

# The Commercial Value of Dispute Boards under FIDIC Contracts

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## ABSTRACT

*A Dispute Board under a FIDIC contract can speedily and economically adjudicate disputes. The commercial value of Dispute Boards is potentially far greater than as adjudicators of formal disputes. A standing Dispute Board, implemented at the start of a project and meeting regularly with the contracting parties, is able to assist them to avoid disputes. The worldwide track record of Dispute Boards shows that they are very effective in helping the parties avoid formal disputes, however if disputes eventuate, in adjudicating an outcome according to law in a timely and cost effective manner. Recent judgments reviewed in this article have provided clarity on the mandatory requirements for Dispute Board decisions and their enforceability. This article briefly reviews Dispute Board costs in the light of the significant risk cost of disputes and concludes that the 'insurance' cost provides clear commercial value to the parties in an international construction contract.*

## I. INTRODUCTION

The contracts in the Fédération Internationale des Ingénieurs-Conseils (FIDIC) 'Rainbow Suite'<sup>1</sup> are the most widely used international construction contracts, particularly in Eastern Europe, the Middle East and Africa. Since 1999, these contracts have provided for the appointment of a Dispute Adjudication Board (DAB)<sup>2</sup>/Dispute Board (DB)<sup>3</sup> that can adjudicate disputes more speedily and economically than arbitration.<sup>4</sup> This innovation removed the Engineer's<sup>5</sup> role as initial dispute adjudicator,

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<sup>1</sup> FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (First Edition 1999) (Red Book); FIDIC Conditions of Contract for Construction MDB Harmonised Edition for Building and Engineering Works Designed by the Employer (MDB Harmonised Edition 2010) (Pink Book); FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works, designed by the Contractor (First Edition 1999) (Yellow Book); FIDIC Conditions of Contract for EPC/Turnkey Projects (First Edition 1999) (Silver Book).

<sup>2</sup> Red, Yellow and Silver Books.

<sup>3</sup> Pink Book.

<sup>4</sup> The terms DAB and DB are both used in this article.

<sup>5</sup> The Engineer is a defined term under the Red, Pink and Yellow Books, and is the person who administers the Contract on behalf of the Employer. The definition in Sub-clause 1.1.2.4 is: 'Engineer' means the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in

and thereby addressed the perceived lack of independence of the Engineer, appointed by the Employer.<sup>6</sup> Notwithstanding the detailed process of dispute resolution in the modern FIDIC contracts, there has been some doubt as to their efficacy, particularly following several judgments in Singapore. Recent judgments, reviewed in this article, have provided welcome clarity on the mandatory requirement for a DB decision, and its enforceability.

The commercial value of DBs is potentially far greater than that arising from their role as adjudicators of formal disputes. A standing DB, implemented at the start of a project and meeting regularly with the contracting parties during the design and construction phases, is able to assist them to avoid disputes. The Procedural Rules for a standing DB in the FIDIC Red and Pink Books enables it to advise the parties on an informal 'without prejudice' basis on potential issues in an endeavour to promote a 'best for project' agreed solution, if agreed by providing a non-binding advisory opinion.

The track record of standing DBs around the world is that they are very effective in helping the parties avoid formal disputes, however if disputes eventuate, in adjudicating an outcome according to the contract and the law in a timely and cost-effective manner.

This article looks briefly at the costs of DBs, often advanced as the reason they are not implemented under FIDIC contracts. These costs are reviewed in the light of the significant risk cost of disputes and this writer concludes that the 'insurance' cost provides clear commercial value to the parties in an international construction contract.

## II. DISPUTE BOARDS UNDER FIDIC CONTRACTS

In the FIDIC contracts, a DB consists of one or three suitably qualified persons, appointed by agreement of the contracting parties in accordance with subclause 20.2 of the General Conditions in each of the Rainbow Suite Contracts. The members of the DB are required to be independent of the parties, and have no financial interest in the parties or the Engineer. Each DB member enters into a tripartite agreement with the Employer and Contractor that contains stringent obligations on the member to be, and be seen to be, independent and impartial.<sup>7</sup>

Current editions of the Rainbow Suite contracts provide for two types of DB – a standing DB in the Red Book and Pink Book, and an ad hoc DB in the Yellow Book and Silver Book. The fundamental difference between them arises from the date of the appointment of their members. In a standing DB, the members are to be appointed by a specified date, which is twenty-eight days after the Commencement Date.<sup>8</sup> By contrast, an ad hoc DB under the Yellow or Silver Books is to be appointed within twenty-eight days 'after a Party gives notice to the other Party of its intention to refer

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the Appendix to Tender [Red & Yellow Books]/Contract Data [Pink Book], or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4.

6 Capitalised terms are used in this article as defined in the FIDIC Rainbow suite of contracts.

7 General Conditions of Dispute Adjudication Agreement – Red, Yellow and Silver Books; General Conditions of Dispute Agreement – Pink Book.

