Inspired by the image of Mount Fuji, the slogan of this year’s DRBF International Conference is “Climb to The Top”, urging the elevation of engineering and construction projects by the successful use of dispute boards.

As with Mount Fuji’s top, the climb to the project top by use of a dispute board is not easy or quick, and to be successful must be made with care. The dispute board climb is not made alone and requires diligent cooperation by the climbing team – Employer, Engineer, Contractor, and dispute board.

Each member of the team must want all of the other members to be and remain in the team, dedicated to working together, and completing the ascent without resort to adversarial behaviour.

No one can foresee all of the potential problems which may arise during the climb, and to achieve the summit, it is essential for the team to maintain mutual respect and to remain open to altering original plans made prior to commencement of the ascent.

When disagreements arise during the climb, the most important role of the dispute board members of the team is not that of an “enforcer”; it is that of a “persuader” who uses its total professional experience to assist the rest of the team to find mutual agreement on how best to overcome the obstacles encountered.

The primary duty of the dispute board is the prevention of formal disputes. Making decisions on formal disputes is only a secondary duty. The truly successful dispute board is one which never has to decide a formal dispute.

What are some specific steps the dispute board can take to prevent formal disputes? We shall explore some by reference to two sets of FIDIC Conditions of Contract: the 2010 Pink Book, developed with the Multilateral Development Banks and International Financial Institutions, and the 2017 Second Edition of the Red Book.

Clauses referenced should be examined carefully as the descriptions in this paper necessarily are brief and do not include certain details and exceptions, nor do they contain all details of time limits. To reduce length, citations of Clauses and Sub-Clauses are referred to without repeating the nouns, and with either “PB” or “RB”. The 1999 First Edition of the Red Book is discussed as well and for it, this text uses “RBF”.

DOCUMENTS

We begin by considering some documents which are important to the work of the dispute board.

FIDIC Conditions involve the use by the Parties and the Engineer of a large number of documents whose details must be agreed and used in administration and execution of the Contract. Many of those documents will record the data with which the climbing team will be involved as it resolves the challenges encountered as it “Climbs the Mountain”.

“AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE”
- Benjamin Franklin

© Gordon L. Jaynes
Glj4law@aol.com
24 May 2018
PB

As evident from PBs 2.5, “Employer’s Claims” and 20.1, “Contractor’s Claims” require documentation. The Employer is to give to the Contractor, either directly or via the Engineer, “notice and particulars” of claimed payment or extension of the Defects Notification Period. The “particulars” are to include “the Clause or other basis of the claim, and the amount and/or extension” sought. The Engineer is to proceed to a PB 3.5 agreement or “determination” on the Employer’s entitlements, if any.

Claims by the Contractor for additional payment and/or time for Completion require “notice to the Engineer…describing the event or circumstance giving rise to the claim” Also, the Contractor is to submit relevant “supporting particulars”. There is a further requirement that the Contractor “keep such contemporary records as may be necessary to substantiate any claim”. These records may be “monitored by the Engineer [who] may instruct the Contractor to keep further contemporary records”, and later may “request any necessary further particulars”. After such submissions the Engineer is to proceed under PB 3.5 to “agree or determine” the amount the Contractor’s entitlements, if any.

Clearly, it is in the interests of all members of the climbing team to establish agreed forms for the documents which will be required to operate the above claims process. This should be done as early as possible after the Board is established.

Particularly important documents include:

PB 1.15: “Inspection and Audit by the Bank”: The Parties, the Engineer, and the Bank should agree as early as possible the acceptable format for the “accounts and records” which must be available for audit purposes. Ideally, this would be done in conjunction with the review by the Parties and the Engineer with the DB of the records to be maintained by the Contractor regarding its costs and regarding its allocation and use of equipment, labour, supervision, and materials, to facilitate DB understanding of such records and enable efficient use of them in substantiation of claims

PB 4.21, “Progress Reports”, and the notices under paragraph “(f)” should include recording of progress on the Parties’ claims, including identification of pending actions and the persons responsible for progressing the pending actions.

