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FIDIC Dispute Avoidance and Adjudication Forum

Practice Note III

Dispute Board Decisions: Preparation and Composition

Issue no. 3, version 1, 2025

FIDIC Contract Services

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About the Forum

The FIDIC Dispute Avoidance and Adjudication Forum ("The Forum") was established by FIDIC in 2022 with the primary functions to:

- Discuss current key global issues in the dispute avoidance and adjudication arena
- Promote dispute avoidance in infrastructure projects
- Anticipate market needs, examine, and analyse the latest trends and developments in dispute avoidance

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

The Practice Note has been produced under the general direction of the FIDIC Dispute Avoidance and Adjudication Forum Standing Group consisting of John Papworth, Suzanne Rattray, Patrizia Palmitessa-Savric, Lindy Patterson, Taner Dedezade and Yann Schneller, co-ordinated by FIDIC Chief Legal and Contracts Officer, Daduna Kokhreidze.

The Practice Note has been reviewed by Leo Grutters and Vincent Leloup, who are members of the FIDIC President's List of Adjudicators.

The Practice Note has been produced in draft form for discussion at the Dispute Avoidance and Adjudication Forum at its 7th meeting in Cape Town, 2025. The discussions at the Forum and the comments received have influenced the final wording of the Note.

The Practice Note has been produced under the general direction of FIDIC and with the support of the FIDIC Secretariat. FIDIC appreciates the time and effort devoted by all the persons who have contributed to the Practice Note.

The Practice Note is a product of consultation with practising Dispute Board Members and other practitioners and is not intended to be exhaustive or prescriptive guidance.

This Practice Note may be updated or superseded by outcomes of the discussions of future Forums.

Purpose

FIDIC has prepared this Practice Note to provide best practice guidance to adjudicators in carrying out their decision writing function envisioned under the FIDIC forms of contract.

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Practice Note

Introduction

1. In this Practice Note, reference is made to a "DAAB", which is the "Dispute Avoidance/Adjudication Board" introduced into the FIDIC Suite of Contracts in the Second Edition 2017 of the Conditions of Contract for (1) Construction, (2) Plant & Design Build and (3) EPC/Turnkey Projects[1], and, as applicable, to FIDIC Contracts published contemporaneously with, and/or subsequently to, those Conditions of Contract[2]. The references in this Practice Note are made to the FIDIC Suite of Contracts 2017 Editions, reprinted in 2022.

2. Whilst this Practice Note is written mainly with a DAAB in mind, the general principles may apply to all types of Dispute Board decisions under other FIDIC forms. The Note uses the generic expressions "Dispute Board" or "DB" to include all variants of Dispute Boards.

Decisions in Perspective

3. It is helpful to put a Dispute Board's decision in perspective. The decision in a Dispute[3] is an extremely important product of a DB's role. It is intended to be a legally enforceable document. It is what the Parties are paying for, and it will possibly affect either or both Parties substantially. Given those significant factors, it is essential that due attention is accorded to (i) the decision and (ii) the way in which it is reached. The second of those two is akin to the journey and the first can be looked upon as the arrival. If the journey is properly organised, there is a better chance that the arrival will be satisfactory.

[1] Commonly known and referred to in this Practice Note respectively as the "Red", "Yellow" and "Silver" Books.

[2] These include the 2022 reprints ("the 2022 Reprints") with amendments to the 2017 Red, Yellow and Silver Books, which are the base books used as the references in this Practice Note.

[3] The term is capitalised in accordance with 2017 editions ("the 2022 Reprints"). However, the Practice Note may equally apply to other FIDIC Contracts.

4. Without diminishing the importance of the many documents and engineering techniques used to create infrastructure projects, one must keep in mind that a project is run by people. A Dispute Board decision will be read by those – and probably other – people. As a minimum, the decision should be sound and compelling; the document should be interesting, clearly written, well-reasoned, comprehensible and should address all the issues raised by the Parties. This is required to avoid legal challenges to the decision, for failure of the DB to deal with all the issues put to it. This also shows a basic courtesy to the readers, as well as maintaining a high standard of professionalism.

