

Dispute Boards: Wedding rings or marriage chains?

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ABSTRACT

The paper compares the standing Dispute Boards, established at the outset of the project, with the wedding rings, strengthening the good faith and commitment of the parties to implement the project, in good times and in bad times. The most important function of the standing DB is the dispute avoidance, unlike the statutory adjudication and the ad hoc DB, which cannot prevent the disputes. The paper outlines the success story of DBs and the FIDIC dispute adjudication procedure, including the expectations about the DAAB provisions in the FIDIC rainbow 2017 Edition Clause 21.

1. What is a Dispute Board?

The dispute board (DB) is a creature of the contract, established as an alternative dispute resolution device in action during the project implementation:

“The term ‘dispute board’ is a generic term that includes (a) the dispute review board, which is a device that originated in the USA (and continues to be used most often there) and which provides non-binding recommendations; (b) the dispute adjudication board, which emerged from the earlier USA model, and which provides a decision that has interim-binding force and which is used most everywhere else in the world except the USA; and (c) the combined dispute board (CDB), which is a hybrid of dispute review boards and dispute adjudication boards and was created by the ICC in 2004. Various other terms have been used, such as dispute settlement panel, dispute mediation board, dispute avoidance panel, dispute resolution board, and dispute conciliation panel. Fundamentally these different varieties of dispute review devices are the same, each providing early adjudication based on the contractual bargain between the parties.”¹

The UK experience demonstrates that the standing DB can coexist with the statutory *ad hoc* adjudication².

2. What is the story of the Dispute Boards?

The Dispute Resolution Board Foundation (DRBF) has gathered information about the use of Dispute Boards since 1982. The data shows the depth and breadth of the process being used worldwide for numerous types of projects of varying size. The database available online includes about 3000 projects in all continents.³

1975	• The first DB was used on the second bore of I-70 Eisenhower Tunnel
1992	• issued the DRB Supplement to the 4 th Ed Red Book, including provisions for DRB
1995	• The World Bank made DBs mandatory for its projects with value above 50 million \$
1999	• FIDIC introduced the DAB: standing for Red Book & <i>ad hoc</i> for Yellow/Silver Books
2004	• ICC introduced DB rules
2006	• 9 Multilateral Development Banks adopted DBs, incorporated in the FIDIC Pink Book

The DRBF statistics shows the DB success:

Over 98% of matters going to the DB do not go on to later arbitration or litigation.

In case the disputes are referred to arbitration/ litigation, the DB decision is considered a reliable expert evidence and in most cases confirmed.

¹ Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (Informa Law Third Ed 2015 eISBN: 978-1-315-75661-5) 41

²² E.g. 2012 Olympic Games Dispute Avoidance Panel and the Transport for London Conflict Avoidance Panel

³ <https://drb.org/publications-data/drdb-database/> accessed on 6 August 2017, incl. e.g. a DB in Kazakhstan: South West Roads Project; Western Europe- Western China International Transit Corridor Project; Reconstruction of Road Section in Kyzylorda Oblast

3. The FIDIC DAB/DB: a precondition to arbitration/litigation

In the 1999 Books for major projects FIDIC⁴ has included the dispute adjudication procedure: pursuant to Clause 20.2 “*Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4*”.

The DBs in the FIDIC Conditions of Contract for major works are:

- 1999 Red Book⁵: a standing DAB (Dispute Adjudication Board);
- 1999 Yellow Book⁶: an *ad hoc* DAB (Dispute Adjudication Board);
- 1999 Silver Book⁷: an *ad hoc* DAB (Dispute Adjudication Board);
- 2006 Pink Book⁸: a standing DB (Dispute Board);
- 2008 Gold Book⁹: a standing DAB comprising 1 or 3 persons before the Commissioning Certificate is issued; then a one-person standing Operation Service DAB for a term of five years; the Operation Service DAB may be reappointed or new appointments follow in the next five-year terms.
- 2017 Edition of the Red, Yellow and Silver Books: a standing DAAB (Dispute Avoidance/Adjudication Board pursuant to Clause 1.1.23 of the Pre-release Second Edition 2017 of the Yellow Book¹⁰).

Where one or both Parties do not agree with the Engineer’s determination of a claim, the dispute is referred to an independent DAB as a precondition to arbitration.¹¹

Within 84 days the DAB renders a decision that is **immediately binding** on the Parties, whether or not one of them is dissatisfied with the decision.

