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FIDIC Dispute Avoidance and Adjudication Forum

Practice Note I

Dispute Avoidance - focusing on dispute boards



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FIDIC Contract Services

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About the Forum

FIDIC set up a Dispute Avoidance and Adjudication Forum, which convened for the first time at the FIDIC Global Infrastructure Conference in Geneva, in 2022. Since then, the Forum is hosted by FIDIC twice a year: at the FIDIC Global Infrastructure Conference; and the FIDIC International Contract Users Conference. It is intended to be a regular Forum at FIDIC conferences in the future.

About the Practice Note

As part of the Forum, FIDIC set up a working group to prepare a Practice Note on dispute avoidance. The working group consists of Daduna Kokhreidze, General Counsel at FIDIC, and FIDIC President's List members:

- Yann Schneller, avocat and partner at Cartier Meyniel Schneller; and
- Taner Dedezeade, barrister and partner at Howard Kennedy LLP

The working group prepared a questionnaire, which was sent out to all members of the FIDIC President's List, to obtain members' views on how dispute avoidance works in practice. The key questions put to them were as follows:

1. How/when does the dispute board make the parties aware of its dispute avoidance role?
2. When should dispute avoidance ideally take place?
3. Where should dispute avoidance take place?
4. What matters most lend themselves to dispute avoidance?
5. What are the most effective techniques for dispute avoidance?

The working group considered the answers given to these questions by the following 34 members of the FIDIC President's List:

Adriana Spassova, Bulgaria; Anton Saad, Jordan; Ashish Gurav, India; Barry Manie, United Kingdom; Barry Tozer, Australia; Brian Barr, England; Bwalya Lumbwe, Zambia; Cagdas Evren Bayrak, Qatar; Derek Ross, United Kingdom; Edin Begovic, Bosnia and Herzegovina; Eugenio Zoppis, Italy; Eyad Al Ali, Jordan; Fortune Murata, Malawi; Geoffrey Smith, France; Gerard Monaghan, Ireland; Giovanni Di Folco, Romania; Hugo Fonseca, Portugal; James Dow, United Kingdom; John Papworth, United Kingdom; Kevin Spence, South Africa; Mark Entwistle, United Kingdom; Metehan Caglar Sonbahar, United Kingdom; Nigel Davies, United Kingdom; Nino Tsaturova, Georgia; Paul Taggart, Italy; Prasath Sanjeewa, Sri Lanka; Robert Werth, Germany; Sean Gibbs, United Kingdom; Siobhan Fahey, Ireland; Suzanne Rattray, Zambia; Thierry Linares, France; Ugo Galli, Romania; Vincent Leloup, France; Volodymyr Yaremko, Ukraine.

Although those listed above responded to the questionnaire, the wording of this Note has not been approved by them.

The Practice Note has been reviewed by Prof Dr Nael G. Bunni, John Papworth and Vincent Leloup, who are all experienced dispute board members. The latter two are members of the FIDIC President's List of Adjudicators.

A draft of the Practice Note was produced for discussion at the Dispute Avoidance and Adjudication Forum during the FIDIC Global Infrastructure Conference in Singapore 2023, and these discussions have influenced the final wording of this Note.

The Practice Note has been produced under the general direction of FIDIC and with the support of FIDIC Secretariat.

FIDIC very much appreciates the time and effort devoted by all of the persons that have contributed to the Practice Note.

This Practice Note may be updated or superseded by outcomes of the discussions of future forums.

Purpose

FIDIC has prepared this Practice Note to raise awareness of the dispute avoidance function of dispute boards for its Contract Users and Adjudicators and to ensure that best practice is adopted in the future. Avoiding disputes as early and as quickly as possible is in the best interests of the project, the parties, and those involved in a funding capacity, whether funding the project or funding the dispute resolution process.

Message from the FIDIC President and CEO

We are delighted that FIDIC has published this practice note to highlight awareness of the dispute avoidance function of dispute boards for FIDIC contract users and adjudicators and to ensure that best practice is adopted going forward.