5. The primary objective of a DB is to seek to avoid Disputes. If a Dispute cannot be avoided, the second objective of a DB accorded to it under the DAAB Procedural Rules is to achieve the expeditious, efficient and cost-effective resolution of any Dispute which may arise between the Parties.[4]

6. Therefore, an important function of a Dispute Board is to render a binding[5] (and potentially final and binding[6]) decision on a Dispute between the Parties to a construction contract. This function, which implicates the rights and obligations of the Parties, is of a legal nature, and the decision must adequately reflect this nature in fulfilment of the expectation of the Parties.

7. The decision is the result of a process set out by the Conditions of Contract, the DAAB Procedural Rules or as otherwise agreed by the Parties in writing and/or required by law[7]. While the process itself is not to be equated to an arbitral process[8], the decision of the DB shall be admissible as evidence in any subsequent arbitration under the Contract[9]. A Dispute Board is therefore well advised to bear in mind the possible further uses of the decision beyond the adjudication itself.

[4] FIDIC 2017 Suite Suite, DAAB Procedural Rules, Rule 1.
[5] FIDIC 2017 Suite Suite, SC21.4.3.
[6] FIDIC 2017 Suite Suite SC21.4.4.
[7] DAAB Procedural Rule 6.1.
[8] FIDIC 2017 Suite Suite, SC21.4.3 "...The DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s)... ".
[9] FIDIC 2017 Suite Suite, SC21.6.

The Importance of the Readership

8. Dispute Board Members come from a variety of legal, technical and cultural backgrounds and bring valuable experiences and competencies to bear in the dispute resolution process. It is therefore not expected, nor desirable, that a uniform style of decision writing will emerge. However, it is expected that the standard of a written decision rendered in the context of a dispute referral process under a FIDIC Contract is consistently high, regardless of the nature of the dispute.

9. From whichever background the Dispute Board Member(s) come(s), the people to keep in mind are those for whom the decision is written. These include the following groups and individuals:

   a) <u>The "losing" Party</u> – they will not be pleased, to put it mildly, so they will need some convincing by way of a clear and unambiguous decision why they have "lost". They may not agree with the decision, but they may see that it is preferable – and less costly – to accept it as being logical, reasoned and unlikely to be overturned by an arbitral tribunal or court.

   b) <u>The "winning" Party</u> – they may be "pleased" with the decision, even if they do not achieve the full financial relief they sought, but, if they care to look at more than just the decision page, they will see how the DB decided certain points and the Dispute Board's thinking behind the decision[10].

   c) <u>Other interested or affected entities</u> – Funding agencies, ministries and public authorities have an interest in the outcome of disputes, which may be financial or reputational or may be of relevance to future projects and programmes. The precision and tone of the narrative, the demonstrated objectivity of the DB, and the reasoning of the decision will provide valuable context to those entities.

   d) <u>An arbitral tribunal or court</u> – either of these will come much later, if at all, to the dispute than the DB, so they will be grateful for a clear and informative document, which acquaints them with the history of the project and the dispute, as well as recounting the evidence and showing how and why the Dispute Board made its decision.

10. When writing the decision, the DB will do well to keep in mind the *entire* readership and think how it might receive the decision. Has the Dispute Board dealt with all it has been asked to decide? Has it provided reasons for its decision? Are the figures right?

[10] It is accepted that it may be difficult to say categorically that a Party "wins" or "loses". For example, a Party who may be said to have "won" in a decision, may, at the end of the project, reflect that he may not have "won", if he does not achieve the level of success he sought. This is a good reason to avoid the dispute in the first place.

Best Practice Tasks and Techniques for Producing a Dispute Board Decision

This Practice Note sets out core tasks and techniques which, if followed, will likely assist DB Members to produce logical and reasoned decisions.