⁴ FIDIC - French acronym *Fédération Internationale Des Ingénieurs-Conseils* - The International Federation of Consulting Engineers, currently including 100 Member Associations & Associates, <http://fidic.org>

⁵ *Conditions of Contract for Construction for Building and Engineering Works designed by the Employer*, First Edition 1999

⁶ *Conditions of Contract for Plant & Design-Build*, First Edition 1999

⁷ *Conditions of Contract for EPC/Turnkey Projects*, First Edition 1999

⁸ *MDB (Multilateral Development Bank) Harmonised Edition*, based on the Red Book, First Edition 2006, last revision 2012

⁹ *Conditions of Contract for Design, Build and Operate Projects*, First Edition 2008

¹⁰ *Conditions of Contracts for Plant & Design Build* issued for the FIDIC Users Conference in London in 2016

¹¹ The case law generally confirms this: e.g.:

The FIDIC DAB procedures are laid out in the following documents:

Clause 20 GC	•SC 20.2 [Appointment of the Dispute Adjudication Board] •SC 20.3 [Failure to Agree Dispute Adjudication Board] •SC 20.4 [Obtaining Dispute Adjudication Board's Decision] •SC 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] •SC 20.8 [Expiry of Dispute Adjudication Board's Appointment]
Appendix to GC	•General Conditions of Dispute Adjudication Agreement (DAA GC)
Annex 1 to DAA GC	•Procedural Rules

DB appointment under SC 20.2

As recommended in the form for Appendix to Tender in the FIDIC 1999 Red Book, the Parties shall jointly appoint the DAB within 28 days of the Commencement Date pursuant to Clause 20.2.

- ✓ The DAB shall consist of one or three people who must be suitably qualified and have no conflict of interest.
- ✓ The composition of the DAB shall be by nomination and then joint selection.
- ✓ The DAB members are to be remunerated jointly by the parties with each paying half of any fees.
- ✓ The DAB members can only be replaced by mutual agreement.

Failure to appoint under SC 20.3

If the Parties fail to agree upon the appointment, then the procedure under Clause 20.3 applies: the appointing entity named in the Appendix to Tender will nominate the DAB. The appointment shall be final and conclusive.

“Sub-Clause 20.3 provides for the possibility that agreement on a person may prove to be impossible. Disagreement is regrettable, because the DAB procedures rely upon the Parties' confidence in agreed individuals serving on the DAB. Although a Party may have less confidence in an individual selected by the appointing entity or

*official named in the Contract, it would be unfair for a Party to prevent a DAB being appointed by withholding approval unreasonably, contrary to Sub-Clause 1.3.*¹²