PB 8.3 “Programme” and any subsequent revisions; this should have integrated in it the detailed time programme for the receipt from the Engineer of any design additional to that contained in the Contract Documents and required to enable completion of the Works.

PB 13, “Variations and Adjustments”: All variations, Contractor applications for variations, and Value Engineering exchanges;

PB 14.3 form of “Statement” for application for Interim Payment Certificates”;

PB 14.6; form of “Interim Payment Certificate”;

Notices under PBs 15, “Termination by Employer” and 16, “Suspension and Termination by Contractor”;

PB 19.2, “Notice of Force Majeure”;

PB 20.1, “Contractor’s Claims”: Written communications of the Contractor and the Engineer;
In addition to resolving the format of the documents, their distribution among the Contract participants should be agreed and should include distribution to the DB at the time of issue. This enables the DB to keep itself informed in a timely manner as the Works progress. It allows the DB to anticipate potential problems which may cause disagreements, and to discuss them immediately with the Parties and the Engineer, before adversarial positioning can develop.

SPIRIT OF THE CLIMBING TEAM

Success in the ascent requires each team member to be active in the prevention of disputes. Some of the diction of the FIDIC provisions regarding the DB sometimes is interpreted as requiring the DB to be “passive”. For example, paragraphs 4 (f) and (k) of the General Conditions of Dispute Board Agreement require the DB to:

(f) “not give advice to the Employer, the Contractor, the Employer’s Personnel or the Contractor’s Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;”

(k) “be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer, the Contractor, subject to the agreement of the Other Members (if any).”

You will note that the two sub-paragraphs are not entirely consistent with respect to when the DB can offer “advice” or “opinion”. Also, the wording “when requested” has been argued to suggest that the DB should “speak only when spoken to”, and should not take the initiative by offering to give advice or opinions.

However, these provisions (which derive from comparable provisions of RBF) should be read in the context of the significant change to PB Procedural Rule 2, compared to RBF Rule 2:

RBF:

“The purpose of the site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims.”

PB:

“The purpose of the Site visits is to enable the DB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and, as far as reasonable, to endeavour to prevent potential problems or claims from becoming disputes.”

Clearly the PB aim is to have a “proactive” DB, and it is open to the DB to take the initiative to persuade the Engineer and either or both Parties to discuss and consider informally the views or advice of the DB on anything which otherwise may lead to a problem or claim becoming a formal dispute.

It may be that the PB text was influenced by the “proactive” emphasis of Article 16 the Dispute Board Rules of the International Chamber of Commerce, first published in 2004, before the publication of the initial version of the PB. (The ICC emphasis on informal DB help continues today and was expanded in the 2015 edition of the ICC Rules; see, Articles 16 through 18.)
Experience also has shown that the DB can be of help to the Engineer in its work of assisting the Parties overcome disagreements, and in arriving at the Engineer’s determinations. This gives the Engineer the benefit of the thinking of senior experts who have no financial stake in any assertions or claims of the Parties, but who do have detailed knowledge of the Contract, have been with the Contract from the outset, have considerable relevant prior experience on comparable projects, and are immediately available to participate in discussions.

RB

Published last December, it is a massively larger and more complex set of Conditions with a much more “prescriptive” system for the management of the Contract. The new structure for dealing with claims and disputes is likely to require increased management and accompanying increased cost. Also, the complexities, and consequent opportunities for extinction of entitlements because of failure to meet timetables and documentary requirements, are likely to generate increased argument over claims and the Engineer’s determinations made regarding them.

To give a quick overview of the magnitude of the changes in the Second Edition, I am grateful for the kind permission of Christopher Seppälä, Legal Advisor to the FIDIC Contracts Committee, and a partner in the law firm White & Case LLP, to present here some PowerPoint statistics which were included in his presentation last month to the Global Arbitration Review Live Construction conference in Paris. They form Attachments 1 through 3 to this paper.

This morning our timing allows comment on only a few of the new provisions relevant to prevention of formal disputes. They are presented by comparison with the PB

DEFINITIONS

“Claim” and “Dispute”: These are not defined terms in the PB, and were not defined terms in the 1999 RBF. They are important to the new RB 3.7, “Agreement or Determination” (which is a successor to the PB 3.5). PB 3.5 is 10 lines long; the RB 3.7 is 125 lines long, covering two and one-half pages.

