



## FIDIC Dispute Adjudication Boards

Of all the provisions to be found in the FIDIC form, the provisions of clause 20 have attracted, by far, the most comment. That in itself is unsurprising, in that if disputes do arise, they can quite quickly become very costly. Of course, the better an understanding both parties have of how the entire contract works, then the less likelihood there is for disputes to arise. However, when disputes do arise, it is of crucial importance that both parties follow the provisions of clause 20 with some care. A failure to do so could quite possibly prevent an aggrieved party from bringing a claim.

One of the potential hurdles that need to be overcome with clause 20 is the appointment of the Dispute Adjudication Board, or DAB, itself. This is dealt with in sub-clause 20.2 of the standard Red and Yellow FIDIC forms and sub-clause 20.3 of the Gold Book.

### Overview of Key Features of Sub-clause 20.2 under the Red Book

- Sub-clause 20.2 establishes the Dispute Adjudication Board, or DAB;
- The DAB shall be jointly appointed by the date stated in the Appendix to Tender;
- The DAB will adjudicate upon disputes;
- The DAB shall consist of one or three people who must be suitably qualified;
- The composition of the DAB shall be by nomination and then joint selection;
- If at any time the parties agree, they may jointly refer a matter to the DAB "for it to give its opinion";
- DAB members are to be remunerated jointly by the parties with each paying half of any fees; and
- DAB members can only be replaced by mutual agreement.

Under the Pink Book<sup>1</sup>, if the parties have not jointly appointed the Dispute Board 21 days after the date stated in the Contract Data, and the Dispute Board is to consist of three members, then each party shall nominate their own member. The nominees then recommend the third member who will act as chair.

### Overview of Key Features of Sub-clause 20.2 under the Yellow Book

- Sub-clause 20.2 establishes the Dispute Adjudication Board, or DAB;
- The DAB shall be jointly appointed by the date 28 days after a Party gives notice of its intention to refer a dispute to the DAB in accordance with sub-clause 20.4;
- The DAB will adjudicate upon disputes;
- The DAB shall consist of one or three people who must be suitably qualified;
- The composition of the DAB shall be by nomination and then joint selection;
- DAB members are to be remunerated jointly by the parties with each paying half of any fees;
- DAB members can only be replaced by mutual agreement;
- Appointment expires when the DAB has given its decision unless other disputes have been referred to the DAB before that decision is given.

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1. Under the Pink Book, the Multilateral Development Banks' version of the Red Book, if the parties have not jointly appointed the Dispute Board 21 days after the date stated in the Contract Data, and the Dispute Board is to consist of three members, then each party shall nominate their own member. The nominees then recommend the third member who will act as chair.

*The Guidance for the Preparation of Particular Conditions* for both the Red and the Yellow Books, notes that, as an alternative, the Engineer may act in place of the DAB, and provides suggested wording for such a clause. If the Engineer is empowered in this way, the Particular Conditions make it clear that the Engineer must act impartially, notwithstanding that the Engineer generally acts for the Employer.

One particular feature of the FIDIC form of contract is that obtaining a decision from a DAB is generally a pre-condition to a party being entitled to commence arbitration. This can often result in two conflicting questions:

- (i) What can I do if the other party to the contract refuses to assist in the appointment of the DAB? How do I resolve my dispute if there is no DAB and no DAB decision? Can I go straight to arbitration?
- (ii) Do I have to go through the DAB process? The contract is at an end. Obtaining a decision of the DAB is just an unnecessary duplication of costs.

Interestingly, there have been two recent decisions which address these issues, one from England and one from Switzerland. It is, therefore, possible to compare and contrast the approach of the Civil Codes and Common Law.

#### **SWITZERLAND: Decision 4A 124/2014**

This was a decision of the Swiss Supreme Court. As it relates to an appeal from a decision of an arbitration tribunal, the decision is redacted, although it is believed that the dispute in question arose out of the rehabilitation of the road from Brasov to Sibiu in Romania.