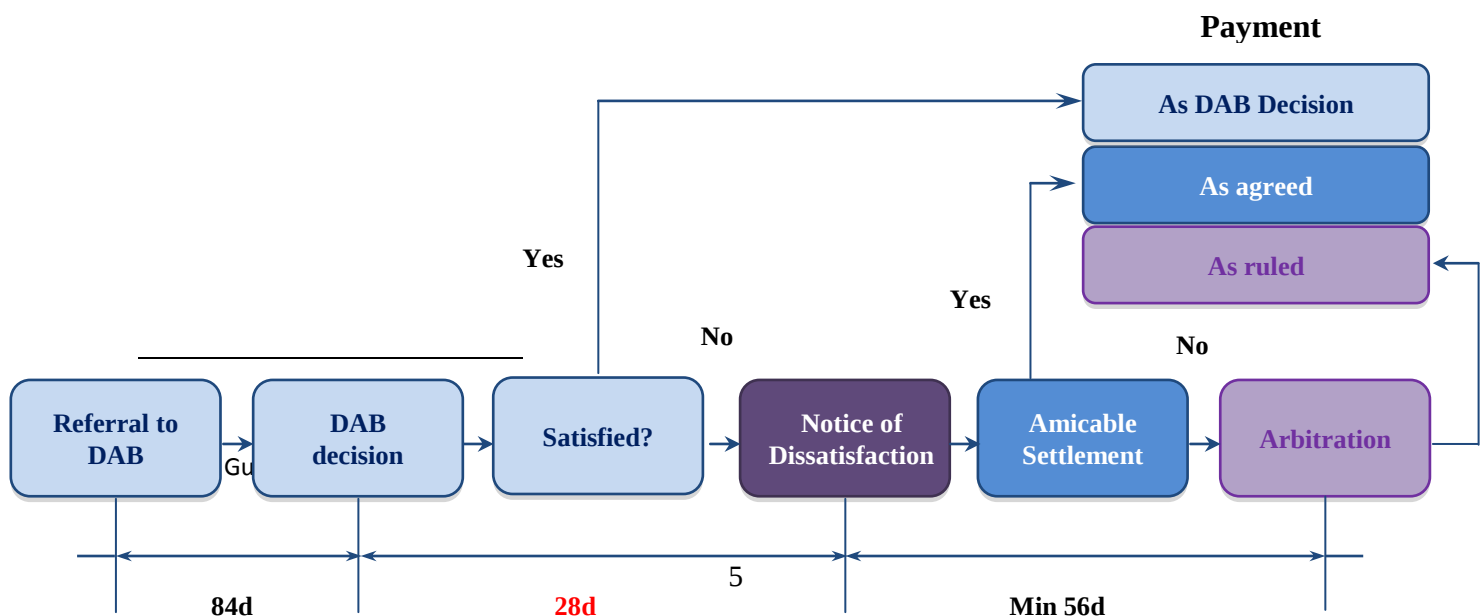
Obtaining the DB decision under SC 20.4

A dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer.

Such reference shall state that it is given under Sub-Clause 20.4.

Once the DB is in place, the procedure for the referral of disputes to the DAB, for the DAB to settle them under Clause 20.4 is the same as for an ad hoc DAB:

- ✓ The referral must be in writing with copies to the other Party and the Engineer.
- ✓ The DB shall be entitled to whatever access it requires, including access to information and the Site.
- ✓ The DB will not act as an arbitral panel.
- ✓ Unless otherwise agreed, the DB shall reach its reasoned decision within 84 days.
- That decision shall be **binding** until it is overturned by agreement or by the decision of an arbitral panel.
- If a Party disagrees with the decision of the DAB, it should serve a Notice of Dissatisfaction within 28 days.
- **If no such notice is served, then the decision of the DAB shall become final and binding.**
- In the event that a Notice of Dissatisfaction is served, both Parties must try and resolve that dispute amicably pursuant to Clause 20.5.
- An arbitration may not be commenced until 56 days after the Notice of Dissatisfaction has been served.
- If a Party fails to comply with a DAB decision, then the other Party may refer the failure to arbitration in accordance with Sub-Clause 20.6.



The DB decision process

An example timetable for planning the process from referral to decision is presented below:

Day	Claimant	DB	Respondent
D 0	Dispute referral with Statement of Case		
D 28			Response to the Statement of Case
D 42	Possible Rebuttal to the Response	May request clarification / further information	
D 49		May organize hearing	Possible Reply to the Rebuttal
D 56	Possible hearing closing submissions	May request clarification / further information	Possible hearing closing submission
D 84		Issues a decision per SC 20.4	

The preventive function of DB

The main benefit of the DB is the prevention of disputes and the support to the efficient and effective project management. This is a unique feature of the standing boards under the Red, Pink and Gold Books.

4. Why do the couples to be married spend time and money for the wedding rings?



The wedding rings are important to those planning to wed. Many couples invest large amounts of time in the selection of rings.

Gold is the preferred material, though not the cheapest. The meaning of gold is illumination, wisdom and wealth. Gold often symbolizes high quality.

The round infinite form symbolizes the perfection in the relations.

The wedding rings are symbols of the love, friendship, and faithfulness that the couple will share. The rings demonstrate the union that has already taken place: a promise to be true in good times and in bad.

5. Can the Dispute Boards be regarded as wedding rings?

Yes, if selected carefully and established as a standing DB at the outset of the project.

