

# DAAB AS A COLLABORATIVE DISPUTE RESOLUTION UNDER FIDIC RED BOOK 2017 2<sup>nd</sup> EDITION

**Jo Johnson<sup>1)</sup>**

<sup>1)</sup>Magister of Construction Law, Pekalongan University, Sriwijaya Street, No. 3,  
Pekalongan, 51119  
E-mail: [jo.johnson96@hotmail.com](mailto:jo.johnson96@hotmail.com)

## **Abstract**

The increasing complexity and risks in the construction industry, combined with the lack of awareness among construction service practitioners in Indonesia regarding contract administration, have made claims and disputes in construction projects a common occurrence. The best way to avoid disputes is to prevent or minimize differences in interpretation that could escalate into formal disputes. The FIDIC Rainbow Series 1999 contracts mandated the appointment of a Dispute Adjudication Board (DAB) as a non-litigation alternative to act as an impartial intermediary between the parties. With the issuance of the FIDIC Rainbow 2017 2<sup>nd</sup> Edition, reprinted in 2022 with amendments, additional authority has been granted to the Dispute Avoidance/Adjudication Board (DAAB), making it a more collaborative dispute resolution alternative compared to the FIDIC Rainbow Series 1999. The inclusion of the new Sub-Clause 21.2 [Avoidance of Disputes] in the FIDIC Rainbow 2017 2<sup>nd</sup> Edition is expected to encourage parties to view the DAAB not only as a dispute resolution alternative but also as a mechanism for dispute avoidance before disputes arise.

**Keywords:** *FIDIC, Claim, Dispute, DAAB*

## **Abstrak**

Meningkatnya kompleksitas dan risiko dalam industri konstruksi, ditambah dengan kurangnya kesadaran di antara para praktisi jasa konstruksi di Indonesia mengenai administrasi kontrak, telah membuat klaim dan perselisihan dalam proyek-proyek konstruksi menjadi hal yang umum terjadi. Cara terbaik untuk menghindari perselisihan adalah dengan mencegah atau meminimalkan perbedaan interpretasi yang dapat meningkat menjadi perselisihan formal. Kontrak FIDIC Rainbow Series 1999 mengamanatkan penunjukan Dewan Adjudikasi Sengketa (DAB) sebagai alternatif non-litigasi untuk bertindak sebagai perantara yang tidak memihak di antara para pihak. Dengan diterbitkannya FIDIC Rainbow 2017 2<sup>nd</sup> Edition, yang dicetak ulang pada tahun 2022 dengan beberapa amandemen, kewenangan tambahan telah diberikan kepada Dispute Avoidance/Adjudication Board (DAAB), sehingga menjadikannya sebagai alternatif penyelesaian sengketa yang lebih kolaboratif dibandingkan dengan FIDIC Rainbow Series 1999. Dimasukkannya Sub-Klausul 21.2 [Penghindaran Sengketa] yang baru dalam FIDIC Rainbow 2017 Edisi ke-2 diharapkan dapat mendorong para pihak untuk melihat DAAB tidak hanya sebagai alternatif penyelesaian sengketa, namun juga sebagai mekanisme penghindaran sengketa sebelum sengketa muncul.

**Kata kunci:** *FIDIC, Klaim, Sengketa, DAAB*

## **INTRODUCTION**

The construction industry has evolved into a highly complex and high-risk sector. Most construction projects are uncertain, involving multiple parties, requiring specialized designs, detailed plans and specifications, high-risk construction methods, effective management, skilled supervision, and efficient coordination. Consequently, a formal working agreement between Employers and Contractors, in the form of a construction

contract, is necessary as the legal foundation. It is widely acknowledged that parties often perceive construction contracts superficially, focusing primarily on the "contract value" and the act of "signing" (Rivai, 2018). Rarely do parties scrutinize the essential elements that should be included in a contract. As a result, claims and disputes frequently arise in construction projects.

Disputes may occur due to the different perceptions of the legitimation and the amount of claim (Hardjomuljadi, 2011). Disputes are costly, on average, 50% of the legal costs borne by the construction industry are related to disputes, and roughly 10% of projects, 10% of total costs, were legal costs (Armes, 2011). In addition to the significant increase in costs, disputes also extend project completion times, damage relationships between parties, harm reputations, and undermine investor confidence—all of which negatively impact the success of a project. The most effective way to prevent disputes is to avoid or minimize differences in interpretation that could escalate into formal conflicts.