Task 1 – Managing the Referral Process

1.1. Referring a Dispute to a DB starts the 84-day process for rendering a decision. Often, Parties may not have had previous experience of referring a Dispute and it is essential that the Dispute Board and the Parties have a common understanding of what is required. Good practice for the Dispute Board will be to calculate the date of the expiry of the 84 days and to ask the Parties to confirm their agreement to the date for the decision to avoid any Dispute as to that date.

1.2. For the purposes of this Practice Note, and for the sake of brevity, the Party referring the Dispute will be called “the Referring Party” and the other Party to the Dispute will be called “the Responding Party”. It is appreciated that there may be other expressions for the Parties, but this Note will adhere to these two for consistency.

1.3. If the DB Members have been appointed before Disputes arise, and are acting as standing Boards, the Dispute Board can often see that a referral is imminent and is able to inform the Parties on various aspects of DB operations. The Parties empower a DB to establish the procedure to be applied in giving decisions under the Conditions of Contract. Proposing to the Parties a referral procedure can be helpful as part of the process. There is no prescribed form as to the shape that a referral procedure should take with each Dispute Board having its own style.

1.4. Even where the Dispute Board is acting as a standing board, an advance warning that a Party intends to refer a Dispute to the DB for its decision is desirable to prepare the Responding Party and the DB for the process.

1.5. Direction may be given, and agreement may be sought in an online or in-person meeting, or by correspondence, on the following aspects of the referral:

➔ **Formats**

1.6. Issues such as whether to use electronic and/or paper submissions should be agreed. For electronic submissions, it is recommended to use email or a large file transfer system. Formatting, such as sequential page numbering, paragraph numbering of the submissions and exhibits, assists in making the documents easily read and understood by the DB within the timelines.

➔ Content of the Referral

1.7. Referring Parties should be guided to ensure that the referral complies with Sub-Clause 21.4 of the 2017 Contracts – or their equivalent in other FIDIC and FIDIC-based Contracts - by providing a clear statement that the referral is being made in accordance with that – or equivalent – Sub-Clause. The Dispute Board should not tell a Party how to present its case and certainly must not help – nor be seen to be helping – a Party present its case.

1.8. Some content which is helpful, to make it easier for the DB to understand the claim being made, includes:

Executive Summary – this may help in outlining the Dispute being referred, confirming the jurisdiction of the Dispute Board to decide the issue and commenting on whether or not a hearing is considered necessary. Not all Parties include an executive summary. It is a matter of personal preference, but the DB may wish to ask the Referring Party to avoid this as being a possible cause of later repetition.

Introduction and Background – it is useful to explain a chronology of events leading up to the crystallisation of the Dispute.

Facts – the allegations of fact and the source(s) of the evidence to support it/them, such as witness statements, appendices and documents.

Issues for the DB to resolve – often the Parties will dispute which issues need to be determined so that the DB can reach its decision. Dispute Boards should encourage the Parties to set out the relevant issues and where possible obtain agreement on the issues which the DB is required to resolve.

The law – the contractual basis and/or law on which the Referring Party relies to establish an entitlement to relief.

Request or Relief Sought – this should contain the questions asked of the Dispute Board, or the relief sought from the Dispute Board, by the Referring Party, including the quantum of the claim, details of the calculation of the monetary and/or time and details of any declaratory relief sought.

Task 2 – Review of the Referral

2.1. Once the referral is received, the DB should confirm to both Parties the date and method of receipt. For electronic submissions, it is good practice to identify the number of files and, in some cases, especially if there are many files, it may be appropriate to list the individual file names. For hardcopy submissions, confirmation of the volumes and number of pages in each serves the same purpose.

2.2. It is advisable that the Dispute Board asks for clarifications about the request for relief, if required. This should not be an opportunity to ask for clarification about the merits of the case.

2.3. The DB must also allow itself sufficient time to finalise a coherent and reasoned decision after all oral and written submissions have been made. Care should be taken not to unduly limit the time available for the Dispute Board just because it is felt that the Parties need more time. Fair and reasonable allowances of time also apply to the DB.