As the global representative voice for the engineering sector, FIDIC is rightly proud of the fact that its international construction contracts are extremely well regarded and respected around the world and are increasingly being seen as the ‘gold standard’ for all those looking to undertake construction and infrastructure projects in a fair and equitable manner.

Dispute avoidance is critical when it comes to successful project delivery and this practice note should be of enormous assistance to our industry in that regard. Avoiding disputes as early and as quickly as possible is in the best interests of the project itself, as well as all those involved with it and we would strongly recommend that all project stakeholders take on board and act on the content of this helpful note.

The FIDIC President’s List of Approved Dispute Adjudicators is also available for the industry to use when looking to avoid disputes. Any party wishing to name or appoint an individual to act as adjudicator or member of a DB, DAB, DAAB or Adjudicator may consult this list free of charge to decide who to name or appoint as member or adjudicator.

We would also pay tribute to the important work of the FIDIC Dispute Avoidance and Adjudication Forum working group in preparing this practice note. The forum, which convened for the first time at the FIDIC Global Infrastructure Conference in Geneva, in 2022, is now hosted by FIDIC twice a year and will be a regular forum at FIDIC conferences in the future, thereby ensuring that FIDIC is able to keep abreast of the latest legal and contractual developments to keep the information we provide in this area as up to date and relevant as it can possibly be.

Once again, congratulations to all those involved in the compilation of this practice note.

Anthony Barry, President, FIDIC

Dr Nelson Ogunshakin OBE, Chief Executive Officer, FIDIC

Foreword

I am honoured to have been asked to provide the Foreword for FIDIC's Practice Note on Dispute Avoidance.

My passion for Dispute Avoidance started sometime towards the middle of the 1990s when I was asked by representatives of both the employer and the contractor on a very large construction project in Dublin, immediately after the project's commencement, to act as a Standing Arbitrator, to whom all references to arbitration on the project would be directed. I had never been asked to act in such a capacity before, but, by that time, I had already acted as an arbitrator in a significant number of domestic and international disputes. It was a novel idea to me at the time and I eagerly accepted the role. I was provided with a set of the project's documents with which I had to acquaint myself and was asked to visit the site periodically and attend monthly site meetings. However, during those meetings, I was never required to make any contribution. I was paid a monthly retainer fee, but, ultimately, the project was completed with no reference to arbitration. At the opening ceremony two years later, to which I was invited, I asked those that had employed me whether there were any disputes on the project and, if so, what happened that these disputes were not referred to arbitration. I also asked them if they felt that the money paid to me was worthwhile. Their answer was startling. They confirmed that, yes, they did have numerous disputes on the project, but, in each case, the parties were fairly sure of what my answer would be, given my involvement throughout the project and, therefore, the disputes were resolved by the parties themselves without a referral to arbitration. Further, they informed me that, as a result of resolving the disputes themselves, they did not incur any further cost and/or time and, therefore, paying my retainer fee in fact kept costs of dispute resolution to a minimum.

What the parties had described fitted perfectly with one of the most quoted lines, but rarely in its original context, from the celebrated seventeenth century poet, John Milton. It was in the year 1655 that he wrote Sonnet 19, in his epic poem, *'Paradise Lost'*: ***"They also serve who only stand and wait"***.

Shortly thereafter, in 1995, FIDIC published its Orange Book for design/build projects, in which it introduced the role of the Dispute Adjudication Board, DAB, as a substitute for the role of the Engineer when dealing with disputes between the contractor and the employer. Then, almost immediately, FIDIC published its Supplement to the Fourth Edition of the Red Book in November 1996, through which it provided for the establishment of a DAB in that Form of Contract, as a replacement for the Engineer's traditional role of a decision-maker.

