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ICCP

Institute of Construction Claims Practitioners

The Increasing Role of Dispute Boards in the International Arena

10 June 2021

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What is a Dispute Board?

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- Experienced and impartial.
- Organised as the project begins.
- Parties shall provide DB with key documents, including the contract and progress reports.
- The DB becomes familiar with:
 - The projects; and
 - The participants.
- Routinely updated in relation to project progress and developments by the parties.
- Joint meetings at regular site visit with senior representative from:
 - Employer;
 - Contractor; and
 - Designer/Engineer.

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What is a DB? (Cont'd)

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- Encourages discussion in relation to key issues that effect:
 - Time (completion);
 - Money (financial claims and financial changes); and
 - Quality (which may have an impact on the above).
- Encourages resolution of issues and disputes at “*job site level*”.
- Advisory opinions (if requested).
- Holds informal meetings as necessary to:
 - Give advisory opinions on potential issues or disputes; and
 - Make decisions on formal disputes.

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Development of DBs

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- 1970s [Not DB, but in the UK, limited use of adjudication in domestic subcontracts]
- 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
- 1998 [HGCRA becomes effective law from May]

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Development of DBs

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- 1999 FIDIC rainbow suite introduces Standing and Ad Hoc Adjudication Boards
- 2004 ICC introduces DB rules (DAB/DRB/CDB)
- 2006 Nine Multilateral Development Banks adopt DBs
- 2014 CI Arb DB rules launched
- 2016 FIDIC to prefer standing DBs for revised 2017 suit
- 2017 FIDIC 2nd Edition – standing DAABs
- 2020 World Bank Strengthening Prevention of Gender-Based Violence (GBV): Contractor Accountability and Disqualification

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Types of Dispute Boards

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- Types:
 - DRB's – Dispute Review Boards;
 - DAB's – Dispute Adjudication Boards;
 - CDB's – Combined Dispute Boards.
- World Bank and other multi-lateral development Banks.
- The Dispute Resolution Board Foundation (DRBF).

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Dispute Board Procedures

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- AAA – DRBs.
- FIDIC 1999 DAB and FIDIC 2017 DAAB:
 - Standing or *ad hoc* (2017 standing for all contracts):
 - Clause 20, DAB Members Agreement and procedural annex.
- ICC Dispute Board Rules:
 - DAB, DRB or CDB.
- ICE Dispute Board Procedures:
 - 84 day Procedure;
 - 28 day HGCRA Compliant Procedure.
- CIArb 2014 DB Procedure:
 - DAB or DRB;
 - DB Rules, Tripartite Agreement and DB precedent clauses.
- JCT DAB Procedure 2021

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The Role of the DB

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- Keep abreast of project activities and developments.
- Visit the site and prepare a site visit report.
- Encourage early recognition of and perhaps early resolution issues.
- When a dispute is referred to the DB:
 - Promptly issue a timetable;
 - Deal with issues and problems immediately;
 - Conduct a meeting/hearing;
 - Complete timely deliberations;
 - Prepare and issue the Decision within 84 days.

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10 Elements of Success

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1. DB members are impartial.
2. DB members sign a three party agreement obligating them to serve both parties equally and fairly.
3. DB is established at the outset of the project, before there are any disputes.
4. The fees and expenses of a DB are shared equally by the parties.
5. DB keeps up to date of the key job developments through:
 - 5.1 relevant documentation; and
 - 5.2 regular site visits.

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10 Elements of Success (Cont'd)

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6. Either party can refer a dispute to the DB.
7. Parties are given equal opportunity to present their cases.
8. Written decisions of the DB are reasoned and implemented promptly by the parties.
9. Project owner, contractors and designer support and engage with the DB.
10. DB members are absolved from any personal professional liability arising from the DB activities.

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Myths and benefits

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- Myth:
 - A DB imposes its own concepts of fairness and equity.
- Reality:
 - DB is required to settle any disputes according to the contract and the applicable law and the parties' submissions.

- Myth:
 - The presence of a DB will promote claims.
- Reality:
 - Quite the opposite as neither party wants to suffer any loss of credibility by submitting a claim. The DB can help the parties deal with difficult issues, avoid disputes, but make prompt decisions in relation to any disputes that do arise.

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Myths and benefits (Cont'd)

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- Myth:
 - The presence of a DB will promote acrimony.
- Reality:
 - The DB process helps to encourage communication and reduces acrimony, and hopefully fosters beneficial working relations.

- Myth:
 - DB's do not work because they lack the formalities of a legal process.
- Reality:
 - The DB follows the project as it evolves. The DB will get a much better understanding than a judge or arbitrator would have retrospectively. Questions from DB members can expose unrealistic positions early on. The DB will apply the contract.

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DRBF Statistical Data Base (1988 to 2005)

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- 1,300 projects worldwide.
- Total construction value US\$ 95 billion.
- Average number of dispute 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\$ 275bn with 85%-98% resolved without arbitration or litigation).

