FIDIC’s dispute adjudication boards: a guide to their use in the UAE

Leonie Sellers considers how dispute adjudication boards (DABs) are used in the UAE and the implications that international case law may have for them in the region.

**Introduction to DABs**

DABs were introduced into Clause 20 of the FIDIC (Fédération Internationale des Ingénieurs Conseils) forms of contract in 1999 and are used as an intermediary step to try and resolve the dispute, before, and in an attempt to avoid, entering into arbitration or court proceedings. Rather than merely acting in an advisory capacity, the DABs decision has a binding effect on the parties, unless or until it is revised by amicable settlement or arbitral award.

**Full-term and ad hoc DABs**

How a DAB is appointed differs between the 1999 FIDIC red, yellow and silver books and as such, alters the functionality and purpose of the DAB and the benefit that having a DAB provides.

The 1999 FIDIC red book provides for a "full-term DAB", whereby the board is appointed before the contractor commences the works; however the 1999 FIDIC yellow and silver books provide for an ‘ad hoc DAB’ whereby the board will be appointed when the dispute arises.

Like with arbitration, the parties to a contract can specify the number of members that sit on the board. The value of a contract has been previously used as a way to determine the number of members that should be required. The standard FIDIC terms require that the board is constituted of one or three members and FIDIC has recommended that a three member DAB is used where the estimated contract price exceeds US$25m (Seppala, C, “The new FIDIC provision for a Dispute Adjudication Board”, 1997).

**Appointment of the DAB members**

Once the DAB members have been agreed between the Parties, to formally appoint the DAB, the parties and the
member(s) of the DAB must enter into a dispute adjudication agreement (a DAA) which should outline, amongst other things, the relevant remuneration provisions.

The provisions of the 1999 FIDIC forms of contract provide that the remuneration of the member(s) of the DAB shall be mutually agreed upon by the Parties when agreeing the terms of the appointment. In practice however, it has been deemed usual that the member(s) of the DAB would propose their own fees, and in the event the Parties disagreed on such fee, a court assessment to determine the reasonableness of the fee would be conducted and it is unlikely the fee would be less than what was originally proposed by the member(s) of the DAB (Taner Dedezade, “Can a party ignore FIDIC’s DAB process and refer its dispute directly to arbitration?”, 2014).

In addition, several international organisations have published rules pertaining to dispute boards, most of which set guidelines for remuneration. Article 17 of the Chartered Institute of Arbitrators Dispute Board Rules 2014 states that in the event the parties are unable to agree upon a reasonable remuneration, the Chartered Institute of Arbitrators shall decide upon the reasonable fee to be paid, a decision which shall be final and binding on the parties.

For an ad hoc DAB, no retainer fee is payable and the remuneration only consists of a daily rate, including any reasonable expenses incurred. Fees are payable in advance and decisions by the DAB can be withheld until payment is received (Ellis Baker, Ben Mellors, Scott Chambers, Anthony Lavers, FIDIC Contracts: Law and Practice, Informa).

The DABs decision

Once a DAB has been agreed between the Parties, the referring party should then provide to the DAB a position paper, including the full details of the case, the assertions and arguments on which it relies and the detailed decision which it wishes the DAB to make (David J. Loosemore, “The Use of Dispute Boards”, the Society of Construction Arbitrators, 2009).

Additionally, the parties have flexibility in requesting what matters the DAB looks to first (e.g. reviewing extension of time claims before quantum). Unless the dispute is sufficiently straightforward, a formal hearing may be convened and site visits may be conducted.

Under the 1999 FIDIC forms of contract the DAB only has 84 days from the date of receipt in which to issue its decision. With a decision being required in such a short time frame after being appointed, an ad hoc appointed DAB will have to quickly become acquainted with the project (having not benefited from the background experience a full-term DAB would have been exposed to). This increases the likelihood that the decision issued will not satisfy one of the parties. This is not seen to be the case with full-term boards however. As full-term boards have the benefit of working alongside the project and becoming part of the project team, they are likely to become trusted as fair and impartial, increasing the potential that their advice will be readily accepted by all parties.

DABs in the UAE and the consequence of recent developments

Whilst there are obvious benefits to having a DAB, their use in the United Arab Emirates (UAE) is still relatively limited.

In 2007, the Government of Abu Dhabi adopted an ad hoc DAB as the first tier of the dispute resolution process in their Condition of Contract (Law No 1. of 2007). Despite this, and the region embracing the 1999 FIDIC forms of contract, the DAB provisions did not gain the widespread support they have seen internationally and remain seldom used, at times being deleted from the contract entirely.

Parties who do not delete these clauses in their entirety should give careful consideration to any preferred amendments
to the standard wording of the FIDIC contracts, as they could find the DAB process held to be mandatory. Recent international case law has limited the ability for parties to avoid the contracted for DAB process and refer the dispute directly to arbitration or court proceedings as designated.

The once perceived flaw in the standard drafting of the 1999 FIDIC forms of contract arose from Clause 20.8, which provides:

“If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB’s appointment or otherwise:

(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply; and

(b) The dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

In the case where an ad hoc DAB was designated in the contract, this clause effectively provided an opportunity for an unwilling party to avoid compliance with DAB process and refer the dispute directly to arbitration, as there would be instances in which there was no DAB in place.

A recent case in the English courts, where a FIDIC contract provided for an ad hoc DAB as a prerequisite to ligation, held that if such clause is retained in a contract, it would not permit the parties to "opt out" as Clause 20.8 was intended to apply to situations in which a full-term DAB has been appointed (Peterborough City Council V Enterprise Managed Services Ltd [2014] EWHC 3193). A similar decision was reached in a recent Swiss case, which again held that allowing the parties to rely on Clause 20.8 as a way of avoiding the contractual provision of DAB would undermine the intention of the contract (Decision 4A_124/2014, Swiss Supreme Court).

With both common and civil law jurisdictions finding that contracted for DAB provisions are mandatory, it is possible the same will be found under UAE law. This is further supported by Article 265 of the UAE Civil Code, which provides that if the wording of a contract is clear, it may not be departed from and in the event there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties. To abandon the use of a DAB in favour of referring the dispute to arbitration or court proceedings on the basis of Clause 20.8, would arguably render the entire DAB provision meaningless and would likely not be found to be the parties’ intention.

**Conclusion**

Retaining the 1999 FIDIC DAB language or deleting the clause entirely is a choice for the parties. There are many benefits that having a DAB provides, both ad hoc and full-term. However there are still many instances in which the parties may not fully understand the inclusion of the standard FIDIC terms and consideration has to be given to the fact that there is now a strong suggestion that, with the inclusion of such a provision, the appointment of the DAB will be held to be mandatory. It is therefore important that the parties to a 1999 FIDIC contract carefully consider what their intentions are, and reflect these accurately in the drafting of their contract.