

## Insights

# ARE DABS THE NEW ADJUDICATION?

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## SUMMARY

The [JCT Dispute Adjudication Board Documentation 2021](#) (JCT DAB) has now been published, for use with the 2016 [Design and Build Contract \(DB\)](#) and the [Major Project Construction Contract \(MP\)](#). But, before we look at how it will operate, it is worth stepping back and looking at what [dispute boards](#) are meant to do and why they are now seen as an option for UK projects.

### **A is for Avoidance or Adjudication?**

Dispute Adjudication Boards are part of the [1999 FIDIC Red, Yellow and Silver Books](#) and provide a temporarily binding decision, as a step before arbitration. In other words, similar to adjudication under the Construction Act 1996.

The 2017 FIDIC suite of contracts introduced the [different concept of Dispute Avoidance/Adjudication Board \(DAAB\)](#) covering both adjudication and avoidance. Rather than just make a decision, the intention is that the DAAB will help informally when any disagreements come up, at the parties' request or at its own initiative. If the dispute is not resolved, the DAAB can then provide a decision.

[NEC4 introduced Dispute Avoidance Boards \(NEC DAB\)](#) as [Option W3](#) in 2017. This was aimed at international users of NEC but there was an interest in using that option in the UK and in April 2019 NEC published [Practice Note 5](#), which includes a Z clause allowing the use of a DAB in contracts subject to the Construction Act 1996. The NEC DAB however is completely separate from the Adjudicator under NEC, providing recommendations but not decisions.

### **Resolving disputes collaboratively**

Adjudication has many advantages and can be an effective way to resolve disputes, but it is an adversarial process that can be detrimental to any attempts to create the collaborative environment that is important for all projects but especially for complex long term infrastructure projects.

It is perhaps unsurprising that nobody picked up collaboradjudication as I suggested 10 years ago. But, as Jonathan Cope wrote, a few years ago the RICS, together with TfL, introduced the Conflict Avoidance Process and, in 2018, Network Rail introduced the Disputes Avoidance Panel. The JCT DAB reflects the same trend for the use of early intervention techniques to resolve differences before they escalate into full blown disputes.

### **How does the JCT DAB work?**

The pack includes a JCT Model Dispute Adjudication Board Tripartite Agreement, which the parties and the DAB members sign. It is a relatively short agreement that deals mostly with fees and liability but it confirms that the parties will observe the JCT/CI Arb Dispute Adjudication Board Rules (Rules). There are also clauses that can be used to amend the JCT DB or MP forms to allow for a DAB to be used. The JCT model proposes a standing DAB, appointed at the start that provides both non-binding informal advice and recommendations, as well as temporarily binding decisions.

The substantive provisions are therefore in the Rules and the main ones are as follows:

- Article 2 makes it clear that the DAB process leading to a Decision is intended to be compliant with the Construction Act 1996 and that the Rules comply with section 108. In other words, whether it comprises one or three members, once appointed the DAB takes on the role of adjudicator in accordance with the Construction Act 1996.
- Article 4 governs the appointment of the DAB, which can be one or three members but if the number is not stated or agreed it is one member. Each party nominates one member for approval and the two DAB members then appoint the third member who acts as chairperson. There is also a provision for the CI Arb to make an appointment on request if the parties fail to set up the DAB. Article 4.9 is worth noting, as it makes it clear that if a DAB has not been appointed and one party starts an adjudication, the Scheme will apply.
- Article 5 deals with impartiality and independence, requiring a declaration from DAB members when appointed and they remain under a continuing obligation to disclose any conflicts with any doubts leading to disclosure.
- Article 7 deals with the periodic meetings and site visits, which are meant to take place every 2 months to allow the DAB to get to know the project and identify potential problems. A report is to be issued to the parties following each visit. Article 7.6 makes it clear that a DAB member cannot speak or meet one party alone and cannot receive or take account of any information that has not been provided to the other side on an open basis. This is to prevent without prejudice communications to the DAB, to address the *Glencot Development v Ben Barrett* issues where there is a later adjudication. However, this may limit what parties tell the DAB when seeking to avoid a dispute escalating.