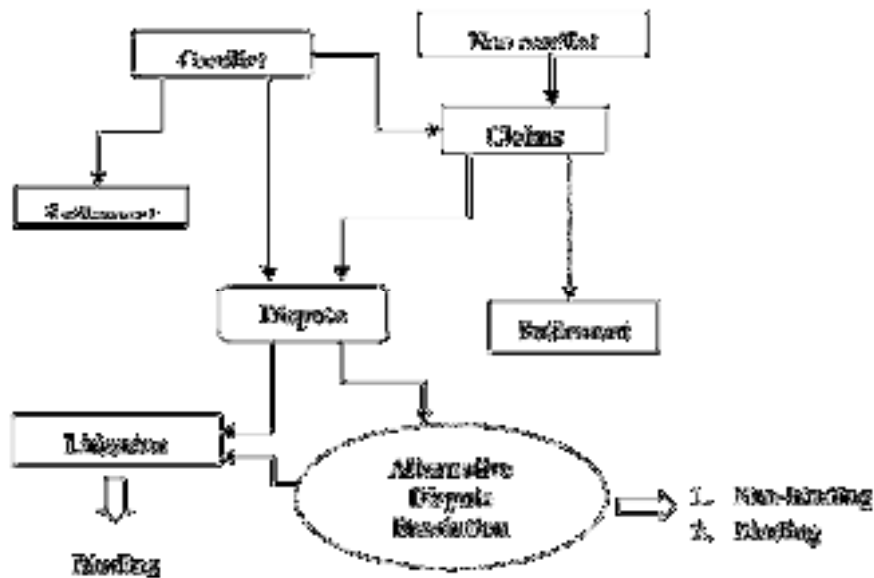


Figure 1. Conflict, Claims, and Disputes (Abeynayake, 2013)

The FIDIC Rainbow Series 1999 mandates the appointment of a Dispute Adjudication Board (DAB) [Sub-Clause 20.2 – Appointment of the Dispute Adjudication Board] as a non-litigation alternative to facilitate neutral decision-making in disputes. The DAB is authorized to issue binding decisions for the parties involved. However, due to the perception that appointing a DAB is "expensive" if done at the start of a project, and arbitration is seen as a more "formal" resolution process, the appointment of a DAB is often overlooked. This reluctance is frequently attributed to a lack of experience with

DABs and a limited understanding of the significant savings a well-established and maintained DAB can offer (Hardjomuljadi, 2014). The introduction of the FIDIC Rainbow 2017 (2nd Edition, reprinted 2022 with amendments) provides additional authority to the Dispute Avoidance/Adjudication Board (DAAB), making it a more collaborative alternative for dispute resolution compared to the FIDIC Rainbow Series 1999. In light of these developments, this study aims to educate stakeholders on the critical role of DABs in construction contracts and to examine the differences between the DAB provisions in the FIDIC 1999 and 2017 editions, with a specific focus on the FIDIC Red Book.

## METHODS

The study followed an inductive reasoning and interpretive approach, including qualitative methods, such as literature review.

## RESULT AND DISCUSSION



Figure 2. The chronological development of FIDIC Conditions of Contract (Hardjomuljadi, etc., 2006)

It is undeniable that FIDIC, as an organization, has become globally renowned for publishing standard conditions of contract, widely recognized for being "fair and balanced" (Hardjomuljadi, 2014). The chronological development of the FIDIC General Conditions of Contract is illustrated in Figure 2. To enhance clarity and reduce potential misinterpretations, FIDIC evolved its 1st Edition Rainbow Series into the 2nd Edition Rainbow Series. The primary theme of this development is an increased emphasis

on dispute avoidance. The second edition is significantly more comprehensive, comprising over 200 pages and containing 21 clauses. This expansion reflects the adoption of more prescriptive provisions aimed at improving clarity, transparency, and certainty by detailing the steps to be followed throughout a project.

The Red Book, or FIDIC Conditions of Contract for Construction 1999, provides contractual provisions for construction projects where the majority of the design is prepared by the Employer or the Employer's appointed Consultant. Under the Red Book framework, project administration and supervision are conducted by an Engineer employed by the Employer. The Engineer's responsibilities include supervising the execution of the works by the specifications agreed upon in the contract, administering the contract, monitoring construction progress on-site, and preparing payment certificates based on measured work completed under the contract. Payments are made by unit rates determined during tender, the schedule of rates, and/or lump sum agreements (Hardjomuljadi, 2014). When the Engineer's opinion is required to resolve an issue or determine a claim, the Engineer is mandated to consult with both parties in an attempt to reach a consensus. If no agreement is achieved, the Engineer must issue a fair decision considering all relevant circumstances. However, if either party disagrees with the Engineer's determination, the dispute is referred to a dispute board for resolution. FIDIC mandates the appointment of a dispute board because the Engineer, being employed by the Employer, cannot act impartially when making decisions on disputes. The dispute resolution process involving a dispute board under the FIDIC Conditions of Contract is illustrated in Figure 3.