The standing DB, established by the agreement of the parties within the first month, can be:

- The **GURU**:
 - The **experienced** DB shall explain the contractual procedures and possible pitfalls;
 - The **inquisitorial** DB shall ask questions to point the problems and carefully guide the Parties to solve the potential disagreements;
 - The **persuasive** DB shall explain the parties that they can use his advice, jointly referring for opinions in case of difficult interpretations or escalating disagreements.
- The **GUARDIAN** of the relationships:
 - The **impartial** DB shall influence the parties not to fall down the slope of adversarial correspondence;
 - The presence of the **expert** DB shall discipline the Parties and Engineer to respect the timelines of the FIDIC procedures;
 - The presence of the DB **familiar with the project** shall restrain the Employer from pressing the Engineer to reject all Contractor's claims;
 - The **objective** DB makes useless any attempt of the Contractor to corrupt the Engineer.
 - The **proactive** DB shall simplify all procedures and invite joint referral for opinion during the site visits and meetings, cooling the negative emotions with his reasons.
- The **RELATIVE** always ready to help:
 - The DB is **part of the project administration**: he is checking the contemporary records on a quarterly basis during the site visits, if not every month;
 - The DB members are **professionals with decades of experience** with similar projects and contracts; they may not interfere in the project execution and supervision, but are clever enough to find a way to point out potential risks and give advice (asking questions or proposing the parties further tests, meetings, negotiations, etc).
 - The DB is **supportive** - always ready to advice how to meet the funders' requirements in case of variations, unforeseeable events and delayed payments.
 - The DB is **economic**: its cost is less than 1% of the project budget; even if the adversarial culture of the parties is predominant, the DB shall sort the numerous referrals, deal quickly with the easy straightforward ones to cool the passions, explain the parties how devastating may be the arbitration/litigation for the project, their relationships and their pockets, advocating for amicable settlement. As a result, at least 50% of the disputes shall be solved, all contemporary records shall be sorted and analysed and the DB determinations shall be recognised as reliable expert evidence in further dispute resolution procedures.

6. Can the Dispute Boards be regarded as marriage chains?



Yes, if appointed in the end of the project against the will of one party.

Chains do not hold a marriage together...

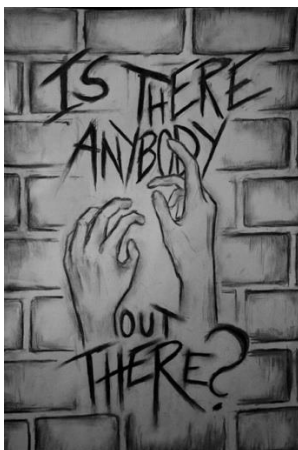


The assumption is that by wearing a wedding ring, people acknowledge their marital commitment publicly and in a continual way.

Having a DB in the tender documents and not appointing one within the stated period, rises doubts in the future fair play, thus disrupting the trust in the long-term commitment. It reminds the husband or wife plotting how to slip off his/her wedding ring and hide it in order to cheat the partner.

If the Parties are terminating the Contract, why should the DB chain them? In a similar situation the arbitration/ litigation stay for a DB appointment/ referral is time/cost consuming and useless like the marriage chains...