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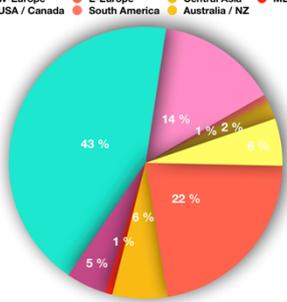


Are DBs Effective?

Statistical Findings : Sample Size 231 Boards

Regions		
Region	No.	%
W-Europe	13	6 %
E-Europe	51	22 %
Central Asia	15	6 %
Far East	11	5 %
Africa	99	43 %
USA / Canada	33	14 %
South America	2	1 %
MENA	2	1 %
Australia / NZ	5	2 %
Total No. Boards	231	
Total Project Value (B US\$)	2,850	

● W-Europe ● E-Europe ● Central Asia ● MENA ● Far East ● Africa
● USA / Canada ● South America ● Australia / NZ



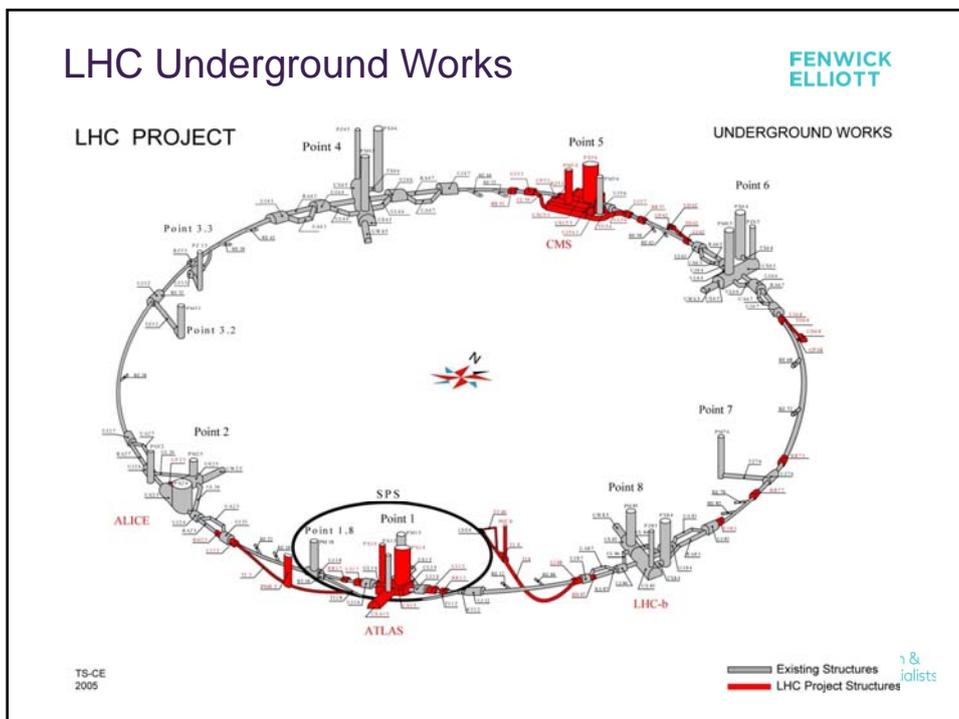
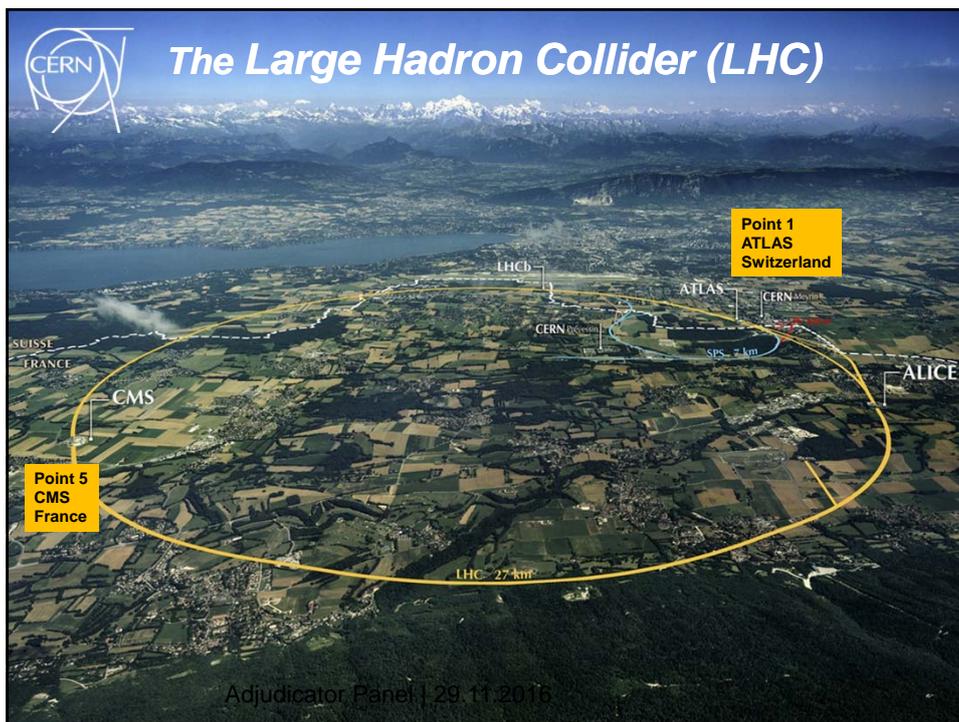
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DRBF 18th Annual International Conference