Figure 3. Flow chart of dispute board process (under FIDIC Conditions of Contract) (Hardjomuljadi, 2020)

The DAB may be composed of either a one-member or three-member board. For the appointment of a 3-person DAB, the Employer and Contractor each nominates, for the other's approval, one member, and then the Parties and the two members agree upon the third member who shall be appointed to act as chairman. For a single Adjudicator, the person should be appointed by mutual agreement of the Parties. It is prudent to keep the number of members to an odd number so that it is possible to achieve a majority decision where the panel cannot reach unanimity. FIDIC DAB decisions are immediately binding, and the parties are obliged to comply with decisions while other stages of the dispute resolution procedure are pending, such as re-vision by amicable settlement or arbitral award. If, within 28 days after receipt of the decision, neither Party serves written notice of dissatisfaction with the DAB's Decision, the Decision becomes final.

There are two types of Dispute Adjudication Boards (DABs): the standing dispute board and the ad hoc dispute board. The standing DAB consists of one or three members who are appointed before the contractor begins work on-site and typically conduct regular site visits thereafter. The primary purpose of a full-term standing DAB is to address disputes arising from or related to the construction site. Additionally, if agreed upon by the parties, a standing DAB can act as an informal sounding board for resolving issues as

they emerge before their formal referral to arbitration. The second type, the ad hoc DAB, is appointed only after a dispute has arisen. This type of DAB is commonly preferred by parties under the assumption that it saves costs compared to a standing DAB. However, this approach undermines the essence of appointing a DAB, which is to proactively identify and address potential risks and issues early in the project. A standing DAB is intended to guide the parties toward amicable resolutions, preventing disagreements from escalating into formal disputes.

The advantages of DBs over arbitration and litigation are (1) timeliness and (2) lower costs, in that a DB also functions as a dispute avoidance and prevention method (Hardjomuljadi, 2020). Since construction disputes involve technical issues, expert opinion resolution of disputes is beneficial when mixed legal and technical disputes are at issue (Abeynayake, 2013). The DB allows more experience and greater relevant expertise to be applied to construction disputes. The major advantage of the DB is that it can operate on-site and resolve issues before leaving the site. DBs provide the parties with the benefit of highly effective dispute resolution by resolving disputes in comparatively much less time, as stated in the FIDIC conditions of contract documents (Irmak, 2017).

In the FIDIC Red Book 2017 (2nd Edition, reprinted 2022), the role of the Dispute Adjudication Board (DAB), which was previously limited to alternative decision maker of dispute resolution under the FIDIC Red Book 1999, has been significantly expanded. This is evidenced by the introduction of Sub-Clause 21.2 [Avoidance of Disputes] and the renaming of the DAB (Dispute Adjudication Board) to the Dispute Avoidance and Adjudication Board (DAAB) [Sub-Clause 1.1 – Definition]. This change emphasizes the DAAB's proactive role in preventing disputes and fostering collaboration between the parties.

The DAAB is now authorized to provide informal opinions and engage in discussions on issues as outlined in Sub-Clause 21.2: *"... 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."* This informal assistance does not carry binding authority but serves as impartial

expert advice to help the parties make decisions, as further clarified in Sub-Clause 21.2: "... *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.*" The inclusion of Sub-Clause 21.2 is intended to encourage the parties to view the DAAB not merely as an alternative dispute resolution mechanism but as a proactive tool for dispute avoidance, helping to resolve issues amicably before they escalate into formal disputes.

## **CONCLUSION**

FIDIC has facilitated and mandated the use of a Dispute Adjudication Board (DAB), now evolved into a Dispute Avoidance and Adjudication Board (DAAB) under the FIDIC Red Book 2nd Edition, reprinted 2022, as a collaborative alternative for dispute resolution. However, despite being required under the contract and offering numerous advantages, parties are still reluctant to appoint a DAAB at the outset of a project, primarily due to the perception that such an appointment is "expensive." In the context of complex construction projects, appointing a DAAB is in fact, more cost-effective than resolving disputes through litigation. Litigation often involves additional expenses such as engaging claim consultancy firms, expert opinions, extensive document preparation, staff transportation, and other costly and time-consuming processes. Appointing a DAAB from the beginning of the project helps parties avoid conflicts and, in cases of disagreements, guides them toward amicable resolutions without escalating the matter into formal disputes.

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