Task 3 – Establishing the Timetable

3.1. Once a referral has been made, it is good practice for the Dispute Board to establish the timetable for submissions and advise the Parties of it. This will include the dates for receipt of the response to the referral and any further rounds of submissions (if considered necessary), such as a reply to the response and a rejoinder. The timetable may provide tentative dates for a hearing should this be deemed necessary by the DB and preferably agreed to by the Parties[11]. It is possible that at least one of the Parties will request a hearing in any event.

3.2. The essential requirement of the process is that it should be fair, and the Parties should be treated equally, with a reasonable opportunity given to each Party to put forward its case and to respond to the other Party's case, all in a manner which avoids "unnecessary delay and/or expense"[12].

Task 4 – Review of Response

4.1. Once the response to the referral is received, the DB should, similarly to the referral, confirm to both Parties receipt of the response. The Dispute Board should check that the response deals with the Dispute presented to it.

4.2. The Dispute Board should also be alive to the possibility that the response may raise a matter which could be seen as a counterclaim. It is advisable that the Dispute Board asks for clarifications about the request for relief, if required. The Referring Party may well oppose the inclusion of it and contend that this is a separate Dispute and that the Dispute Board does not have the jurisdiction to deal with it. The Dispute Board will have to deal with this matter, requesting and considering written and/or oral submissions from each side and giving its decision on this matter as early in the dispute process as possible.

[11] DAAB Procedural Rule 5.1(e) and Procedural Rule 7.

[12] FIDIC 2017 Suite Suite, Procedural Rule 6.2.

Jurisdictional Challenges

4.3. The response may also contain a challenge to the Dispute Board's jurisdiction to hear a part, or all, of the Dispute, possibly even contending that there is no Dispute. Jurisdictional challenges should be made as early as possible. It is quite possible that a Responding Party will have some idea of the likely contents of a referral, so ought reasonably to be able to raise the challenge on, or very quickly after, receipt of the referral. If a challenge is judged by the DB to be made "too late", the Dispute Board may refuse it on the ground of lateness alone.

The Dispute Board's decision on the challenge may be made at the time of the challenge or within the overall decision on the substantive matters. Unless it is not practical, or there is reasonable objection by either or both Parties, it is preferable to inform the Parties of the Dispute Board's decision at the time of the challenge, so that the Parties know where they stand.

The decision on jurisdiction should observe the principles applied to decisions in general described in this Practice Note. It should be given in writing, following written, and possibly oral, submissions by both Parties.

Dispute Boards can take some comfort from the provision in Procedural Rule 5.1(c) in the 2017 Edition, Reprinted 2022 of the Red, Yellow and Silver Books, which gives the DAAB the power to *decide on the DAAB's own jurisdiction, and the scope of any Dispute referred to the DAAB; …*

This is a wide power. It gives the Dispute Board the power to decide not only that it has jurisdiction, but to decide the extent of the jurisdiction. In giving the DAAB the power to decide on the scope of the Dispute, the Rule empowers the Dispute Board to deal with the possible situation noted above, where a response may have introduced a counterclaim.

4.4. The DB may prepare a list of clarifying questions based on the response. In asking these questions, the Dispute Board may remind the Parties that it has the power to adopt an inquisitorial procedure and may point out that it is prepared to use it as necessary.

Task 5 – Managing Additional Exchanges

5.1. The DB may provide its list of questions to the Parties with deadlines for responses as provided for in the timetable. The Dispute Board should take care as to the time and manner in which the questions are asked to avoid assisting one Party. The Dispute Board may also bring to the attention of the Parties and request them to address any points it considers relevant for the resolution of a dispute that has not been raised by either Party.

5.2. If the Dispute Board allows a reply to the response, the reply should do what it says and *reply* to points made in the response. It is not an opportunity to make points which were omitted or forgotten in the referral. Similarly, if a rejoinder by the Responding Party is allowed, it should also do what the name suggests and *rejoin* argument with points made in the reply.

5.3. If a Party objects to the contents of either of the submissions, it is sensible for the Dispute Board to invite and consider the objections, orally and in writing, and give its reasoned written decision on the objections as soon as possible, or to state that the objection is noted and shall be addressed by the Dispute Board in the decision.

