



WAGEMANN
ABOGADOS & INGENIEROS



CNCSP

Cámara Nacional
de Comercio y Servicios
de Paraguay

www.wycia.com

CONTRATOS FIDIC Y DISPUTE BOARDS

Soluciones eficientes para las Disputas en la Industria de la Construcción

Alex Wagemann

Abril 15- 2021



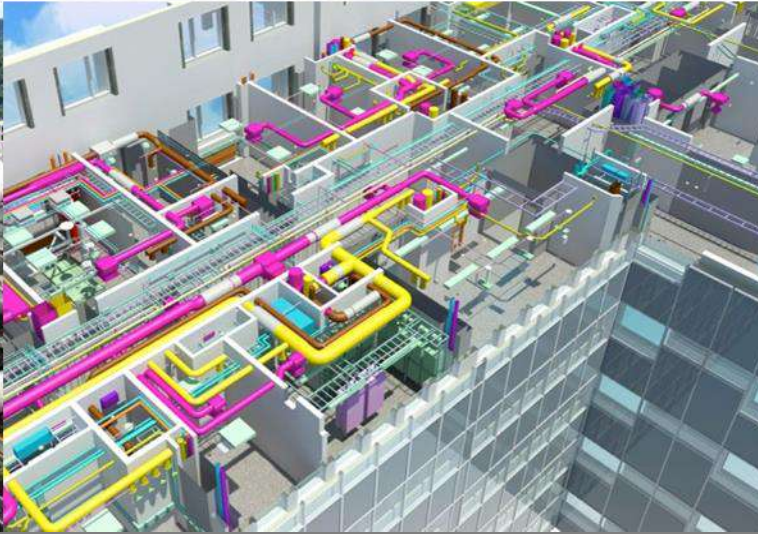
**CENTRO
DE ARBITRAJE
Y MEDIACIÓN
PARAGUAY**

CAMARA NACIONAL DE COMERCIO
Y SERVICIOS DE PARAGUAY



A L D E C

¿Dónde opera FIDIC?



¿En qué tipo de proyectos se usa FIDIC en Latinoamérica?

- Proyectos públicos financiados por MDB's
- Contratos de Préstamo que ajustan el marco legal de la legislación base de OOPP y le otorgan una normativa específica
- Supletoriedad de la norma general de OOPP
- Por lo tanto, no se gestiona como un contrato tradicional de OOPP requiriendo de un **ajuste o apropiación cultural del modelo**

Aspectos culturales que afectan la aplicación de FIDIC

- Entendimiento cabal del rol del Ingeniero
- Comprensión de conceptos propios del *Common Law* (por ejemplo, taking over, periodo de notificación de defectos y cumplimiento final versus recepción de obras)
- Procedimiento de Variaciones y Reclamos vs Orden de Cambio y Modificación de Contrato
- **Funcionamiento y rol de los DB**

¿Hay un real compromiso en usar los DB?

- No se nombra el DB (se elimina la disposición)
- Se elimina la provisión que designa a la organización que nombra al DB en caso de discrepancia entre las partes
- Se nombra el DB, pero nunca se activa operativamente el nombramiento (nadie recurre a el)
- Se utiliza solo como ad-hoc pero no en formato standing, a diferencia de lo indicado en el RB (SB-YB tienen tratamiento diferente)
- El DB opera pero la parte perjudicada no acata la Decisión
- Aplicación dificultosa de la Decisión en un subsecuente arbitraje

**¿Qué perfil debe tener el miembro de un Dispute Board según
FIDIC? ¿Hay reglas?**

Perfil del DB – Condiciones Generales del DAB (Appendix)

This employment of the Member is a personal appointment. At any time, the Member may give not less than 70 days' notice of resignation to the Employer and to the Contractor, and the Dispute Adjudication Agreement shall terminate upon the expiry of this period.

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is:

- (a) experienced in the work which the Contractor is to carry out under the Contract,
- (b) experienced in the interpretation of contract documentation, and
- (c) fluent in the language for communications defined in the Contract.

Perfil del DB – Condiciones Generales del DAB (Appendix)

- 4
General Obligations of the Member
- The Member shall:
- (a) have no interest financial or otherwise in the Employer, the Contractor or the Engineer, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;
 - (b) not previously have been employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;
 - (c) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the Contract forms part;
 - (d) not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except as may be agreed in writing by the Employer, the Contractor and the Other Members (if any);
 - (e) comply with the annexed procedural rules and with Sub-Clause 20.4 of the Conditions of Contract;

- (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;
- (g) not while a Member enter into discussions or make any agreement with the Employer, the Contractor or the Engineer regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication Agreement;
- (h) ensure his/her availability for all site visits and hearings as are necessary;
- (i) become conversant with the Contract and with the progress of the Works (and of any other parts of the project of which the Contract forms part) by studying all documents received which shall be maintained in a current working file;
- (j) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any); and
- (k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any).