Tokyo 2018

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CERN's Panel of Adjudicators

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- Hi Luminosity Large Hadron Collider Project (HiLumi or HL-LHC Project).
- New entry points in Geneva and Cessy, so two systems of law and construction codes and procedures.
- FIDIC based.
- Panel of Adjudicators (POA):
 - 5 adjudicators including 1 chairperson;
 - Adaptable range of skill sets.

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FIDIC Appointment of DAB members

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- 1999 Red Book (all of the 2017 versions are similar):
 - Clause 20.2: At the date stated in the Appendix;
 - Within 28 days of the Commencement Date;
 - Either one or three; and
 - Default appointment by the FIDIC President or person nominated by the FIDIC President.
- 1999 FIDIC Yellow & Silver – when a dispute arises (2017, now standing DAAB)
- Tri-party Agreement.
- Procedural rules.
- FIDIC President's list of adjudicators.

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Claims and Dispute Resolution

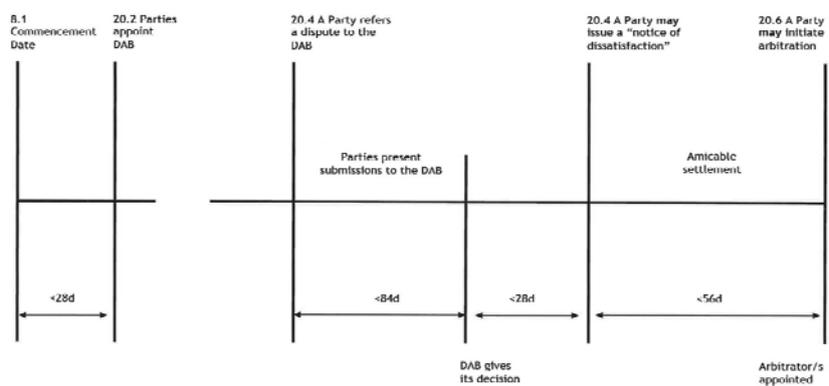
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- Engineering determination under Sub-Clause 3.5 (not every claim).
- **Notice of a claim** (Sub-Clause 20.1 condition precedent).
- Formation of Dispute.
- **Referral** of dispute to the DAB.
- Standing or *ad hoc* DAB?
- **84 day procedure.**
- Written DAB decision.
- **Notice of Dissatisfaction** – 28 days.
- No NOD – Arbitration (Sub-Clause 20.7).
- Referral to arbitration:
 - Amicable Settlement (Sub-Clause 20.5); and
 - Sub-Clause 20.6.

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Dispute Events (Clause 20)

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Typical sequence of Dispute Events envisaged in Clause 20

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FIDIC 2017 – Clauses 20 & 21

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- Claims – Clause 20:
 - Claims (time, money and another relief) are just disagreements;
 - Notice of a Claim (condition precedent), Engineer's initial response;
 - Fully detailed Claim (legal basis CP) contemporary records;
 - Agreement or Engineer's determination; and
 - Monthly updates, assessment and payment.
- Disputes - Clause 21:
 - Formation of Dispute;
 - Referral of Dispute to the DAAB;
 - 84 day procedure;
 - Written DAAB decision;
 - Notice of Dissatisfaction – 28 days; and
 - Arbitration:
 - NOD – Amicable Settlement - Arbitration (Sub-Clause 20.7); and
 - DAAB compliance – Arbitration, and interim measures.

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Enforcement of DB Decisions

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- ICC Case 10619 concerned the FIDIC Red Book, Fourth Edition, Clauses 11 and 67. There were four Engineers' Decisions. The Employer ignored them. The matter was referred to Arbitration. The Arbitrators enforced immediately, but did not enforce the two that were out of time.
- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)*. There are a number of cases in Singapore relating to the enforcement of Arbitration Awards arising from DAB Decisions:
 - Last DB Decision not honoured;
 - Notice of Dissatisfaction issued;
 - Interim Award issued for immediately payment;
 - Should Tribunal have reviewed or revised?
 - Should the DAB have dealt with the non-payment as a second dispute?

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Questions

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