#### **The attempts to set up a DAB**

On 6 June 2006, the parties entered into a contract, based on the FIDIC Red Book.

In March 2011, the Contractor notified the Owner of its intention to refer to a Dispute Adjudication Board (DAB) a claim for EUR 21 million.

It was not until 2 May 2011, that both parties had appointed their respective adjudicators.

In October 2011, the prospective chair of the DAB was provisionally agreed. However, no formal appointment was made, because the DAB Agreement was not itself agreed.

In March 2012, the prospective chairman disclosed a conflict of interest.

A further chairman was not agreed until 14 June 2012. That second prospective chair requested that the parties produce a draft agreement by letter dated 2 July 2012.

On 27 July, the Contractor filed a request for arbitration with the ICC and a 3-member Tribunal was appointed, the seat of the arbitration being in Geneva.

On 13 September 2012, the prospective chair of the DAB circulated a draft DAA. On 18 October 2012, the Owner suggested some changes and invited the Contractor to sign the Dispute Adjudication Agreement.

The Contractor replied the following day noting that as the DAB was still not in place some 18 months after it had first tried to initiate proceedings, it had initiated the arbitration procedure to protect its rights.

The Owner challenged the jurisdiction of the Arbitration Tribunal on the failure of the Contractor to follow the DAB procedure required by the contract.

#### **The Decision of the Arbitral Tribunal**

On 21 January 2014, the Arbitration Tribunal made an award, by a majority, holding that the DAB procedure contemplated by clause 20 of the FIDIC form was:

*“not mandatory in that it would be a pre-condition to the right to initiate arbitration or that failure to observe it would lead to inadmissibility.”*

This was for the following reasons:

- (i) The word “shall” used in sub-clause 20.2 of the General Conditions must not be read in isolation but in the broader context of the dispute resolution mechanism instituted by clause 20;
- (ii) In particular, sub-clause 20.4, to which sub-clause 20.2 refers, uses the word “may” which suggests that the DAB procedure is simply an option available to each party to submit the case to the DAB;
- (iii) Sub-clause 20.4 mentions two exceptions to the principle that no party can introduce an arbitration request without tendering a notice of dissatisfaction to the other after receiving the DAB decision. One of these is the exception referred to at sub-clause 20.8, which would allow direct recourse to arbitration without resorting to the DAB procedure when its requirements are met;
- (iv) In the English case of *Doosan Babcock Ltd v. Comercializadora de Equipos y Materiales Mabe Limitada* ([2013] EWHC 3010/TCC), Mr Justice Edwards-Stuart said that:

*“By clause 20.8, if no DAB been has been appointed, the dispute can be referred directly to arbitration. That is the position here.”*

Sub-clause 20.8 of the FIDIC form states that:

*“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 DAB in place, whether by reason of the expiry of the DAB’s appointment or otherwise:*

*a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and*

*b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].”*

Finally, the majority of the Tribunal referred to the FIDIC Contracts Guide, which in the commentary on sub-clause 20.8 notes that one of the reasons that there may not be a DAB in place is because of a “party’s intransigence,” and pointed out that the FIDIC General Conditions do not do not set a time limit to constitute a DAB, which they said would argue against the mandatory nature of the prior procedure of dispute settlement established by FIDIC. The approximately fifteen months (March 2011 to July 2012) it took for the parties to succeed in constituting such a body in the case at hand without either party being entirely responsible for the delay was said to be irrefutable evidence of that.

On 26 February 2014, the Owner filed a request to set aside the interim award for lack of the tribunal’s jurisdiction.

### **The Decision of the Swiss Supreme Court**

As a starting point, the court said that the Owner could not argue that the DAB was appointed as at 2 July 2012. Appointing a chair was not sufficient by itself. The DAB must be operational, which presupposes that there is an agreed and signed Dispute Adjudication Agreement in place.