7. The Banks: Is there anybody out there?

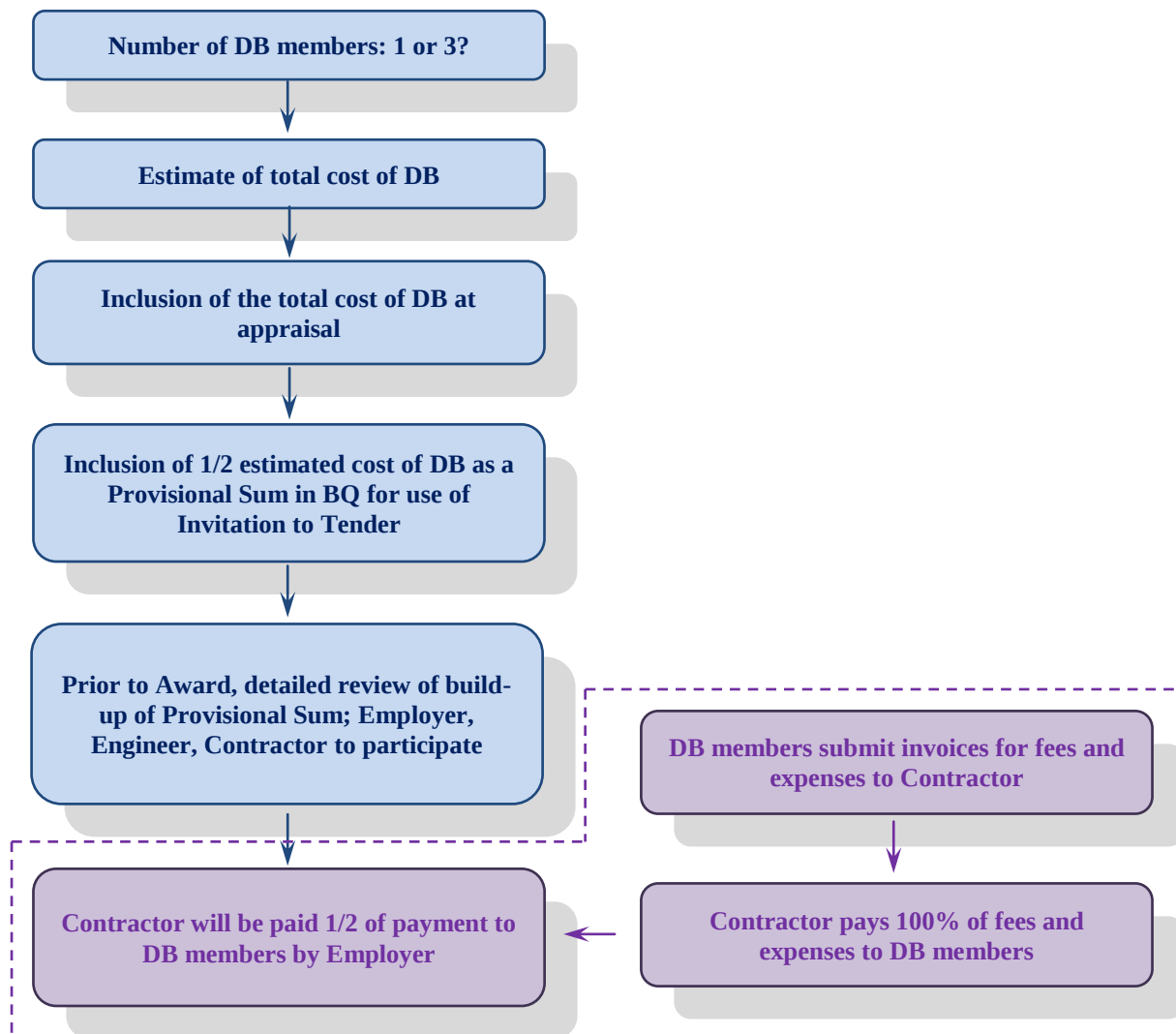


It is very strange why most of the MBDs are negligent about the establishing of the DB at the outset of the project!

The funders give their “no objection” to the tender documents and selection of the contractor and wash their hands... They are not interested how the DB can be financed and whether it is established as agreed under the contract...

This is a strange behaviour, taking into account, that the adjudication has been implemented by the World Bank for several decades!

Luckily, JICA (the Japan International Cooperation Agency) is out there! “JICA recognizes the DB as a mechanism for sound contract management rather than conflict settlement procedures, and deems the cost for the DB eligible to be financed by the Loan.”¹³



8. December 2017: The time has come: FIDIC is ready to strengthen the DB preventive role in the 1999 Second edition

An ounce of prevention is worth a pound of cure!!!

The DAAB: Dispute Adjudication Avoidance Board shall be the wedding ring in the new 2017 edition of the FIDIC 1999 Red, Yellow and Silver Books!

Relying on the preliminary information from the Yellow Book December 2016 Pre-Release version, we hope that the new edition not only corrects the mistake with the ad-hoc DAB in the 1999 Yellow and Silver Books, but makes further improvements:

¹³ JICA, *Dispute Board Manual* (version 1.0, March 2012) iv, https://www.jica.go.jp/activities/schemes/finance_co/procedure/guideline/pdf/DisputeBoardManual_201203_e.pdf checked 6 August 2017

- The Employer's and Contractor's claims are grouped together in Clause 20;
- A new Clause 21 is created for disputes, demonstrating, that the Contractor's claim notification is an early warning, important for the risk management; it is not an adversarial act leading inevitably to disputes.
- Clause 21 implements the modern more certain provisions of the 2008 Gold Book, emphasizing the preventive function of the DAB.

Conclusions:

Secure the budget for the golden wedding rings, made in your style, looking forward to harmonious and lasting partnering!

The impartial DB experienced in similar projects is the key to success!

Carefully select the wedding rings: Whatever your choice of FIDIC Conditions of Contract, use the 2017 FIDIC Clause 21, deriving from the Gold Book and further strengthening the preventive function of the DB, in order to have the standing DAAB as a project management instrument!

Live happily ever after!!!