplace and recurring issue.

Dispute Adjudication Board Don'ts

Drawing largely on the experience from the UK law on adjudication, it is suggested that Dispute Adjudication Boards should not:

1. proceed in the absence of jurisdiction, or in excess of it.[6]
2. fail to make decisions within the (statutorily or contractually) stipulated period(s) for so doing.[7]
3. proceed with bias.[8]
4. fail to decide all significant matters referred.[9]
5. otherwise act in breach of the rules of natural justice. [10]
6. fail to satisfy any other contractually stipulated requirements (to the extent that such requirements are not in contravention of any statutory adjudication requirements that may apply).[11]

About the author

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[6] See, for example, Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, per Chadwick LJ, at [52].
[7] See, for example, AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd [2007] EWHC 1360 (TCC), holding at [6] that, in order to be valid, an adjudicator's decision must be completed within this period.
[8]See, for example, AZ v BY [2023] EWHC 2388 (TCC), in which Constable J held, at [20], that the important question was whether the deployment of the without prejudice material gave rise to a question mark over the decision, in the sense of an objective legitimate fear of partiality.
The issue is usually one of apparent rather than actual bias.
[9]See, for example, Dawnus Construction Holdings Ltd v Marsh Life Ltd [2017] EWHC 1066 (TCC).
[10]See, for example, Ridge v Baldwin (No 1) [1963] UKHL 2.
[11] Thus, see in the UK the requirements of section 108 (5) of the HGCRA, providing:
' If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.'

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