This was the overall approach of the Swiss Court:

*"The interpretation of an arbitration agreement in Swiss law takes place according to the general rules on the interpretation of contracts. The Court must first learn the real and common intent of the parties, empirically as the case may be, on the basis of clues without stopping at the inaccurate names or words they may have used. Failing this, it will apply the principle of reliance and determine the meaning that, according to the rules of good faith, the parties could and should give to their mutual statements of will in each circumstance."*

By way of example, Article 970 of the Romanian Civil Code provides that:

*"Contracts must be fulfilled in good faith. They are mandatory not only in respect of what is expressly mentioned therein but also in respect of all consequences of equity, custom or law as they may relate to such obligations."*

First of all, the court considered whether the pre-arbitration procedure was mandatory. The court was of the view that it was. The word "shall" was an obligation or duty, and means that the action to which the verb applies must be undertaken. FIDIC itself made this clear in the definitions section of the Gold Book, where it said at sub-clauses 1.2(e) and (f):

*"shall" means that the Party or person referred to has an obligation under the Contract to perform the duty referred to ...whilst 'may' means that the Party or person referred to has the choice of whether to act or not in the matter"*

Adopting the broad interpretation of sub-clause 20.8 of the General Conditions by the majority of Arbitral Tribunal would mean that it would be sufficient for a DAB not to be operational at the time arbitration proceedings are initiated, no matter for what reason, for a decision of this body to become optional. Such a conclusion would ultimately turn the alternate dispute resolution mechanism, devised by FIDIC, "into an empty shell."

With sub-clause 20.8, what is contemplated is the "exceptional situation in which the mission of a standing DAB expires at the end of the time limit it was given before a dispute arises between the parties. In its absence, there would be uncertainty as to whether the dispute could nonetheless be submitted to arbitration or instead to the competent state court.

*"Furthermore, the majority arbitrators give great weight to the wording "or otherwise" at the first paragraph of Sub-Clause 20.8. This very vague expression doubtlessly does not facilitate understanding the Sub-Clause in question. Yet, interpreting it literally and extensively would short-circuit the multi-tiered alternative dispute resolution system imagined by FIDIC when it came to a DAB ad hoc procedure because, by definition, a dispute always arises before the ad hoc DAB has been set up, in other words, at a time when "there is no DAB in place," however, such interpretation would clearly be contrary to the goal the drafters of the system had in mind."*

Further, the court noted, that in the Doosan case, the parties agreed in an amendment to the General Conditions that the DAB should be constituted within 42 days from the starting date of the Contract, a condition which was not met, so that Sub-Clause 20.8 was effectively applicable. In the view of the court, the DAB dispute resolution proceeding, foreseen by clause 20 of the General Conditions, is mandatory insofar as it must be finished for an arbitration procedure to begin. Further, the court looked at the circumstances of the case and considered the benefits or otherwise of the DAB process itself.

*"From a general point of view, it must be emphasized at the outset that the DAB system established by FIDIC was conceived above all with a view to constituting a permanent DAB and not an ad hoc DAB, the idea being to facilitate speedy disposition of the disputes arising during the performance of the*

*project without jeopardizing its continuation and having disputes decided by specialists appointed at the beginning of the contract and able to follow its implementation from the beginning to the end. Yet in the case at hand, the benefit expected from such a procedure was never on the agenda. There is an ad hoc DAB for the constitution of which no time limit had been agreed and the implementation of which started on March 10, 2011, namely after the completion of the work encompassed in Contracts 5R8 and 5R9, if one considers that the pertinent acceptance certificates were issued on June 23, and December 15, 2010, respectively. The DAB contemplated was more similar to an arbitral tribunal of first instance rather than an actual DAB, considering that it would intervene so late in the development of the contractual relationships and even after they were extinguished, when the respective positions of the parties were already fixed and the opponents doubtlessly irreconcilable. Therefore, even though it was proscribed by the General Conditions in principle, its implementation may no longer have been absolutely necessary in view of the economy of the system because it was unlikely that it would avoid the initiation of the arbitral procedure reserved by Sub-Clause 20.6 of the General Conditions. Seen in this perspective, the Appellant's will to obtain a DAB decision no matter what appears questionable at the very least."*