The concept of the DAB was then adopted in FIDIC's 1999 Suite of Contracts with the idea of a standing DAB being implemented only in the 1999 Red Book. However, the idea of Dispute Avoidance was planted in that Red Book in a small paragraph in Sub-Clause 20.2, which stated that ***"If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party."***

The idea of Dispute Avoidance gradually gained popularity and the small paragraph of the 1999 Red Book became a full Sub-Clause in FIDIC's Conditions of Contract for Design, Build and Operate Projects, the Gold Book, in 2008, Sub-Clause 20.5.

Subsequently, in the 2017 Suite of Contracts, and in its Reprint of 2022, it was embedded in Sub-Clause 21 and, perhaps more importantly, the Dispute Adjudication Board was re-named as Dispute Avoidance/Adjudication Board, DAAB.

Thus, by being alert to the process of the manifestation of a dispute, the DAAB would deal with disagreements contemporaneously when conflicting views were expressed by the parties. Such disagreements and conflict are settled as soon as possible after they arise rather than being left to fester and develop into intransigent disputes.

This Practice Note on Dispute Avoidance highlights that process and is both excellent and an important addition to the literature available on Dispute Avoidance and Dispute Boards in general. It raises the awareness of the Construction Trinity regarding the best available practice in avoiding disputes effectively and efficiently.

By firstly seeking responses from the members of the FIDIC President's List of Approved Dispute Adjudicators to specific questions on Dispute Avoidance before then drawing up the Practice Note, the working group has impressively ensured that all aspects of the Dispute Avoidance function have been properly addressed and covered in the Practice Note.

Furthermore, the Note has an important section on the benefits of Dispute Avoidance which must be read and understood by all those involved in a construction project. The working group set out five tasks for the Dispute Board members to follow in order to accomplish this successfully. The working group's idea to present these tasks is particularly insightful as it puts Dispute Avoidance in context and helps the user to navigate their way to a successful outcome. This insight is applauded!

The Practice Note, in my opinion, is a document that must be studied thoroughly and implemented fully on every project. It amplifies and details the way that a DAAB can achieve its obligation and provides guidance on the Dispute Avoidance function of dispute boards for its Contract users and adjudicators and ensures that the best practice is adopted in the future. Avoiding disputes as early and as quickly as possible is in the best interests of the project itself, as well as everybody involved with it.

Prof Dr Nael G. Bunni

Practice Note

Introduction

1. Construction projects are sensitive to an extremely large matrix of hazards and risks due to many of their inherent characteristics. These characteristics include: the extensive time and cost involved; the competitive tendering procedures employed; the uniqueness of each project in its design and construction methods; and many others. The hazards and risks give rise to the inevitability of claims for time, money or other relief or entitlement. In its standard forms of contracts, FIDIC is continually reviewing and refining which processes are the most effective to deal with such hazards, risks and the claims that emerge.
2. FIDIC adopts a multi-tier dispute resolution mechanism which is designed to avoid disputes or to resolve them as early as possible, ideally during the currency of the project. A key feature of the multi-tier dispute resolution process is the role of the dispute board in that process.
3. The most effective standing dispute boards will help facilitate the parties' avoidance of disputes and where that is not possible (or where there is an ad hoc dispute board¹) to engage in the expeditious, efficient, and cost-effective resolution of those disputes².
4. While the Engineer also plays a crucial dispute avoidance role, this Practice Note concentrates on the dispute avoidance role of the standing dispute board both under the 1999 and the 2017 Forms, including the 2022 Reprint, and does not affect the parties' obligations and contractual provisions, which should be adhered to.

Dispute Avoidance

5. FIDIC introduced the standing dispute board, with dispute avoidance function, in 1995 with the publication of the FIDIC Orange Book³. In 1996, FIDIC published a supplement to the FIDIC 1987 4th edition⁴, which adopted a standing dispute board. Then followed the FIDIC 1999 Red Book⁵ and a slightly enhanced dispute avoidance role in the Pink Book⁶. In 2008, the Gold Book⁷ introduced a separate Sub-Clause dedicated to dispute avoidance in Sub-Clause 20.5 and still more prominence was given to dispute avoidance in the 2017 Forms, which is maintained in the 2022 Reprint. In 2017, there was an addition of an "A" for Avoidance, making the 'DAB' a 'DAAB' and it became mandatory for the parties to appoint a standing DAAB across the 2017 FIDIC Rainbow

¹ FIDIC Yellow and Silver 1999 Books.