5.4. It is also possible that Parties may make unsolicited submissions to the Dispute Board. The DB has a discretion on whether to allow unsolicited submissions. The Dispute Board may consider unsolicited submissions if the other Party is given an opportunity to respond and time is available. The time period for issuing the decision may be extended by agreement of the Parties, should the DB consider this necessary.

Task 6 – Assessment of Evidence

6.1. Given the reliance of the Parties on their evidence, the assessment of it is an extremely important aspect of the Dispute Board's role and is a vital part of the "journey" towards the decision. There are two basic types of evidence: (i) evidence of fact and (ii) opinion or expert evidence. The entire subject of evidence is probably worthy of a separate Practice Note and beyond the scope of this one. It is helpful and sufficient to simply discuss the two types of evidence here in a practical way. The rules of evidence applying in arbitration or judicial proceedings usually do not apply, but only those in the Procedural Rules and the Contract.

- **Evidence of Fact**

6.2. This is usually produced in both oral and written form. Oral evidence would usually be given at a hearing, with the person giving the evidence having produced a statement in advance. It is not the normal practice to administer oaths or affirmations, nor to go through examination in chief, cross-examination or re-examination, nor to try to destroy a witness' credibility. The Parties may ask questions of witnesses through the Chairperson of the Dispute Board, and the Dispute Board may ask its own questions. The detailed procedure of a hearing is beyond the scope of this Practice Note and may be addressed in a future Practice Note.

- **Expert Evidence**

6.3. The choice whether to use independent experts lies with the Parties. However, the Dispute Board may consider pointing out to the Parties that it has considerable expertise of its own in certain areas, and the Parties may like to bear that in mind before engaging independent experts, with the attendant expense.

6.4. The Dispute Board may also remind the Parties that it has the power to use its Members' own specialist knowledge and that it may appoint its own expert, with the agreement of the Parties, if need be.

6.5. Ultimately, though, the choice whether to use experts is that of the Parties.

6.6. The procedure is as with witnesses of fact, and, again, questions must go through the Chairperson. And, of course, there is no harm in reminding experts that they are there to help the Dispute Board, not to act as advocates.

6.7. If the Parties engage experts, they will almost certainly wish to submit expert reports. The DB should ensure that expert reports are exchanged so that sufficient time is available for the Dispute Board and the other Party to read and prepare any questions and receive responses from the experts.

Task 7 – Hearings

7.1. The DB will decide whether or not hearings are to be held[13]. If both Parties request a hearing, it is usual to schedule one. Even if only one Party requests a hearing, a Dispute Board should think carefully before denying the request. Apart from allowing the Parties to be heard, it is an opportunity for the Dispute Board to meet everyone involved in person and observe people's oral and physical language and demeanour. This will say much about the credibility of the Parties' submissions and witnesses.

7.2. The DB should provide the agenda for the hearing as far in advance of the hearing as is practicable to enable the Parties to properly prepare for it, indicating the amount of time available for each Party

[13] DAAB Procedural Rule 5.1(e) and Procedural Rule 7.

to make its presentation. The Board may restrict attendance at the hearing to those who will speak and answer questions[14].

7.3. The DB will want to hear specifically from the individuals who have first-hand knowledge of the facts giving rise to the Dispute. In this respect, the Dispute Board will almost certainly wish to hear from the Engineer, and/or his/her site representative(s).

7.4. Should the Parties have submitted conflicting expert reports, the DB may, if the written responses to its questions are not adequate, invite the experts for questioning at the hearing.

7.5. The DB controls the questioning at the hearing. Parties may pose questions to the other side via the Dispute Board. The precise mechanism of the manner of questioning afforded to the Parties should be explained by the DB.

7.6. Once the Parties have made their presentations and have responded to the questions posed, the DB closes the hearing.

7.7. The Parties may be allowed to present a summary of their submissions at the hearing or within a very brief period after the hearing.