Further, the court noted that the procedure to constitute the DAB had started 15 months before the Respondent filed its request for arbitration (March 10, 2011, to July 27, 2012) which is a long time "in the context of a dispute resolution mechanism supposed to be expeditious": five times longer than the 84 days within which the DAB procedure must normally be conducted. While refusing to place responsibility upon one of the two parties, the Arbitral Tribunal's factual findings in the award as to the way the process leading to the constitution of the ad hoc DAB was conducted, did not, in the view of the Swiss Court, "permit blame to be placed on the Respondent for such procrastination." The court noted that, after initiating the process, the Contractor tried several times to restart the process despite the Employer's "passivity", a role it shook off only after the filing of the arbitration notice. Further the court asked what interest the Contractor could have had in delaying the procedure for the constitution of the DAB it initiated when it is seeking the payment of some EUR 21 million.

That said, as noted above, paragraph 5 of sub-clause 20.2 of the General Conditions requires the parties to enter into a Dispute Adjudication Agreement. This only comes into force when the DAB, Employer and Contractor have signed it. Failing this, there is no validly constituted DAB. This meant that the Arbitral Tribunal was right to find that the DAB was not in place.

### Swiss Court Conclusion

Accordingly, the court concluded that:

*"In this respect, considering the circumstances germane to the case at hand ... they cannot be criticized for failing to denounce the Respondent's failure to sign the DAA from the point of view of the rules of good faith. Pursuant to these rules and considering the process of constitution of the DAB, it is indeed impossible to blame the Respondent for losing patience and finally skipping the DAB phase despite its mandatory nature in order to submit the matter to arbitration."*

Thus, although the Court agreed that the DAB procedure was mandatory, it also took into account the reasons why there had been no DAB. Here it would be a breach of good faith for the Owner to insist on the mandatory nature of the DAB procedure, given the substantial delay in constituting the DAB for which it was primarily responsible. In addition, the court did question whether, in circumstances where the project was over, the ad hoc DAB would actually, in reality, be similar to an arbitral tribunal at first instance. Would holding a DAB: "have been absolutely necessary in view of the economy of the system?"

**ENGLAND: Peterborough City Council v Enterprise Managed Services Ltd<sup>2</sup>**

Here, Peterborough engaged EMS to design and install a 1.5 MW solar energy plant. The Contract was made on the FIDIC General Conditions of Contract for EPC/Turnkey Projects (or Silver Book), and provided that if the plant did not generate 55 kW of power by 31 July 2011, then EMS would be liable to pay liquidated damages of £1.3m to the Council (“the Price Reduction”).

Sub-clauses 20.2–20.7 set out the procedure for dispute resolution by a Dispute Adjudication Board (“DAB”) to be appointed on an ad hoc basis after any dispute had arisen. The Red and Pink Books require the parties to establish a dispute board from the outset of the project, known as a standing board. Sub-clause 20.8 provided that if at the time a dispute arose there was no DAB in place, “... *whether by reason of the expiry of the DAB’s appointment or otherwise*,” then either party could go to court.

Following completion, Peterborough alleged that the plant had failed to achieve the required power output and claimed the Price Reduction. On 6 January 2014, Peterborough issued a letter of claim under the Pre-action Protocol. EMS responded that, in accordance with the Contract terms, the dispute ought to be referred to a DAB.

During July 2014, EMS gave notice of its intention to refer the dispute to a DAB, and since no DAB had by then been established, on 26 August 2014, EMS applied for the appointment of a DAB adjudicator. Peterborough issued court proceedings on 11 August 2014, and on 27 August 2014, EMS issued an application for an order to stay these proceedings.

Mr Justice Edwards-Stuart was, therefore, asked to consider whether or not the terms of the contract required a dispute to be referred to adjudication by a DAB first as a pre-condition to any court proceedings. If that was correct, should the court exercise its discretion and order that the Council’s proceedings be stayed?