² See FIDIC Red, Yellow or Silver Book, 2017 (2022 Reprint) FIDIC DAAB Procedural Rules, Rule 1, Objectives.

³ FIDIC Conditions of Contract for Design-Build and Turnkey, First Edition, 1995.

⁴ Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition, 1987.

⁵ FIDIC Conditions of Contract for Construction, for Building and Engineering Works designed by the Employer, first Edition, 1999.

⁶ Conditions of Contract for Construction (Multilateral Development Bank Harmonised Ed) for Building and Engineering Works designed by the Employer, first Version 2005, second Version 2006 and third Version 2010.

⁷ FIDIC Conditions of Contract for Design, Build and Operate Projects (2008 Gold Book).

Suite, maintained in the 2022 Reprint. In addition, FIDIC rendered the importance of the appointment of a dispute board as one of its Golden Principles⁸. The World Bank in their Particular Conditions (COPA)⁹, which supplement the FIDIC General Conditions of 2017 Forms as Reprinted in 2022, went one step further by making the appointment of the standing DAAB a condition precedent to the commencement of the Works.

6. One of the pre-eminent functions of a standing dispute board (which is beyond the role of an ad hoc dispute board) is to engage the parties in dispute avoidance. In the FIDIC 1999 Red Book and Pink Book, the parties were entitled to seek opinions from the dispute board, and, in the 2008 Gold Book and 2017 Forms, the term “opinions” was widened to provide ‘informal assistance’. The contract provisions are supported in the Procedural Rules for Dispute Adjudication (Avoidance) Board. For full details of the contractual provisions and the procedural rules applicable to dispute avoidance, see the relevant FIDIC Contracts. We have reproduced the key provisions in Appendix 1 to this Practice Note.
7. In some cases, dispute avoidance is used successfully. In other cases, parties either are not aware of the dispute avoidance function of the dispute board or underestimate the value of appointing a dispute board at an early stage, primarily for reasons of costs. However, experience has shown that the benefit of appointing a dispute board often outweighs the cost involved.

Benefits of dispute avoidance

8. All of the participants on a project are encouraged to play a proactive role in avoiding disputes as to do so would likely result in significant benefits including:
 - a. maintaining cashflow,
 - b. enabling real-time project management and the successful completion of projects,
 - c. clearing differences at an early stage, before positions crystallise, therefore avoiding disputes from piling up,
 - d. avoiding the costs and time of resolving conflict and in particular in arbitration,
 - e. avoiding the need to be engaged in the enforcement of dispute board decisions and/or arbitral awards,
 - f. eliminating or minimising the damage to business relationships,
 - g. minimising harm and stress on project participants.

⁸ See Golden Principle 5, FIDIC Golden Principles available from FIDIC website https://fidic.org/sites/default/files/_golden_principles_1_12.pdf.

⁹ See for example the World Bank's Standard Procurement Document, Request for Proposals, Works, July 2023, Section IX – Particular Conditions (PC) Sub-Clause 8.1 Commencement of Work.