Task 8 – Deliberation among Dispute Board Members

8.1. It is normal for the DB Members to be deliberating throughout the Dispute Board process on various procedural aspects. In addition, the DB will also be deliberating on the submissions as received, to collate any clarifications that may be required and to identify sub-issues that need to be addressed in the process of deciding the issues in dispute.

8.2. Once the Dispute Board has closed the evidentiary phase of the process, the deliberations on the merits will intensify. It is important that the DB has a full and frank discussion and all views are considered and analysed.

8.3. The DB meets in private[15] and the confidentiality of the discussions must be maintained at all times. The Dispute Board will therefore ensure that, whether meeting together in person, or remotely, proper precautions are taken to preserve the confidentiality of the deliberations.

8.4. It is preferable for there to be unanimity in the decision making. However, a majority decision is valid and binding on the Parties. The majority "may require the minority Member to prepare a separate written report setting out his/her dissenting opinion, with reasons and supporting particulars, which shall be issued to the Parties"[16].

[14] DAAB Procedural Rule 7.1(g).
[15] FIDIC 2017 Suite, PR8.2(a).
[16] FIDIC 2017 Suite, PR8.2(c).

8.5. The Chairperson of the Dispute Board plays an essential role in managing the consultative process and keeping the focus of the discussion on each decisive aspect in a logical sequence.

8.6. The Chairperson needs to maintain a collegial atmosphere among the Dispute Board Members, even in the presence of divergent views and thoughts. This is where the Chairperson must show some leadership. He/she must keep the peace between disagreeing Dispute Board Members – not always easy – and try to hear and understand each Member's views. It is also where a Member must listen to views which differ from his/her own, acting in good grace if it becomes apparent that another Member's views may prevail. This is especially important in the context of a standing Dispute Board, given that the DB operates as a team over a long period and, generally, the successful teams are united teams.

8.7. If there are divergent views, ultimately the Chairperson must decide how the matter will be handled. His/her approach may not appeal to either or both wing-Members, but this is not a popularity contest, and the Chairperson must be willing and able to make that decision. Where possible, the Chairperson should seek to avoid dissenting opinions.

8.8. In the case of a Sole Member DB, the situation is different. In this position, the Sole Member carries out analyses and makes decisions on his/her own. Some may find it easy and some may find it difficult intellectually and/or temperamentally. Being a Sole DB Member can be a lonely job. Upon appointment, the Sole Member should be prepared to face that.

Task 9 – Structuring the Decision Document

9.1. The decision serves not only to convey the binding, and, possibly, final and binding, decision of the DB, but also to record the process followed and explain the reasoning. The decision shall be given effect by the Parties and therefore must be expressed in language appropriate to its purpose and must provide reasons for the decision reached. The decision may also be submitted as evidence in a subsequent process of arbitration.

9.2. The document should flow logically from the introductory sections, through the process, the findings of facts, the reasoning, application of the law to the facts and conclude with the decision.

9.3. The quality of the analysis will be demonstrated by the internal consistency of the document.

9.4. It is common for the decision to be structured as follows, though it is acknowledged that it is only one example, and DB Members may adopt a different one, provided the overarching objectives of clarity, logic and completeness are observed.

Cover page – indicating Contract Number and Name, the number of the decision (No. 1, 2 and so on) and its subject – matter, the names of the Dispute Board Members and the date of the decision. It may also indicate the Sub-Clause under which the decision is given.

Table of contents – this is self-explanatory.

Introduction – containing details of the project, the Contract, the Parties, the dispute resolution provisions in the Contract, the fact that (a) Dispute(s) has/have arisen, the appointment and jurisdiction of the DB, briefly, the nature of the Dispute and a summary of the structure of the decision. This section shall indicate the Sub-Clause under which the decision is given. It must be given in the language required by the Contract.

Process and timetable – summary of the procedure applied in reaching the decision.

Decision and/or relief sought – it is essential to identify the exact question(s) being referred to the Dispute Board by both Parties, and the decision(s) and/or relief sought, as this defines the scope of the Dispute Board's jurisdiction.