Peterborough argued that sub-clause 20.8 provided an opt-out from DAB adjudication, but that if reference of a dispute to a DAB was mandatory, the court proceedings should be allowed to continue on the grounds that:

- (i) What was a complex dispute was unsuitable for a “rough and ready” DAB adjudication procedure; and
- (ii) Any DAB adjudication would be an expensive waste of time as it was inevitable that the losing party would go to court.

Both parties referred to a judgment of Hildyard J in *Tang v Grant Thornton* [2013] 1 All ER (Comm) 1226, in which he had to consider the enforceability of a dispute resolution clause:

*[56] This recitation of authority illustrates the tensions, in the context of provisions for conciliation or mediation of disputes prior to arbitration or court proceedings, between the desire to give effect to what the parties agreed and the difficulty in giving what they have agreed objective and legally controllable substance.*

*[57] Agreements to agree and agreements to negotiate in good faith, without more, must be taken to be unenforceable: good faith is too open-ended a concept or criterion to provide a sufficient definition of what such an agreement must as a minimum involve and when it can objectively be determined to be properly concluded. That appears to be so even if the provision for agreement is one of many provisions in an otherwise binding legal contract, with an exception where the provision in question can be construed as a commitment to agree a fair and reasonable price.*

*[58] However, especially when the relevant provision is but one part of a concluded an otherwise*

*legally enforceable contract, the court will strain to find a construction which gives it effect. For that purpose it may imply criteria or supply machinery sufficient to enable the court to determine both what process is to be followed and when and how, without the necessity for further agreement, the process is to be treated as successful, exhausted or properly terminated. The court will especially readily imply criteria or machinery in the context of a stipulation for agreement of a fair and reasonable price."*

The Judge agreed with these observations. Here, the only missing ingredient, the rate of the adjudicator's daily fee, was one that can readily be assessed by the court in default of agreement. Indeed, the adjudicator put his proposals to the parties in respect of his fees and neither party challenged them.

On the first issue, the Judge decided that, upon a proper interpretation of the Contract, sub-clause 20.8 would only apply to give Peterborough a unilateral right to opt out of DAB adjudication if the parties had agreed to appoint a standing DAB at the outset. Accordingly, given that sub-clause 20.2 provided for ad hoc DAB appointments, the Judge accepted EMS's argument that the Contract required the determination of the dispute through DAB adjudication prior to any litigation. The right to refer a dispute to adjudication arises under sub-clause 20.4 as soon as a DAB has been appointed, whether under sub-clause 20.2 or 20.3.

Considering sub-clause 20.8, the Judge was clear:

*"First, the words "if a dispute arises ... and there is no DAB in place" apply to a situation where there is no DAB in place at the time when the dispute arises. If it were otherwise, as Miss Day pointed out, the provisions of sub-clauses 20.2 and 20.3 could never have any application because, by definition, under those sub-clauses there has to be a dispute in existence before the process of appointing a DAB can begin. Thus in every case where sub-clause 20.2 or 20.3 applies there will be in existence a dispute but no DAB. Thus, since under sub-clause 20.8 sub-clause 20.4 is disapplied, on Ms. Sinclair's approach to the construction of sub-clause 20.8 there can never be a reference of a dispute to adjudication in any contract which provides that the DAB is to be appointed in accordance with the provisions of sub-clause 20.2 or sub-clause 20.3.*

*It seems to me that sub-clause 20.8, which is in the same form in all three of the FIDIC Books, probably applies only in cases where the contract provides for a standing DAB, rather than the procedure of appointing an ad hoc DAB after a dispute has arisen...*

*In addition, I do not accept Ms. Sinclair's submissions about what is meant by the phrase "no DAB in place". The right to refer a dispute to adjudication arises under sub-clause 20.4.1 as soon as a DAB has been appointed, whether under sub-clause 20.2 or 20.3. It is quite clear from the words "final and conclusive" in sub-clause 20.3 that the process of appointment is complete once the nominating body has "appointed" the adjudicator. That must mean the identification of a particular person as the adjudicator because the appointing body cannot make the Dispute Adjudication Agreement for the parties. In my judgment, therefore, a DAB is "in place" once its member or members have been duly appointed in this way because from that moment onwards a dispute can be referred to it. Not even Humpty Dumpty would suggest that a dispute could be referred to a DAB that was not in place."*

