



1º Seminário Internacional de Dispute Boards

Os Dispute Boards nos Contractos FIDIC
São Paulo 7 e 8 de agosto de 2014



Introduction to FIDIC

- Founded in 1913.
- Composed of national associations of consulting engineers.
- Promotes and implements the consulting engineering industry's strategic goals.
- Members endorse FIDIC statutes and policy statements and comply with FIDIC Code of Ethics.
- Develops and promotes business practice: Business Integrity Management; Project Sustainability Management; Quality Management, Risk Management.



Introduction to FIDIC

Organises:

- Extensive programme of seminars and conferences.
- International Training Programme (courses; workshops)
- Capacity Development Programme (accredited trainers, training suppliers, programmes and events).

Publishes:

- Business practice contracts
- International professional services agreements
- **Works Contracts**



Background to FIDIC Contracts

- First FIDIC Works Contract was published in 1957 – “*Conditions of Contract (International) for Works of Civil Engineering Construction*” – known as the “Red Book”.
- Second edition was published in 1969 & reprinted in 1973.
- The 1973 version followed closely the fourth edition of the English “ICE Conditions of Contract”.
- Thus, as in the UK, an important role was reserved for “*The Engineer*”



Background to FIDIC Contracts

- Third edition of the Red Book published in 1977
- First edition of the FIDIC Yellow Book for mechanical and electrical works in 1963, with an emphasis on testing and commissioning and more suitable for the manufacture and installation of plant.
- The second edition was published in 1980.
- New editions of both the Red and Yellow Books were published in 1987.



Background to FIDIC Contracts

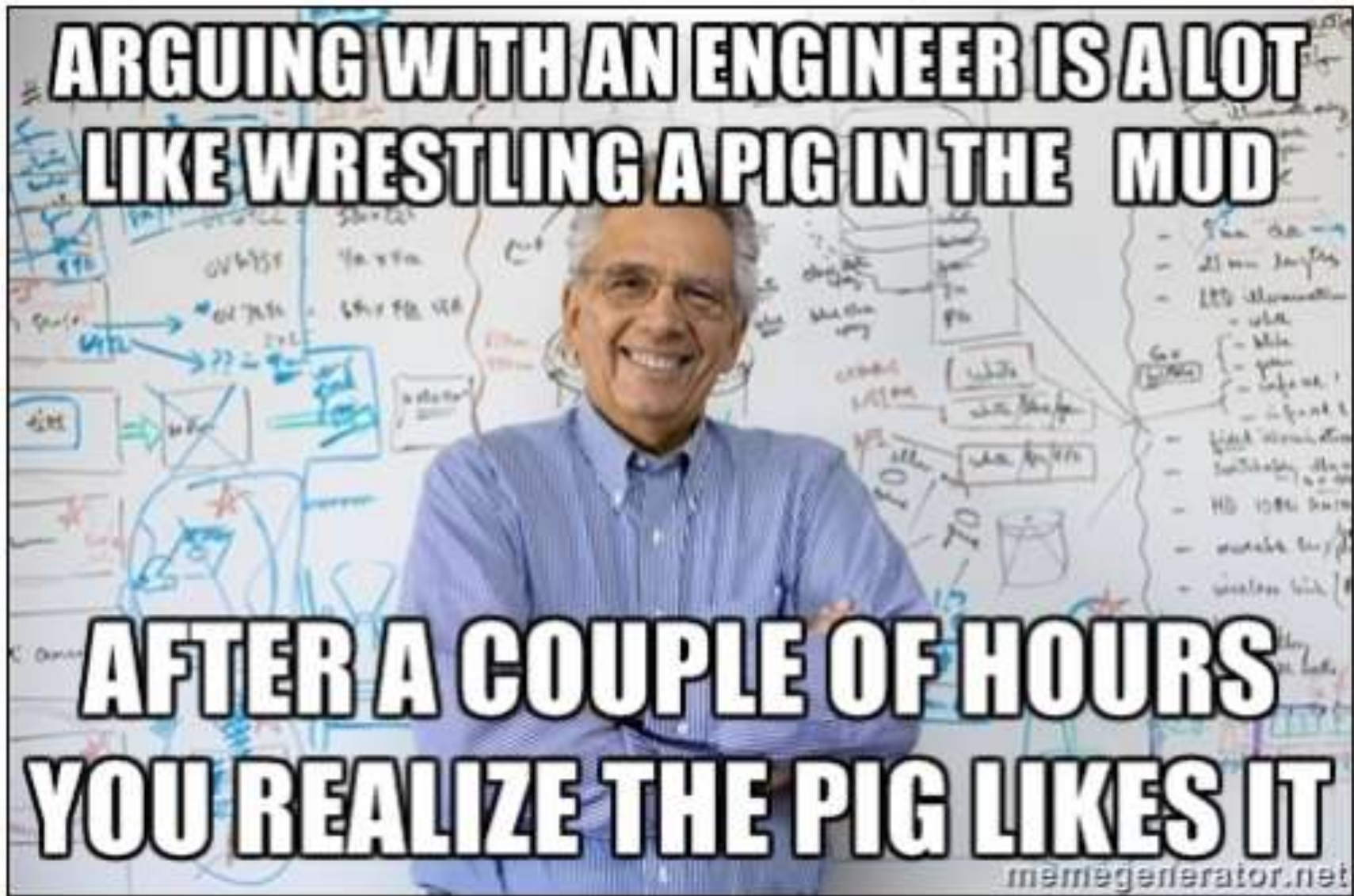
- A Red Book 4th Edition Supplement was published in 1996 which gave an option for a Dispute Adjudication Board.
- Conditions of Contract for Design-Build and Turnkey (1995 Orange Book).