Positions of the Parties – these sections will provide summaries of the facts as alleged by both Parties and their contentions on the law. There is no need to repeat the written submissions entirely. A summary is sufficient. The length of this will depend upon the nature of the Dispute. The summaries must capture the fundamental contentions of the Parties. It may be necessary to repeat parts of a submission if it relates to a complex and/or esoteric aspect of expert evidence, for example, or a Party's analysis of a point of law.

Discussion and findings – this section of the decision is absolutely critical, and should be drafted with great care. It should explain the reasoning of the Dispute Board in reaching its decision step-by-step, in a logical way. It should address most, if not all, of the Parties' arguments, especially those of the "losing" Party. This is important when the Dispute Board is a standing board to maintain its trust with the Parties, especially if the project is at an early stage. It is also beneficial that the matter is resolved at the dispute board stage and the cost and time of going to arbitration is avoided. The best means of achieving this is to show that the "losing" Party's arguments have been heard fully and decided by neutral and independent adjudicators. The Parties will bear this in mind before proceeding to arbitration as they may realise that an arbitral tribunal is likely to follow the Dispute Board's decision.

This is the analytical section of the decision which will address the burden and standard of proof, the contractual and legal basis of the claim, analysing issues, various allegations and the evidence provided. It will conclude with the findings of the DB.

The previous sections of the decision basically distil the information provided by the Parties. The Dispute Board's analysis and reasons and the decisions flowing from them are the DB's own work. It is helpful to define the issues which the Dispute Board must address and decide, and if an issue is decided against the Referring Party, whether that is fatal to its entire claim, or it can maintain its claim on the remaining issues.

This need not be a complicated or difficult exercise. It is important to "tell the story". A distinction should be made between what the Dispute Board "finds" by way of facts, and what it is told.

As well as avoiding Latin, it is helpful, and indeed courteous, to the Parties to let them know what acronyms mean and not leave them wondering as to the significance of sets of initials.

Pictures, photographs and other illustrations from the Parties can be very useful – a picture paints a thousand words – and a Dispute Board may well refer to the merits of some of these illustrations. However, it is not advisable for the Dispute Board to produce illustrations of its own, in case they show incorrect interpretations or other errors in understanding of the Parties' submissions.

Whilst every Dispute is different, the following are useful guidelines in drafting the decision, gained from long and wide experience among the contributors to this Practice Note.

- As a matter of continuing professional development ("CPD"), DB Members may find it helpful or gain inspiration from reading judgments given by courts or awards published by Arbitral Institutions. There are some excellent text books, journals and other publications on arbitration which may give guidance on how to structure a decision.
- Note how judges and experienced arbitrators express themselves and construct their logic. It is normal for judges to use plain and simple language, using short sentences in short paragraphs of only up to five or six sentences in length.
- Avoid lengthy discussion on a point, which can amount to waffle. Avoid giving reasons for reasons and convoluted thinking. Keep it simple.

- Avoid causing offence. If a DB disagrees with a point made by a Party, all that is needed is to say the Dispute Board disagrees with the point or that the Dispute Board is not persuaded by the point raised. There is no need to use dismissive language or give the impression of finding the Party concerned to be ignorant.
- Making a decision on a hard-fought construction dispute is not easy, nor should it be. The Dispute Board Members have been appointed because they put themselves forward as competent to make decisions and are well paid for what they do. The Parties place their trust in the DB. This may make the Dispute Board Members feel under pressure and even worried. If that is the case, it may be helpful to keep in mind the advice given by a judge in the England and Wales construction court in or around 1980. He suggested that the arbitrator imagined he was telling a story to a friend and explained why he agreed with one party and not the other party.

Summary of the decisions - Although this should be a very short section, it is the operative section of the decision and must be drafted with the utmost care and certainty, summarising the decisions on the points requiring decisions, together with directions as to payment, if any. It must also state that the decision is given under Sub-Clause 21.4.3, if given under the Red, Yellow or Silver Books.