Main drivers for success and failure of dispute avoidance

9. In practice, the main drivers for successful dispute avoidance include:
 - a. trust and confidence in the dispute board,
 - b. parties commitment to the process,
 - c. open and constructive communication between the dispute board and the parties,
 - d. integrity, knowledge, qualifications, work ethic, experience and expertise of the dispute board,
 - e. adoption by the dispute board of a proactive approach to resolve matters quickly,
 - f. having decision-makers from each party with relevant knowledge and experience present during discussions,
 - g. acting in good faith¹⁰, without hidden agendas or engaging in negative posturing,
 - h. the adoption of early warning mechanisms by the parties¹¹.
10. The main obstacles preventing successful dispute avoidance include:
 - a. pressure on government officials, including audit pressure, preventing the settling of disputes without a final arbitration or court decision,
 - b. internal procedures which prohibit admission or agreement,
 - c. internal pressures on parties contract teams to deliver financial results,
 - d. lack of availability of the dispute board members or the parties,
 - e. no decision-makers from each party present and engaged in discussions,
 - f. parties' lack of knowledge and familiarity with dispute avoidance and its benefits, and the resulting perception that the dispute board constitutes an unnecessary cost,
 - g. hidden agendas, incompetence and inexperience of the parties or the dispute board, poor management and/or poor performance of a party or parties,
 - h. parties being entrenched in their views with a lack of flexibility,
 - i. litigation culture in certain jurisdictions.

¹⁰ See for example Sub-Clause 6.3 of the General Conditions of DAAB Agreement included as Appendix in the 2017 FIDIC Suite of Contracts, including the Reprints 2022.

¹¹ Such as that provided in Sub-Clause 8.4 [Advance Warning] of the 2017 Forms of Contract, including the 2022 Reprint.

Best Practice tasks and techniques

The Dispute Avoidance Working Group has identified 5 core tasks and techniques which if followed will likely result in better awareness of the dispute board's avoidance role and more successful avoidance of disputes.

Task 1: Raising the parties' awareness of the dispute board's dispute avoidance role as early as possible

11. Bringing parties together in the pre-commencement phase helps both parties to build rapport, build confidence in each other and to focus on mutual success. It is recommended that in the first instance, the dispute board should convene an 'introductory' or 'kick-off' meeting as soon as practicable after it is appointed to explain to the parties its dispute avoidance role. Such 'introductory' or 'kick-off' meeting should preferably be in-person or, if that is not an option, by video-conference and it is suggested that the dispute board prepares a presentation to explain, amongst other matters, how dispute avoidance works. The presentation could be delivered orally and then a written version could be given to the parties after the meeting so that it can be referred to later during the progress of the Works. The presentation should include reference to:
 - a. contract provisions and applicable dispute board procedural rules,
 - b. how to implement dispute avoidance, with examples (see Task 4 below for examples of what matters are appropriate for dispute avoidance),
 - c. how dispute avoidance practice and procedure differs from the formal referral process,
 - d. how dispute avoidance techniques and procedures can be used to successfully avoid disputes early on in the project.
12. It is also suggested that, throughout the project, the dispute board should indirectly remind the parties that it can assist in the avoidance of disputes by:
 - a. including "matters of concern" in the agenda for site visits,
 - b. maintaining a proactive dispute avoidance spirit when communicating with the parties,
 - c. switching on the 'dispute avoidance radar'. This may lead to the dispute board potentially flagging up issues before they crystallise into disputes,
 - d. suggesting to the parties that they may jointly ask the DAAB for an opinion, if and when a candidate for dispute avoidance arises,
 - e. reminding the parties to comply with their reporting requirements under the contract. There are often mines of useful information contained in Monthly Progress Reports relating to contentious matters that may serve as an early warning mechanism to the dispute board to avoid disputes,

¹² See Rule 3.2 under the 2017 Suite of Contracts, including the 2022 Reprint.

- f. holding regular 'risk workshops' to identify risks and to develop mitigation strategies.