“NOD”, or Notice of Dissatisfaction is defined to be for use with respect to not only DAAB Decisions, but now also for Engineer’s Determinations.

The new definitions speak for themselves as to whether they clarify the distinction between the two words, “Claim” and “Dispute”:

Claim = “request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of the Contract or the execution of the Works”.

Dispute = “any situation where

(a) one Party makes a claim against the other Party (which may be a Claim as defined in these Conditions), or a matter to be determined by the Engineer under these Conditions or otherwise;
(b) the other Party (or the Engineer under RB 3.7.2) rejects the Claim in whole or in part and
(c) The first Party does not acquiesce [sic] (by giving an “NOD” under RB 3.7.5) provided however that a failure by the other Party (or the Engineer) to oppose or respond to
the claim, in whole or in parts, may constitute a rejection if, in the circumstances the
DAAB or the arbitrator(s) as the case may be, deem it reasonable for it to do so."

Note also that under RB 3.7.3, a matter which the Contract says is “to be agreed” by the
Parties becomes a “Dispute” if agreement is not reached within the specified time limit.

Categories of “Claim”

In addition to the above new definitions, RB 20.1 “expands” the above definition of “Claim”
by distinguishing three different categories of Claim, using three sub-paragraphs, (a), (b),
and (c). It is essential to grasp the distinctions among the three categories of Claims and to
keep them in mind when proceeding under RB 3.7, “Agreement or Determination”, and RB
20, “Employer’s and Contractor’s Claims”.

Category (a) is an Employer claim for additional payment [sic] from Contractor, or a
reduction in payment to be made to Contractor, “and/or” an Employer claim for extension in
the DNP.

Category (b) is a Contractor claim for additional payment from the Employer and/or EOT.

Category (c) is a “catch all” category of any other entitlement or relief either Party asserts
under the Contract other than those described in (a) and (b).

There may be problems in practice making a distinction between (a) or (b) and what is
covered by (c). The definition of (c) is an entitlement or relief “…of any kind
whatsoever…except to the extent that it involves any entitlement referred to in …(a) and (b)
above…” The sentence from which that quotation is taken has parenthetical examples –
“(including in connection with any certificate, determination, instruction, Notice, opinion or
valuation of the Engineer)“.

Also, in the “Guidance for Preparation of Particular Conditions”, at p. 46, there is a further
elaboration of what may be category (c) entitlements:

“another entitlement or relief …or the execution of the Works” may include such matters as:
interpretation of a provision of the Contract, rectification of an ambiguity or discrepancy
found in the Contract documents, a declaration [sic] in favour of the claiming Party, access to
the Site or to places where the Works are being (or to be) carried out, and/or any other
matter of entitlement under the Conditions of Contract or in connection with, or arising out of,
the Contract that does not involve payment by one Party to the other Party and/or EOT
and/or extension of the DNP.

It can be seen that disagreement may arise over whether a claim is under (b) or (c): for
example, an Engineer valuation may affect the money due to the Contractor; or an issue of
Site access may involve delay to the Contractor. This has led to RB 20.1 including a lengthy
provision to deal with handling “disagreement” or “deemed disagreement” regarding
category (c) claims:

“…where the other Party or the Engineer has disagreed with the requested entitlement or
relief (or is deemed to have disagreed if he/she does not respond within a reasonable time),
a Dispute shall not be deemed to have arisen but the claiming Party may, by giving a Notice
refer the Claim to the Engineer and Sub-Clause 3.7 [‘Agreement and Determination’] shall
apply. The Notice shall be given as soon as practicable after the claiming Party becomes
aware of the disagreement (or deemed disagreement) and include details of the claiming
A potential problem is that no time limits are set for these steps, other than vague wording “within a reasonable time” and “as soon as practicable”. The RB “Guidance for Preparation of Particular Conditions” refers to “within a reasonable time and suggests: “Consideration may be given to replacing the words ‘within a reasonable time’ in the last paragraph of this Sub-Clause by a specified time period.” It would seem the same should apply to “as soon as practicable”.