Perfil del DB – Condiciones Generales del DAB (Appendix)

- Ser una persona natural. Es una designación *in tuito personae*
- Experiencia en las obras del contrato en el que va a actuar
- Experiencia en la interpretación de documentos contractuales
- Fluidez en el lenguaje del contrato
- No tener conflictos de interés
- Actuar de forma imparcial
- Tratar la información recibida como confidencial

Perfil del DB – Condiciones Generales del DAB (Appendix)

- Capacidad de contener y manejar a las partes en las visitas y en las audiencias cuando debe emitir una Decisión. No sirve entonces un buen técnico o jurídico sin capacidad de gestión, por mucha experiencia que tenga
- Disponibilidad para acometer el trabajo. Tampoco sirve un profesional sobrevenido
- Nociones mínimas de contract management y experiencia on site

¿Es posible recurrir al Dispute Board sin necesidad de pasar por el Ingeniero?

20.4 FIDIC RB - YB

20.4

Entity of Official.

Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

La palabra clave es "Disputa" o "Controversia", concepto no definido en FIDIC.

1.1.29 “**Dispute**” means 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 Sub-Clause 3.7.2 [*Engineer's Determination*]) rejects the claim in whole or in part; and
- (c) the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*] or otherwise),

provided however that a failure by the other Party (or the Engineer) to oppose or respond to the claim, in whole or in part, 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.

Se reducen considerablemente las opciones de no involucrar al Ingeniero; sin embargo, se elimina cualquier duda en relación con la necesidad de presentar un reclamo al Ingeniero, bastando que una de las Partes no esté de acuerdo con una Determinación del Ingeniero

¿Qué ocurre si una de las partes no quiere constituir un Dispute Board?

20.3

Failure to Agree on the Composition of the Dispute Board

- deleted
- consult PC
- replaced PC
- amended PC

If any of the following conditions apply, namely:

- (a) the Parties fail to agree upon the appointment of the sole member of the DB by the date stated in the first paragraph of Sub-Clause 20.2 [*Appointment of the Dispute Board*],
- (b) either Party fails to nominate a member (for approval by the other Party) or fails to approve a member nominated by the other Party, of a DB of three persons by such date,
- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

Problema? No siempre está designada la organización en los Datos del Contrato

20.8 PB (similar en versión RB 2017)

20.8	
Expiry of Dispute Board's Appointment	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 DB in place, whether by reason of the expiry of the DB's appointment or otherwise:
<input type="checkbox"/> deleted	
<input type="checkbox"/> consult PC	
<input type="checkbox"/> replaced PC	(a) Sub-Clause 20.4 [<i>Obtaining Dispute Board's Decision</i>] and Sub-Clause 20.5 [<i>Amicable Settlement</i>] shall not apply, and
<input type="checkbox"/> amended PC	(b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [<i>Arbitration</i>].

Efecto: evita la negociación amistosa (amicable settlement)

**¿Qué sucede si la parte vencida no cumple con la Decisión del
Dispute Board? Efectos de la *res iudicata***

20.4 PB (similar en versión RB 1999)

Within 84 days after receiving such reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.

If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration. If the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction and intention to commence arbitration.

If the DB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision shall become final and binding upon both Parties.

OBLIGATORIO NO ES IGUAL A OBLIGATORIO + FINAL (O A FIRME)

20.7 PB (similar en versión RB 1999)

20.7 Failure to Comply with Dispute Board's Decision

- deleted
- consult PC
- replaced PC
- amended PC

In the event that a Party fails to comply with a DB decision which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*]. Sub-Clause 20.4 [*Obtaining Dispute Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference.

¿Y QUE PASA EN EL ARBITRAJE?

CONCLUSIONES

Conclusiones

- El uso de DB bajo formato FIDIC se da en forma limitada para proyectos financiados por los MDB
- El modelo FIDIC requiere de un proceso de apropiación cultural y entendimiento de su mecánica, que no siempre se da
- Los DB son una figura que no resulta natural en un esquema de contratación de OOPP, no obstante, hay una percepción general de sus beneficios
- Para su correcta implementación, se hace necesario, como mínimo:
 - Compromiso por parte de los stakeholders (Dueño y Contratista)
 - Entrenamiento a todos los usuarios (representantes de las Partes e Ingeniero)
 - Selección adecuada del Panel o miembro único



WAGEMANN

ABOGADOS & INGENIEROS

www.wycia.com

(Chile)

Nueva Tajamar 481, oficina 705
World Trade Center Santiago, Torre Sur
Las Condes, Santiago de Chile
+56 2 3244 3620 / wycia@wycia.com

(España)

C/ José Abascal, 44 – 1ª Planta
Madrid 28003, España
+ 34 91769 7439 / wycia@wycia.com