Task 2: Building and maintaining trust with the parties

13. The dispute board should build and maintain trust with the parties and this may be achieved by dispute boards demonstrating and, where possible, communicating to the parties the following qualities:
- Impartiality and independence: the dispute board should make the parties aware that it is impartial and independent and behave as such. It should always provide the parties with an equal opportunity to present their case. It should always be cautious in expressing its own views but should not shy away from doing so if jointly requested by the parties.
 - Effective communication: the dispute board should promote open dialogue to create an environment of trust and inclusion. A clearly defined and well-explained communication policy could be established at the first meeting and could accordingly be applied during the project to show the dispute board's availability and willingness to listen to the parties. The dispute board should always listen to the parties carefully and ask questions to ensure that the parties views are fully understood.
 - "Best for project approach": the dispute board should explain that it is part of the project team, and that its overall goal is the successful completion of the project.
 - Gaining respect: the dispute board should demonstrate a very strong grasp of the technicalities of the project itself, the FIDIC Contracts and the construction industry to gain respect from the parties.
 - Professionalism: the dispute board should always be respectful, calm and courteous to all stakeholders.
 - Quality of informal opinions and decisions: the dispute board should, when required, draft clear and well-reasoned opinions and decisions. It should address all of the parties' arguments – especially those of the losing party – as ignoring a party's argument may undermine trust.

Task 3: Determining when/where dispute avoidance should ideally take place

14. The obvious and ideal place to provide dispute avoidance is when all the relevant representatives of each party with authority to make decision are present in one location, preferably physically or via teleconference or video-conference. Often site visits would be ideal. Dispute avoidance can also be carried out via emails.
15. The dispute board should also remind the parties that dispute avoidance is an ongoing process with the dispute board actively looking for opportunities to encourage the parties to make a joint request for an opinion (see Task 5 for advantages of opinions) or to offer to provide informal assistance, where appropriate, and subject to the parties' agreement. When a candidate for dispute avoidance has been identified, the dispute board should set an appropriate timetable for discussion of the issue at hand to maximise the possibility of avoiding the identified dispute.

16. The dispute board should not be too rigid and should make it clear to the parties that they do not have to wait for the next site visit to request informal assistance, if in the intervening period there are matters that can be resolved informally. The dispute board should make clear to the parties that it can be approached at any time. The dispute board, upon reading the periodic reports received from the parties between site visits, may identify possible disagreements that may be amenable to dispute avoidance. Accordingly, as the potential for dispute avoidance might subsequently arise, the board members should ask relevant questions. Any opportunity to avoid disputes should be flagged to the parties and explored.
17. If there are no matters identified between site visits, then it would be good practice at the next site visit to consider as part of the agenda if there are any new matters which could potentially lead to a dispute without trying to introduce or make the parties' case.
18. Whilst it is never too late to assist the parties to avoid a formal dispute, the likelihood of avoiding disputes tends to decrease, as they progress through the different tiers of the multi-tier dispute resolution mechanism. Accordingly, the dispute board should ideally try to avoid disputes as early as possible in that process, before the parties become entrenched in their views.

Task 4: Identifying and communicating to the parties examples of matters that are appropriate for dispute avoidance

19. Examples of matters that may be candidates for dispute avoidance include:
 - a. Questions of contract interpretation or understanding of the Contract's substantive or procedural provisions, including the proper interpretation of the BoQ and its specifications. The dispute board can offer informal guidance to help the parties better grasp their respective responsibilities and rights, thereby pre-empting possible conflicts.
 - b. Whether an Engineer's instruction constitutes a Variation.
 - c. Evaluation of the additional time and cost caused by a Variation.
 - d. Design responsibility and liability. For instance, whether different tiers of liability exist and where fitness for purpose is required.
 - e. Contractual and/or legal merit of claims.
 - f. How a particular event encountered on Site would be dealt with under the contract.
 - g. What evidence of cost incurred would be considered sufficient by the dispute board for seeking compensation and how it should be presented.
20. However, the list mentioned above is not exhaustive. All matters that could cause disagreement may be candidates for dispute avoidance. The parties and the dispute board should always look for opportunities to identify and resolve disagreements as they arise.