- Article 9 covers non-binding informal advice. Either party can ask for it or the DAB can also raise an issue with the parties if it considers it necessary, although both parties can ask the DAB to stop if they think it is unnecessary. The key provision is Article 9.7 that makes it clear that if the DAB is later called upon to make a Decision or Recommendation, it is not bound by the views expressed in giving informal advice and can only rely on information, documents, submissions or evidence formally submitted following a formal referral. One can see arguments about a DAB member being nonetheless influenced by the earlier informal advice but as the formal Decision or Recommendation process will be more detailed this may be less of an issue in practice.
- Article 10 covers referral of a dispute to adjudication by the DAB and Article 11 governs the conduct of a hearing. Helpfully, the DAB must avoid delay or unnecessary expense and use procedures which are proportionate to the dispute.
- Article 12 covers Decisions and the statutory timetable. Much of it also applies to non-binding Recommendations. Where the DAB has three members, it is interesting that the decision is by majority (or the chairperson) but the minority view is issued in a separate report that is not part of the Decision. That can be quite useful in helping the losing party to assess whether it is likely to get a different decision if it refers the dispute to court or arbitration. There is an overall 21-day period for correcting clerical or typographical errors, which must be notified within 14 days, but in practice that should happen over a shorter period.
- Article 13 sets out the powers of the DAB, which include the power to decide on its own jurisdiction (and the scope of the dispute referred to it), presumably in order to reduce jurisdictional challenges. In addition, there are the usual powers with regard to procedure, taking the initiative in ascertaining the facts or law and asking for more information, as well as opening, reviewing and revising any decisions, valuations, certificates and instructions.
- Article 14 deals with a party that refers a dispute to the DAB but only seeks a non-binding Recommendation. Article 14.4 makes it clear that while a Recommendation is not binding it must be considered by the parties. A Recommendation is therefore based on a more extensive procedure and information than an informal advice but ultimately it can still be ignored. It is not dealt with expressly but it seems possible to refer a dispute that has resulted in a Recommendation to adjudication by the DAB, which will lead to a binding Decision that the referring party would no doubt expect to follow the Recommendation.
- Articles 6.4 and 6.5, and clause 6 of the Tripartite Agreement govern termination. This is not linked to the underlying contract so the DAB can manage post termination disputes and the parties can jointly terminate a DAB member's appointment on one month notice and each DAB member can terminate their Tripartite Agreement on 2 months' notice.

In his [recent blog](#), Matt Molloy made the point that issues will arise where the same DAB that discussed the issues with the parties at the outset, and may have provided an informal opinion, also makes the binding Decision. JCT acknowledges this in the “Forward” to the JCT DAB Rules. Provisions such as articles 7.6 and 9.3 of the Rules are designed to avoid such issues and Article 2.4 confirms the parties’ agreement that the Rules comply with section 108 of the Construction Act 1996. Although not expressed as such, the parties’ entry into the tripartite agreement and agreement to the Rules may be seen as a waiver of any objections they may seek to raise later, but the effectiveness of such an argument will no doubt depend on the facts in each case. As Matt says, the DAB members will need to be alert to the issues that their position will raise.

### **A DAB for every project?**

Anything that encourages early dispute avoidance is to be welcomed and using a DAB has clear benefits that on appropriate projects will outweigh the additional costs and potential complexity of using a DAB. As is the case with collaborative contracts, the parties will need the right mind set to use a DAB effectively and if the parties do not cooperate with the DAB or take into account non-binding advice or Recommendations, the DAB is likely to lose its effectiveness in terms of dispute avoidance.

In any event, the options for a one member DAB or a later ad-hoc appointment are useful and suggest that the process can also be considered for smaller projects, that will benefit from dispute avoidance just as much if not more. The JCT is also looking at how DABs can be used for large and longer-term subcontracts and it will also be interesting to see if a DAB service for lower value less complex projects will develop, in the same way as has happened with adjudication. These are however early days and it remains to be seen to what extent the JCT DAB process will be adopted by parties.

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This article first appeared on the Practical Law Construction blog dated 17 May 2021.

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