In relation to the second question, Peterborough submitted that any decision by the DAB would almost inevitably provoke a notice of dissatisfaction from one or other party. Accordingly, to embark on the fairly lengthy (and therefore expensive) adjudication procedure under the contract would be a wholly, or at least largely, unproductive exercise. The dispute raised complex questions of construction and application of legislation, mandatory codes and standard industry practice and would require extensive disclosure. Therefore, the "rough and ready" process of adjudication was entirely inappropriate to resolve this dispute.

However, the Judge noted that this was nothing new: the complexity of a potential dispute about when the required power output was achieved was foreseeable from the outset, yet, nevertheless, the parties chose to incorporate the adjudication machinery in the FIDIC form of contract. Both parties, therefore, agreed to the “rough and ready” adjudication procedure.

That said, in circumstances where the parties had not yet invested time or money in the DAB adjudication, the Judge was sympathetic to Peterborough’s case that the court proceedings should not be supplanted by adjudication.

However, the over-riding principle, as illustrated by the English legal authorities, for example: *DGT Steel & Cladding v Cubitt Building*<sup>3</sup>, clearly showed a presumption in favour of leaving parties to resolve their disputes in the manner they had agreed to in their contract. If the parties have agreed on a particular method by which their disputes are to be resolved, then the court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*<sup>4</sup> court proceedings had been commenced, despite a term of the contract which provided for the initial reference of disputes to a panel of experts, and which also stipulated that any remaining disputes would be the subject of arbitration in Brussels. The House of Lords held that the court had an inherent, albeit discretionary power to stay proceedings brought before it in breach of an agreement to decide disputes by an alternative method. Lord Mustill, who gave the leading speech, said:

*“This is not the case of a jurisdiction clause purporting to exclude an ordinary citizen from his access to a court and featuring inconspicuously in a standard printed form of contract. The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted and equally plain that all concerned must have recognised the potential weaknesses of the two-stage procedure and concluded that, despite them, there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reason for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose is to my way of thinking quite beside the point.”*

Accordingly, the Judge ordered that the court proceedings were to be stayed.

### **Conclusion: the Swiss and English decisions compared**

Although the circumstances of the cases were very different, both the English and the Swiss courts emphasised that DAB procedures must be treated as mandatory.

One of the main differences between the two decisions was the attitudes of the parties. In the Swiss case, the Employer was essentially trying to frustrate the entire dispute resolution process, first by moving very slowly when it came to the appointment of the DAB and using the lack of a DAB to allege that the arbitration tribunal did not have jurisdiction. In the English case, the Employer did not really want to have a DAB, preferring to go straight to a final resolution of the case. This may have, to a limited degree, had an influence on the decision.

Thus, whilst both courts did agree that the DAB was a condition precedent to arbitration, in England, this meant that the parties had to submit to the DAB, even though the Judge recognised that there was a real risk of duplication of costs. This was not a case where either party had invested any time or

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3. [2007] EWHC 1584 (TCC)

4. [1993] AC 334



money on the preparation for, or conduct of, an adjudication, and so it can be fairly said that it was better to have one, if more expensive and extensive, dispute resolution procedure than to take the real risk that this will be required in any event in addition to an adjudication.

However, in the Swiss case, the Supreme Court, perhaps because the Swiss Civil Code, like that of Romania, makes provision for the parties to act in accordance with the principles of good faith, looked at the whole circumstances of the disputes between the parties. Here the Contractor spent some 18 months trying to bring about the appointment of a DAB before resorting to arbitration. An Employer could not then, in good faith, insist on the mandatory nature of the DAB procedure it had done so much to frustrate in the first place. This is rather helpful for Contractors who are faced with an Employer who is apparently trying to prevent what is seen as a legitimate dispute from being resolved through the DAB process.

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