8 Appendix to Tender (Red Book); Particular Conditions - Part A: Contract Data (Pink Book).

a dispute to the DAB'.<sup>9</sup> Both standing and ad hoc DBs are appointed to adjudicate a dispute (of any kind whatsoever) arising 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 [Silver Book: Employer]'.<sup>10</sup>

The General Conditions in each of the Rainbow suite contracts contains in an Appendix 'General Conditions of Dispute Adjudication Agreement', to which is attached an Annex that contains Procedural Rules on the operation of the DB. The Red Book and the Pink Book contain the following nine rules:

1. Intervals between DB site visits;
2. Timing and agenda of site visits;
3. Attendance and organisation of site visits;
4. Copies of documents furnished to DB;
5. Procedure for dispute referred to DB;
6. Hearing of a dispute at DB's option;
7. Ambit of DB procedural powers for hearing;
8. Defined procedural powers of DB in deciding a dispute; and
9. Process for DB making its decision.

The first three of these rules relate to the DB's 'standing' role, in which it is required to become and remain familiar with the Contract and the Works, including by regular site visits (typically at three–four months intervals). The remaining six rules relate to the DB's role as adjudicator of a formal dispute and these rules (numbered 4–9 above) also comprise the Procedural Rules for a DB under the Yellow and Silver Books.

A standing DB is in a unique position to assist the parties to avoid disputes: it comprises one or three experienced members independent of the Parties, familiar with the contract, the Works, the personnel and the technical and contractual issues that typically arise during the execution of construction projects. By holding 'without prejudice' meetings with the parties, a standing DB can facilitate resolution of issues on a 'best for project' basis that is acceptable to the Parties. The DB will employ mediation skills in such a role, and the Parties are free to agree to a 'non-legal' solution. Many DBs function exclusively in this 'dispute avoidance' mode and are never called on to adjudicate a formal dispute.

Clearly, an ad hoc DB that is only implemented after a formal dispute has arisen is unable to act in dispute avoidance mode, and is confined to adjudication of a dispute in accordance with the Contract and the law. It is worth noting that the FIDIC Contracts Committee has foreshadowed that the next editions of the Yellow and Silver Books will have a standing DB, a recognition of the substantial value added by a standing DB over an ad hoc DB.<sup>11</sup>

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9 Silver Book, subcl. 20.2; Yellow Book, subcl. 20.2.

10 Silver Book, subcl. 20.4; Yellow Book, subcl. 20.4.

11 Presentation by Svend Poulsen, Chair, FIDIC Updates Committee at the FIDIC International

The DB adjudication process detailed in the FIDIC contracts provides for a much speedier and more economical dispute resolution process than arbitration. The DB is required to give its decision, with reasons, within eighty-four days after a dispute has been referred to it. That decision is binding and both parties must give effect to it. However, it may be a 'rough and ready' process due to the insufficient time to review in depth all of the relevant documents, engage expert witnesses etc. The independence, experience and expertise of the DB members, and their reasoned decision may produce an outcome that will be accepted by the Parties. If neither Party serves a notice of dissatisfaction within twenty-eight days after the DB has handed down its decision, that decision becomes final.

Provided that the DB is not constituted by the Engineer, this adjudication process in large measure addresses one of the major contractor criticisms of the traditional role of the Engineer, by removing his dispute resolution function.<sup>12</sup> In earlier editions of FIDIC contracts, the Engineer not only certified the Contractor's entitlements under the Contract, but also in the first instance adjudicated on any disputes arising from his own certifications. When coupled with the fact that the Engineer was engaged by the Employer, and acted as his agent in many functions under the Contract, it is not surprising that the impartiality of the Engineer as adjudicator of disputes arising from his own determinations has long been questioned.<sup>13</sup> Absent a DB to adjudicate on disputes over the Engineer's certification, the Contractor's only remedy was (and is) to embark on lengthy and costly arbitration.

One of the important features of a DB is that it can provide an independent, reasoned and economical resolution of a dispute arising from an Engineer's determination in a reasonably short time frame. Given the long execution time of many major construction projects, it is in both Parties' interests to resolve contentious issues as they arise (at least provisionally), and focus on progressing the Works, rather than preparing for a long and detailed arbitration.

Notwithstanding the DB's reasoning in its binding decision, a Party may not be satisfied that the decision is correct. In this case, the dissatisfied Party may issue a notice of dissatisfaction (NOD) within twenty-eight days of the DB decision, with a view to the issue being finally decided by arbitration. Such arbitration can be deferred until after completion of the Works, although it need not be.

The Parties have, what is in effect, a 'cooling off' period of fifty-six days after the NOD has been issued, during which they 'shall attempt to settle the dispute amicably before the commencement of arbitration'. There is no contractual requirement for the

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Contract Users' Conference, London, 2-3 December 2014.

<sup>12</sup> The Guidance for the Preparation of Particular Conditions in the Red and Yellow Books suggest that, as an alternative to independent member(s) of the Dispute Board, the Engineer could be the sole member of the Dispute Board and make the pre-arbitral decisions that have traditionally been part of the Engineer's role in common-law countries. For the reasons given above, this writer does not consider this to be consonant with the modern approach to the Engineer's role, who should not be seen to be a witness and judge in his own cause.