Background to FIDIC Contracts

- Updates of Red, Yellow and Orange Books were published in 1999 as “Construction”, “Plant and Design-Build” and “EPC/Turnkey” Contracts.
- Aims:
 - standardise the terminology;
 - make the documents as user-friendly as possible,
 - solve the problem of the Engineer not seen as acting impartially while he was employed and paid by the Employer.



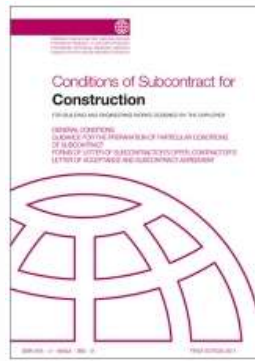
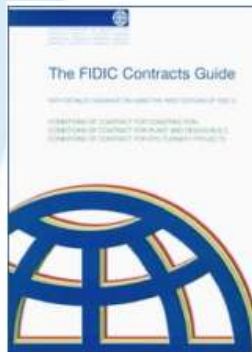
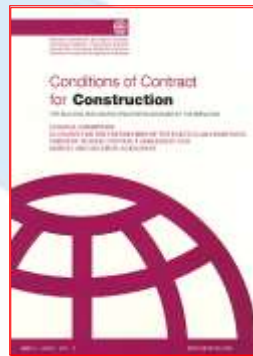


Background to FIDIC Contracts

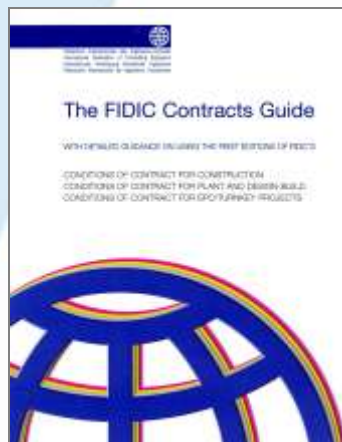
- The express requirement to be impartial was also removed, although when determining value, costs or extensions of time the Employer's Representative had to *“determine the matter fairly, reasonably and in accordance with the Contract”*.
- Need to submit matters to the Engineer for his “Decision” prior to an ability to pursue a dispute, was eliminated.
- In its place - an independent Dispute Adjudication Board (DAB).



FIDIC now publishes 7 standard Works Contracts & distributes 25000 copies each year



Since May 2005
Multilateral Development Banks
use the General Conditions of
the MDB Harmonised Edition of
the FIDIC Construction Contract



MDB Supplement to Contracts
Guide is also available



FIDIC in Brazil

- Associação Brasileira de Consultores de Engenharia (ABCE)

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- Red, Yellow and Silver Books available in Portuguese since June 2011 FIDIC/ICC Conference in São Paulo.



Conference website

: www.fidic2014.org



The Impact on Dispute Boards

- The 1999 suite and the Multilateral Development Banks, including IDB.
- ICC Rules
- JICA and MCC.
- Romania
- Peru
- Contractors' overseas experience brought home (France).
- Difference/ Similarities with UK style adjudication.