A final point on disagreements on category (c) claims is the exclusionary provision in the final paragraph of RB 20.1 stating that in the event of such disagreements “a Dispute shall not be deemed to have arisen” and instead of involving the DAAB, those disagreements are to be diverted to the Engineer for disposition under RB 3.7, “Agreement and Determination”. It seems that FIDIC’s intention is that the DAAB not be involved in disagreements on which a Determination by the Engineer is to be made.

The intricacies of the three categories (a), (b), and (c) and their timetables are complex and likely to lead to disagreements.

AGREEING AND DETERMINING

Under PB:

To summarize the PB requirements: on receipt of the claim or request of a Party and unless otherwise specified in the Contract the Engineer has 28 days to “consult with each Party in an endeavour to reach agreement”, and if no agreement results, “make a fair determination in accordance with the Contract” and notify it to the Parties, who are obliged to “give effect to each agreement or determination unless and until revised under Clause 20, “Claims, Disputes, and Arbitration’.”

Under RB:

Agreeing

The RB 3.7.1 sets forth the procedure for “consultation to reach agreement” where the Contract provides that such agreement is to be attempted on “any matter or Claim”.

Instead of the PB duration of 28 days, RB 3.7.3 allows 42 days or “such other time limit as may be proposed by the Engineer and agreed by both Parties”. No time for start of the consultation is prescribed except “promptly”, although time limits on the process are set in RB 3.7.3, discussed below. The Engineer is to consult with both Parties but can do so “jointly and/or separately”, and unless otherwise “proposed by the Engineer and agreed by both Parties” the Engineer is to provide both Parties with a “record of the consultation”.

If agreement is reached within the time limit, the Engineer is to give the Parties a “Notice of the Parties’ Agreement” which is to include copy of a written agreement signed by the Parties. No guidance is given as to whether the written agreement is to be drafted by the Engineer or the Parties, or whether the written agreement itself is to have any signature or authenticated by the Engineer, whether as a witness to the Parties’ signatures or otherwise.

If no agreement is reached within the time limit, or if both Parties advise the Engineer that no agreement can be reached within the time limit (whichever is earlier) the Engineer is to give
a Notice accordingly to the Parties and “immediately proceed” to make a “determination” on the matter or Claim.

The RB is silent on what is to happen if a Party fails to abide by the signed agreement which is appended to the Engineer’s “Notice of the Parties’ Agreement”. Does the matter revert to the Engineer for a “determination”, or can an aggrieved Party refer the alleged breach directly and immediately to the DAAB, or perhaps directly and immediately to arbitration under RB 21.6, or must the signed agreement itself contain an arbitration agreement?

**Determining**

Where required by the Contract, the Engineer is to make a fair determination of “the matter or Claim” and within the time limit give the Parties a “Notice of the Engineer's Determination” describing the determination “in detail with reasons and detailed supporting particulars”.

**Time limits for Agreements and Determinations**

RB 3.7.3 is sufficiently complex that FIDIC has published three separate line diagrams for three “scenarios” under RB 3.7.3, each scenario identifying by footnotes the scenario’s assumptions. These diagrams appear at the first page prior to the General Conditions title page. Illustrative copies form Attachments 4 through 6 to this paper for convenient reference.

A NOD on a Determination is to set out the “reason(s)” for dissatisfaction and is to be given within 28 days as detailed in RB 3.7.5 (c), after which either Party may proceed to obtain a DAAB Decision. If no compliant NOD is given, the Determination is “final and binding” on the Parties.

RB 3.5 goes on to provide for a new concept of “dissatisfaction with only part(s)” of a Determination. No guidance is given by FIDIC on this new concept, and it is not clear why the concept has been introduced. What happens of one Party objects to only a part of a NOD and the other Party does not object to the Determination? Is the non-complaining Party compelled to participate in a referral to the DAAB on the severed part of the Determination? If a NOD with respect to part of a Determination is given by one Party, and later but within the applicable time limit the other Party gives NOD with the entire Determination, does the latter NOD force the party objecting to only part of the Determination to take the entire Determination to the DAAB? In short, is the concept vulnerable to “gaming” by a Party?