The directions as to payment should state clearly what is to be paid by whom and within what time. The Parties should not be left trying to use their calculators. If the sum to be paid includes Value Added Tax or any other type of tax, the Dispute Board should state this. For example:

The Responding Party shall pay to the Referring Party the sum of US$ 10,000,000.00 which sum is inclusive of Value Added Tax in the sum of US$ 1,000,000.00.

The said sum of US$ 10,000,000.00 shall reach the Referring Party's nominated bank account within 14 days of the date of this decision.

The period of 14 days is an example only, but a specific number of days is essential and defines the promptness required by the FIDIC Contracts.

The Dispute Board should check to see whether it is empowered to award interest or financing charges, if claimed. If the Dispute Board is so empowered, it should check the rate(s) and which bank's rates apply, and the period(s) over which interest or financing applies. The decision should also state whether or not interest or financing continues to apply to the sum(s) awarded up to and including the date when the amount awarded reaches the "winning" Party's nominated bank account.

List of documents provided - A decision may have limited Annexures or Appendices, such as the list of the documents produced and the timeline followed during the process, but not material forming part of the substantive decision. That should be included in the body of the decision.

Task 10 – Compliance with FIDIC Contract Provisions and Formalities

10.1. There are 84 days from the referral to the decision, unless an extension of time is proposed by the DB and granted by agreement of the Parties[17]. It is essential that the agreed timeline is complied with, as failure to do so may mean that the decision will not be valid and enforceable.

10.2. The DB should make sure to comply with all contractual requirements in issuing the decision.

10.3. The Laws may require some formalities that must be observed. Whilst it may not always be compulsory, it is recommended that the decision is signed. This may avoid legal challenges for want of formality and in the case of a three-Member DB, communicate to the Parties that it is a unanimous decision. It costs little to do and is probably what the Parties generally expect.

Task 11 – Post-Decision Considerations

11.1. Once the decision is issued, the Dispute Board is, if the use of one Latin expression may be forgiven, on grounds of custom and practice, *functus officio* with respect to that Dispute. In ordinary language, it has done its job in respect of the dispute referred to it. It has no power to change the decision, save for the correction of specified errors[18]. Sometimes, a Party may ask for some clarification of a decision. This should be treated with caution and not be allowed to become an avenue to re-opening the decision. Clarifications should be limited to explaining unclear language, correction of typographical, clerical or arithmetical errors and not address reasons for the decision, as described in Procedural Rules 8.3 to 8.7.

11.2. It is highly likely that the DB will receive a Notice of Dissatisfaction ("NOD") with the decision, and possibly one from each Party. It does not mean that the decision is inherently flawed or wrong, and the DB should not treat a NOD as a matter which is to be rebutted. It is best to simply acknowledge each NOD briefly and politely, but avoiding taking issue with any of the dissatisfied Party's comments and without addressing the reasons advanced as grounds for dissatisfaction.

[17] FIDIC 2017 Suite, SC21.4.3.

[18] See Procedural Rule 8.3 of the Red Book 2022 Reprint.

11.3. It is best to avoid taking the NOD personally. As stated above, this role is not a popularity contest. If a DB genuinely feels it has given a reasoned decision, that should be sufficient, whatever criticism may be levelled later. In the case of a standing board, the DB and the Parties may have to co-exist for months and years to come, so bearing grudges will not help the project. The Dispute Board is expected to remain calm and professional. If a Dispute Board Member resents criticism or is upset by it, he/she may wonder if he/she is in the most appropriate position. It is hoped that this Practice Note will help to avoid that possibility.

CONCLUSION

11. Given that decisions are an important part of a Dispute Board's work, this Practice Note is produced with the intention of offering a standard of good practice to be expected of DB Members.

About 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.

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To further its goals, FIDIC publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related guides and guidance documents. FIDIC Contracts represent best practice in construction and engineering contracting and are used widely across the world. For more information about FIDIC Contracts, please visit https://fidic.org/bookshop.

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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.

FIDIC President's List of Adjudicators

FIDIC maintains 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 FCL. The list is publicly available for consultation by the parties to select a dispute board member. 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.

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