Task 5: Identify the best form for dispute avoidance

Dispute avoidance may take any of the following forms:

21. Informal discussions between the dispute board and the parties. These can be used to lead to a swift resolution by, for instance, a joint reading of the Contract, or by facilitating a negotiation between the parties. In such instances, whether informal assistance is to be carried out orally or in writing shall be determined after consultation with the parties, considering their preferences and taking into account the specific circumstances of the situation. For example,
 - a) oral assistance may be preferable if, following discussion between the dispute board and the parties, agreement is reached on a particular interpretation of the Contract, which leads to one party abandoning its stance. It might save embarrassment for the conceding party if there is no written record.
 - b) a “formal” request in writing, and a written record of the dispute board’s assistance, may be appropriate when the parties need to have a written record to be able to present it to their management and/or third parties (authorities, financiers, etc).
22. Issuing opinions. Opinions, which can be either oral or in writing, issued as a separate document or included in a site visit report, may be very helpful for the parties to avoid disputes, as they provide a useful indication of the dispute board’s view on a particular issue. Furthermore, owing to the non-binding nature of an opinion, the parties keep control of the dispute resolution process which often encourages the parties to settle. It should be emphasised that opinions are cheaper than decisions. The dispute board should therefore encourage the parties to make joint requests for an opinion whenever they feel that it could help them to avoid disagreements from becoming claims and disputes.

Conclusion

23. Parties are encouraged to engage in dispute avoidance as early as possible and throughout the project, in order to achieve successful completion of the project, maintain amicable and successful business relations and avoid unnecessary additional costs of protracted disputes.
24. The dispute boards should help the parties to achieve the above objectives.

Appendix 1

FIDIC 1999 Red Book and MDB Pink Book

24. To exercise dispute avoidance under the 1999 Red Book and MDB Pink Book, the parties may jointly refer a matter to the DAB (or DB) for its opinion. See the seventh paragraph of Sub-Clause 20.2 which provides that:

"If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.", and

25. Paragraph 4(k) of the Appendix - General Conditions of Dispute Adjudication Agreement further provides that:

"The Member shall be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any)."

FIDIC 2017 Red, Yellow and Silver Books (FIDIC 2017 Suite of Contracts), including 2022 Reprints

26. In the 2017 forms, dispute avoidance is encouraged by promoting the parties to seek 'informal assistance' which is defined as:

"[...] the informal assistance given by the DAAB to the Parties when requested jointly by the Parties under Sub-Clause 21.3 [Avoidance of Disputes] of the Conditions of Contract".¹³

27. The first paragraph of Sub-Clause 21.3 [Avoidance of Disputes] of the 2017 FIDIC Suite of contracts provides, in turn, that:

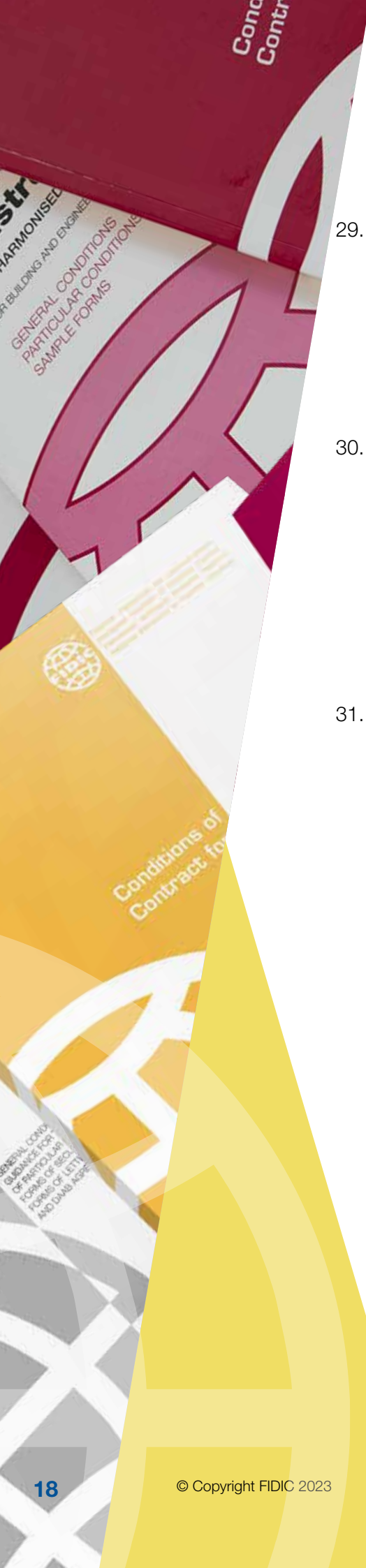
"If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request."