**INTERACTION OF RB 3.7, “AGREEING AND DETERMINING” & RB 20, “EMPLOYER’S AND CONTRACTOR’S CLAIMS”**

We should note that the timings shown on the three scenarios related to RB 20 fail to highlight the potential for significant delays arising from the RB 20 provisions. In addition to the initial notice required within 28 days from the relevant event, unless otherwise agreed with the Engineer RB 20.2.4 requires a “fully detailed” Claim submission within 84 days from the relevant event. The submission must include not only “a detailed description of the event or circumstances giving rise to the Claim” but also “all contemporary records on which the claiming Party relies”. The adjective “all” may be intended to be preclusive, although the Clause goes on to provide for later submission of some materials.

The “fully detailed” Claim also must include “a statement of the contractual and/or other legal basis of the Claim”. Failure to include this “legal” statement causes the Notice of Claim to “lapse”, and “invalidates” the entire submittal.
The Engineer is notify this “lapse” and “invalidity” to the claiming Party within 14 days of the receipt of the submittal under RB 20.2.4. If the claiming Party disagrees with the Notice or considers that there is justification for failure to meet the 84 day deadline, it can notify the Engineer of such disagreement or circumstances justifying the failure to meet that deadline, and this notification is to be added to the “fully detailed claim”. No time limit is set for this Notice from the claiming Party. Presumably it should be submitted before expiry of the 42 days time limit of RB 3.7.3., unless otherwise agreed by the Parties and the Engineer, but this is not wholly clear.

If the Engineer does not notify a “lapse” or “invalidity”, the claiming Party’s 84 day submission is “deemed” to be valid.

However there is a further complication: If the non-complaining Party disagrees with such “deeming” it is to give a Notice to the Engineer, including details of such disagreement. RB 20.2.4 states that any disagreements with the Engineer’s Notice of “lapse” or “invalidity”, or any non-claiming Party disagreement with the absence of such Notice, are to be “reviewed” by the Engineer its RB 20.2.5 “agreement or determination” by a RB 3.7 Determination. However, no Determination is made at the time of the disagreement, and instead it is postponed until the “fully detailed Claim” is determined. In short, the Claim proceeds but may be challenged as to “validity”.

RB20.2.4 closes with the prescription of a procedure by which the Engineer can require of the claiming Party further “necessary additional particulars” which are to be submitted “as soon as practicable”, although the Engineer must “respond” on the “contractual or other legal basis” of the Claim. (It is not clear whether the “response” is to be a determination of the point, or something else.)

The “necessary additional particulars” must be provided “as soon as practicable” after receipt of the Engineer’s request, and the Engineer “then” (i.e., after receipt and analysis of the “necessary additional particulars”) proceeds to complete its Determination. The time limit is measured from “the date the Engineer receives the additional particulars” and the time limit is that for “agreement” under RB 3.7.3, which appears to be a further 42 days. It is not clear that there is a truly fixed deadline for the Determination and it seems questionable whether in practice the full procedure will be completed within the originally intended 42 days after receipt of the request for, or requirement of, a Determination.

RB 21, “Disputes and Arbitration”

RB 21.4 seems to discourage dispute board participation during the Engineer’s “Agreeing and Determining” process, by barring board assistance unless the Parties agree in writing to request it. In many contracts with public authorities, the imposition of a requirement for prior written agreement is apt to impede because public authorities often require extensive internal reviews and approvals before making any written agreement.

If the dispute board is not involved in the Agreeing and Determining process, the Parties and the Engineer are more likely to become locked into disagreement which will require formal referral to the dispute board (or in some cases proceed) directly to arbitration. This is because of the detailed and lengthy requirements to achieve an Engineer’s Determination. We have seen that a Claim of whatever category – (a), (b), or (c) – involves detailed written submissions and discussions which can extend over some 84 days or more before a Determination is made. After that long Parties’ positions will have become entrenched and it is likely that the Dispute will proceed to a formal Referral to the dispute board.
Attachment 7 to this paper is FIDIC’s graphic presentation of RB 21 timing, with an additional foot note added for this paper.

