

DAB in Bulgaria – An Engineer’s Perspective



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DAB Experience Overview

General

- Substantial railway project with 7 interfaced works contracts, total value circa 420m Eur.
- Modified FIDIC Yellow Book - **Ad Hoc DAB**
- Experience - Documents Only

Dispute 1 – ‘Simple’ (Value circa 1m Eur)

- DAB assisted to resolve the definition of 'station'
- Defined the extent ducting provided from one contractor to another
- DAB Process - Successful, useful, facilitated contract progression

Dispute 2 – ‘Complex’ (Value circa 2m Eur)

- Dispute regarding 'Final Account'
- Considerations of EoT, Employer's Claim, Concurrent Delay, Etc.
- DAB Process - Extent of value open to question (unresolved payment, decision not "final and binding")



"Pay Now Argue Later"

- Complex Final Account Dispute
- Arbitration provision curtailed by Particular Conditions
- Final Account dispute crystallised after the Performance Certificate
- Notice of Dissatisfaction regarding the decision
- In the absence of arbitration, if amicable settlement fails, is the DAB dissatisfied party required to pay and then proceed to take the (possibly foreign) entity through litigation to recover?
- How would you react?
- Could a Public entity Employer actually pay public funds on this basis? (The DAB process does not have legislative recognition in Bulgaria - it represents an 'experts opinion')

Conclusion

- DAB Process less successful at contract end
- DAB None "Final and Binding" decisions are a problem in Bulgaria
- Particularly so if the arbitration process is curtailed
- The DAB process may facilitate the dispute resolution through 'expert opinion'



Quality of Argument? Or, Quality of Presentation?

- Contractor
 - Resourceful
 - Legal, Quantum, Planning Expertise ('Sophisticated Planning Techniques')
- Eastern European Public Employer
 - Limited funding, limited experience
 - Use of Engineer?
- DAB
 - Will respond to what is placed in front of him/her

Conclusion (a thesis)

- It could be possible for the presentation of the argument to beat the substance of the argument?
- It seems that this could be a particular point within Eastern Europe public projects?
- It seems that Contractors could theoretically use this point strategically?
- It seems that Clients could, as a result, seek to remove the DAB process from their contracts because of perceived unfairness?
- It should be noted that this consideration reflects primarily 'ad hoc' DAB



Involvement of the Engineer

Q. *Should the Engineer provide inputs to DAB disputes?
Perhaps to 'defend' a 'Fair Determination'?*

- I believe that the DAB process is likely to reach a fully considered - and therefore fair conclusion - if the Engineer does provide inputs
- Such inputs (provided they are factual and themselves 'balanced', not 'advocacy') should assist to ensure 'fairness' of outcome
- There is a relevant consideration regarding the integrity and/or competence of the Engineer

Conclusion

- Without Engineer's involvement the argumentation could be 'unbalanced' and lacking in certain facts
- Notwithstanding the Parties are business partners who have contracted to the DAB process, this lack of balance could potentially be inherently 'unfair'
- If supervision contract provides for it, Engineer inputs to DAB should be acceptable, if not essential
- These need though to be competent, fair and fact based



DAB Expanded Settlement Function

- Several contracts include the following Particular Condition modification to Sub-Clause 20.4:

"...DAB shall attempt to reconcile both parties and respectively terminate the dispute if possible, then within 84 days after receiving such reference, or the DAB shall give its decision,"

- Methodology not defined - 'Mediation', 'Conciliation', 'Expert Opinion'?
- Clearly a potential conflict with impartiality
- Overlap with Engineer's consultation function under Sub-clause 3.5 [Determinations]
- How will confidential information be treated?
- How can the 84 days be kept? (noting UK 28 day adjudication)

Conclusion

- Not yet tested - to be confirmed!



DAB Process - An Engineer's Opinion

- There has been a debate about the role of the Engineer - ability to be 'fair'
- For 'Ad-Hoc' DAB, particularly, a debate regarding the integrity of the 'process' appears merited, if not already held
- In Bulgaria, after 160 contractual claims, 2 have resulted in DAB proceedings
 - The Engineer function has therefore usefully served to 'filter' the claims
 - The 'Ad Hoc' DAB process resolved one, but left one 'open' (although 'decided')

But,

- It appears that a 'Standing' DAB (or Dispute Review Board) could have further assisted:
 - Resolution of differences in a more timely manner
 - Focus on the issues, not their presentation
 - Clarity regarding what the issues and differences actually are
 - Better ability of the Parties to understand the strength of their positions (eg. per 20.2 RB)
- In Bulgaria, a full-term 'Standing DAB' could potentially have assisted to resolve all disputes - leaving resolution of the "final and Binding" concern unnecessary.
- **For large scale projects I fully support the use of the DAB process, but believe that the Full-Term Standing DAB, or Dispute Review Board, approach would be favourable**

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