Dispute Adjudication Board Principles

- Allow parties to refer disputes to the decision of either one or three impartial individual(s).
- Parties should not disregard the possibility to seek an opinion from the DAB on any matter to avoid a potential dispute.
- No formal notice of dispute is required to make a formal referral.
- The DAB is then required to give notice of its decision, including reasons within 84 days.



Dispute Adjudication Board Principles

- The DAB is to be named by the date stated in the Appendix to Tender.
- The DAB shall conduct regular Site Visits and shall be available on 28 days' notice.
- The appointment of the DAB (including each member) shall expire when the Discharge is submitted.



Dispute Adjudication Board Principles

FIDIC Editions 1999 and MDB

- Standing Dispute Boards
 - FIDIC Construction Form, MDB Harmonized Edition and the Design Build and Operate (DBO)
- Ad hoc Dispute Boards
 - FIDIC the Plant and Design-build or the EPC Turnkey Project Forms



Dispute Adjudication Board Principles

- Composition of the 3-person Board
 - construction professionals?
 - lawyers?
 - A balance of disciplines?
- Composition of the 1-person Board
 - construction professionals?
 - lawyers?



Dispute Adjudication Board Principles

- DAB services may be terminated at any time by agreement between the Parties but not by a Party acting alone (42 days notice).
- For failure of the DAB to comply with Conditions of the Dispute Adjudication Agreement.
- Sanctions
 - refund of fees and of abortive costs to the Parties.



Dispute Adjudication Board Principles

- The legal status of the DAB/DB is found in the Contract itself.
- Under the FIDIC forms of Contract the Parties sign on to a two-tiered dispute resolution process.
- The first tier is found in Clause 20 where the Parties submit to the DAB/DB process.
- If that fails the dispute passes to the second tier, arbitration.
- The DAB decision is binding unless and until there is an arbitral Award.



Dispute Adjudication Board Principles

The Standing (Full Term) DAB

- Retainer Fee
 - be available on 28 days' notice
 - becoming and remaining conversant with all project developments
 - all office and overhead expenses including secretarial services, photocopying and office supplies



Dispute Adjudication Board Principles

The Standing (Full Term) DAB

- Daily Fee
 - travel up to two days in each direction,
 - each day spent reading submissions, attending hearings, preparing decisions, or making site visits.
- Reasonable Expenses
- Fixed for 24 months



DAB/DB working

The method to appoint the DAB is set out in Sub-Clause 20.2 *[Appointment of Dispute Adjudication Board]*

- The DAB shall comprise either one or three suitably qualified persons.
- If three persons, each Party shall nominate one member for the approval of the other.
- The Parties shall consult both members and shall agree upon the third member – the chairperson.



DAB/DB working

Finding DAB members

- FIDIC President's List of Approved Dispute Adjudicators
- ICC International Centre for ADR
- Syntec-Ingénierie FIDIC French National List
- VBI FIDIC German National List
- AJCE FIDIC Japanese National List
- Brazilian National List?
- AACE - Certified Forensic Claim Consultant (CFCC)



DAB/DB working

If the Parties fail to appoint the method is set out in Sub-Clause 20.3 *[Failure to Appoint the DAB]*.

- The Parties fail to agree upon the appointment.
- Either Party fails to nominate a member.
- The Parties fail to agree upon the appointment of the third member.
- The appointing entity, upon the request of either or both of the Parties and *after due consultation* with both Parties, shall appoint a member or the DAB. *This appointment shall be final and conclusive.*



DAB/DB working

If the Parties fail to appoint the method is set out in Sub-Clause 20.3 *[Failure to Appoint the DAB]*.

- Each Party shall be responsible for paying one-half of the cost of the appointing entity.



DAB/DB working

Dispute Adjudication Agreement

- The DAB enters into a contract with the Parties (TPA)
- The terms of payment and the undertaking of the Employer and the Contractor to be jointly and severally liable to ensure that the DAB is paid.



DAB/DB working

The Standing DAB/DB Responsibilities as a member of the Project team.

- Be available for site visits and hearings;
- Become and remain conversant with project developments;
- Treat the details of the Contract and DAB activities as private and confidential;
- Be available to give advice and opinions;
- Conduct regular visits to the site and meet with the Parties and the Engineer to exercise its role in dispute avoidance and establish procedures.