ARBITRATION

Arbitration is like litigation in that it is almost impossible to understand fully the procedure until you have endured it. Past ICC statistics have indicated that despite the Rules aiming for earlier conclusion, an average of some 18 months duration has been calculated. That is an average of Cases, large and small, and it is acknowledged that arbitrations of engineering and construction disputes typically are longer and frequently last for several years. It is a rare arbitration that does not erode or even destroy future business relationships between the Parties.

The costs of either Party are daunting, especially the legal costs, and sometimes Parties embark on an arbitration without realizing that in addition to their legal costs, plus their share of the expenses of the administration of the arbitration, and of the fees and expenses of the arbitrators, there is a “gamble” of losing the arbitration and being held responsible to reimburse the winning Party its legal costs and share of the expenses of the administration of the arbitration and the fees and expenses of the arbitrators.

In closing, it should be noted that currently there seem to be a growing number of arbitrations which are financed by third parties. Availability of such financing may make prevention of formal disputes even more challenging for dispute boards. It would seem that such third party intervention should be of urgent interest to those who finance the design and construction of projects.
## FIDIC Red Book – General Conditions

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*Courtesy of Mr. Christopher Seppälä, Legal Adviser, FIDIC CC, Partner, White & Case LLP*
## FIDIC Red Book – Claims Procedure

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| 1999         | Contractor’s Claims: 1 page – (S-C 20.1)  
              | Employer's Claims: 1/2 page – (S-C 2.5)  
              | Engineer’s Determination: 2 paragraphs – (S-C 3.5) |
| 2017         | Employer’s and Contractor’s Claims: 4 1/2 pages – (Clause 20)  
              | Agreement or Determination by Engineer 2 1/2 pages – (S-C 3.7) |

*Courtesy of Mr. Christopher Seppälä, Legal Adviser, FIDIC CC, Partner, White & Case LLP*
# FIDIC Red Book – Dispute Procedure

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</table>

*Courtesy of Mr. Christopher Seppälä, Legal Adviser, FIDIC CC, Partner, White & Case LLP*
Typical Sequence of Events in Agreement or Determination under Sub-Clause 3.7

Scenario 1: Agreement is reached within 42 days, error found in Engineer’s Notice of agreement and corrected.

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<thead>
<tr>
<th>Engineer starts performing duties</th>
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- \( \leq 42d \)
- \( \leq 14d \)
- \( \leq 7d \)

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Scenario 2: The Parties' early advice that agreement cannot be reached and so Engineer's determination is necessary, no error in Engineer's determination.

<table>
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<tr>
<th>Engineer starts performing duties</th>
<th>Parties advise the Engineer: no agreement Sub-Clause 3.7.1(b)</th>
<th>Engineer's Notice of determination Sub-Clause 3.7.2</th>
<th>Notice of Dissatisfaction Sub-Clause 3.7.5</th>
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<td>Period for making Engineer's determination</td>
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**Typical Sequence of Events in Agreement or Determination under Sub-Clause 3.7**

**Scenario 3:** No agreement within 42 days, Engineer determines within 42 days, error found in Engineer's determination and corrected.

<table>
<thead>
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<th>Engineer starts performing duties Sub-Clause 3.7</th>
<th>No agreement between the Parties Sub-Clause 3.7.1(a)</th>
<th>Engineer's Notice of determination Sub-Clause 3.7.2</th>
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Typical Sequence of Dispute Events Envisaged in Clause 21

- Contractor receives the Letter of Acceptance
- 21.1 Parties appoint the DAAB
- 21.4.1 A Party refers the Dispute to the DAAB
- 21.4.4 A Party may issue a "Notice of Dissatisfaction"
- 21.6 A Party may initiate arbitration
- Parties present submission to the DAAB**
- DAAB gives its decision
- 21.5 Amicable settlement

<42d# ≤<84d <28d >28d

*If not stated otherwise in the Contract Data (Sub-Clause 21.1)
**"INTERACTION" at pp. 7 & 8 of this paper

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