28. Rule 2 of the DAAB Procedural Rules entitled "Avoidance of Disputes" states that:

"Where Sub-Clause 21.3 [Avoidance of Disputes] of the Conditions of Contract applies, the DAAB (in the case of a three member DAAB, all three DAAB Members acting together) may give Informal Assistance during discussions at any meeting with the Parties (whether face-to-face or online) or at any Site visit or by an informal written note to the Parties"

¹³ Sub-Clause 1.6 of the General Conditions of Dispute Avoidance/Adjudication Board Agreement.

¹⁴ The FIDIC 2017 Contracts Guide, Second Edition, including the 2022 Reprint.

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29. The FIDIC Contracts Guide 2022¹⁴ states that:

The well-known saying ‘prevention is better than cure’, is very relevant to disputes under engineering and construction contracts. ... Sub-Clause 21.1 expressly obliges the Parties to set up a ‘standing DAAB’ and the DAAB is entrusted with the role of taking positive action to avoid Disputes, by providing informal assistance to the Parties in an attempt to resolve any disagreement and so prevent potential Disputes from materialising.

30. The FIDIC 2017 Contracts Guide, including the 2022 Reprint, provides examples of when it might be appropriate for dispute avoidance to take place as follows:

“informal assistance to avoid Disputes could be in connection with, for example, the Parties’ understanding of one Party’s obligations or rights in a given situation; the Parties’ understanding of how to give effect to a determination by the Engineer ...or by the Employer’s Representative ...; or, any situation arising during the course of the Works to obtain the DAAB’s informal view as to whether that situation warrants action and, if so, what action and by whom.”¹⁵

31. Sub-Clause 21.3 of the 2017 Forms, including the 2022 Reprint, makes explicit an intention that was also present in the 1999 Forms that the parties are:

“not bound to act on any advice given during such informal meetings, 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, whether provided orally or in writing”.

¹⁵ The FIDIC 2017 Contracts Guide, Second Edition, 2022.

FIDIC

FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide.

Founded in 1913, FIDIC is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its Member Associations and to disseminate information and resources of interest to its members. Today, FIDIC membership covers over 100 countries of the world.

FIDIC Member Associations operate in over 100 countries with a combined population in excess of 6.5bn people and a combined GDP in excess of \$30tn. The global industry, including construction, is estimated to be worth over \$22tn. This means that FIDIC member associations across the various countries are worth over \$8.5tn.



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www.FIDIC.org

FIDIC President's List of Adjudicators

FIDIC maintains a list of approved adjudicators: The FIDIC President's List of Approved Dispute Adjudicators. Members of the President's list are suitably qualified individuals holding a valid FIDIC Certified Adjudicator Certification issued by FIDIC's independent credentialing body, FCL. The list is publicly available for consultation by the Parties to select a dispute board member, or when they fail to agree the appointment of the adjudicator, FIDIC acts as appointing authority and makes a selection from this list. The profiles, language capabilities and expertise of the members are set out in their profiles. To access the list, please visit: <https://fidic.org/president-list>. To make a request to FIDIC to appoint an adjudicator or to recommend a short list of potential dispute board members, please visit: <https://fidic.org/node/2552>.

FIDIC Credentialing Limited (FCL)

FCL is a fully owned subsidiary of FIDIC which was established in 2019, with the mandate of providing certification to professionals working in the global infrastructure industry. As part of its global certification programmes, FCL is offering the FIDIC Certified Adjudicator certification which is a dedicated programme suitable for experienced dispute adjudicators who offer dispute avoidance and/or dispute adjudication services to the infrastructure industry. For more information, please visit: <https://fcl.fidic.org>.

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