DAB/DB working

- DAB shall visit the site at intervals of not more than 140 days, including times for critical construction events;
- at request of either the Employer or the Contractor
- timing and agenda for each site visit to be agreed jointly by the DAB and the Parties or in the absence of agreement, be decided by the DAB.
- site visits shall be attended by the Employer, the Contractor and the Engineer.



DAB/DB working

- The DAB to make special effort during regular visits to the site to promote open discussion between the Employer, the Contractor and the Engineer concerning problems causing delays to progress of the Works and disputes that may arise.
- The DAB to encourage the Parties to seek advisory opinions in respect of problems that occur on the Site.
- The DAB should produce its site visit report before leaving the Site.
- The review of Site Visit Report by Parties and the Engineer.



DAB/DB working

- The DAB must hold itself available to the Employer and the Contractor to give advisory opinions if asked to do so.
- Critical for dispute avoidance role
- Contractor and Employer should avail themselves of this role, and if not;
- DAB should offer.
- A successful DAB is one that never receives a referral.



DAB/DB working

The referral should be a reasoned statement of case submitted by the claimant.

DAB to review the referral in terms of scope and complicity;

- does it possess the specialized knowledge necessary in order to decide?
- will the issue require a hearing?
- decide on the basis of its own knowledge of the Contract and on the document exchanges
- will require one or two submission exchanges?
- Procedural Time Table (84 days)



DAB/DB working

Article 8 of the Procedural Rules, DAB powers and duties.

- Establish the procedure to be applied in deciding a dispute.
- Decide upon the DAB's jurisdiction, and the scope of the dispute.
- Conduct a hearing as it thinks fit.
- Take initiative to ascertain the facts and matters required for the decision.



DAB/DB working

Article 8 of the Procedural Rules, DAB powers and duties.

- Make use of its own specialist knowledge.
- Decide upon provisional relief such as interim or conservatory measures.
- Open up, review and revise certificates, decisions, or determinations.



DAB/DB working

The DAB must determine a time table that will allow:

- At least one exchange (more probably two) of position papers.
- The time required to conduct the oral hearing
- The time required to write its decision.
- The DAB to comply with time for giving its decision.



DAB/DB working

The DAB to determine:

- That it is in possession of sufficient facts in order to make its decision.
- If the DAB has been unsuccessful in leading the Parties to resolve their differences by consultation, it is in a position to use outside experts to resolve the question.
- To take initiatives in ascertaining the facts which might involve referring the matter to outside experts.
- All the above within the 84 day period allotted.



DAB/DB working

The DAB to determine the extent

- That it admits evidence statements without opportunity to hear and question witnesses
- It may request “hot tubbing” of (or consultations between) experts where conclusions or opinions reached are in conflict.



DAB/DB working

Site visit before hearing.

The DAB may require a prehearing site visit if:

- If physical conditions are the cause of the dispute.
- If defective workmanship is the fundamental cause of the dispute.
- Instruct conservatory measures.



DAB/DB working

Attendees.

The DAB may decide to limit the persons attending the hearing or require that oral presentations be made by persons familiar with or resident at the site:

- Presence of lawyers?
- Presence of third party experts.



DAB/DB working

Decision.

- It should contain at least the following elements;
 - a statement establishing its jurisdiction
 - a description of the dispute(s) and the background(s)
 - the claimant's position(s)
 - the respondent's position(s)
 - the DAB analysis and findings, and
 - the decision(s).

More than an arbitral Tribunal, DAB is “selling” its decision



DAB/DB working

Enforcement of Decisions.

- The DAB decisions are not directly enforceable.
- Contractually a decision is immediately “binding” on the Employer and the Contractor.
- 28 day notice of dissatisfaction or a decision becomes “final and binding.” Sub-Clause 20.4 [*Obtaining a Dispute Board’s Decision*].
- Unless and until there is an arbitral award the Employer and the Contractor shall comply.



Concluding Remarks

Avoiding problems

- ✓ Appoint the DAB in a timely manner
- ✓ Appoint qualified DAB Members
- ✓ Don't let disputes accumulate

FIDIC in the 2nd Editions (2015)

- More accent on provisions for dispute avoidance
- May adopt the ICC DAB Procedural Rules



MANY THANKS!

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