<sup>13</sup> 'We have no reason to hope that he will approach the question without being grievously fettered and grievously embarrassed by the fact that he has already decided, and that his professional character is involved in upholding the decision.' *Nuttall v. Manchester Corporation* (1892), Hudson's Building Contracts (4th ed.) Vol. II, 203 (per Mathew J).

form of such amicable settlement, and even if it has not been attempted, arbitration may still be commenced after the fifty-six day period. This writer considers that the ‘cooling off’ period is a worthwhile pause before the commencement of a (frequently) long and expensive arbitration: the Parties have the benefit of the DB’s reasoned decision that provides an independent view of the legal merits of each Party’s position – a useful starting point for any commercial negotiation. It is worth noting that the decisions of DBs in the United States (referred to as Dispute Resolution Boards) are generally advisory and not binding; nevertheless, in a large majority of cases the Parties negotiate an acceptable resolution without resorting to arbitration or litigation.

The FIDIC provisions on the DB, therefore, do not compromise the Parties’ right to a final and binding resolution of their dispute that is enforceable in most jurisdictions. The Red, Yellow and Silver Books provide for international arbitration under the rules of the International Chamber of Commerce (ICC), thus (usually) ensuring that the arbitral decision is enforceable in any country that is a signatory to the New York Convention. The arbitration is a hearing *de novo* and the Parties are not limited to the evidence or arguments previously put before the DB or to the reasons for dissatisfaction given in the NOD. The DB decision is admissible in evidence, although clearly the arbitral tribunal is not bound by it or its reasoning.

### **III. IS A DISPUTE BOARD DECISION A PRE-REQUISITE TO REFERRING A DISPUTE TO ARBITRATION?**

#### **a) Relevant Provisions in the FIDIC Contracts**

Notwithstanding that the Red and Pink Books provide for a standing DB and the Yellow and Silver Books for an *ad hoc* DB, the following extracts from clause 20 are worded identically in the Red, Yellow and Silver Books, and with minor changes in the wording, to the same effect in the Pink Book.

Subclause 20.2 provides that:

*Disputes shall be adjudicated by a DAB* in accordance with subclause 20.4 [Obtaining Dispute Adjudication Board’s Decision] (emphasis added).

Subclause 20.4 provides that:

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, ... *either party may refer the dispute* in writing to the DAB for its decision ... *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 DAB’s decision, then either Party may, within 28 days after receiving the decision, give notice of its dissatisfaction. ... neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this subclause. If the DAB has given its decision as to the matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB’s decision, *then the decision shall become final and binding upon both Parties* (emphasis added).

Subclause 20.6 provides that:

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.

Subclause 20.8 provides 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) subclause 20.4 [Obtaining Dispute Adjudication Board's Decision] and subclause 20.5 [Amicable Settlement] shall not apply, and
- (b) *the dispute may be referred directly to arbitration* under subclause 20.6 [Arbitration] (emphasis added).

Whilst subclause 20.4 requires a DAB decision on a dispute and a notice of dissatisfaction with that decision within twenty-eight days as a prerequisite to referring the dispute to arbitration, subclause 20.8 contemplates referring a dispute directly to arbitration where there is no DAB in place. In view of the combination of mandatory and permissive text in the above extracts ('shall' and 'may'), this divergence raises the question as to whether a Party can bypass the DAB process and refer a dispute directly to arbitration if it does not cooperate in the appointment of a DAB.

## b) Case Law

In *Doosan Babcock Limited v. Comercializadora de Equipos y Materiales Mabe*,<sup>14</sup> the Contractor sought an injunction in connection with an arbitration to prevent the Employer from having recourse to the performance securities. The Contractor sought an injunction in connection with an arbitration to prevent the Employer from having recourse to the performance securities. No DAB had been appointed under the FIDIC Contract, and Justice Edwards-Stewart concluded, without analysis, that subclause 20.8 applied: 'By clause 20.8, if no DAB been has been appointed, the dispute can be referred directly to arbitration. That is the position here.'<sup>15</sup>

This issue was subsequently addressed in detail by Justice Edwards-Stewart in the case of *Peterborough City Council v. Enterprise Managed Services Ltd.*<sup>16</sup> In the context of an amended FIDIC Silver Book Contract, he determined that the Parties were required to obtain a DAB decision on their dispute before it could be referred to a final determination in court (the standard FIDIC General Conditions had been amended by the substitution of arbitration by litigation in subclause 20.8). The decision was made in the particular circumstances of an amended Silver Book Contract and the judge's reasoning was influenced by the fact that an ad hoc, not a standing DAB was to be appointed.

The issue was also addressed in the Supreme Court of Switzerland, following an arbitral tribunal's partial award that it had jurisdiction to hear a dispute notwithstanding

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<sup>14</sup> [2013] EWHC 3010 (TCC).

<sup>15</sup> *Ibid.*, para. 2.

<sup>16</sup> [2014] EWHC 3193 (TCC).

that a DAB had not been appointed.<sup>17</sup> The Employer sought to have the partial award set aside on the grounds of lack of jurisdiction, arguing that DAB proceedings must be completed before arbitration could be initiated. The Court construed the dispute resolution provisions in the FIDIC contract as a whole under Swiss law, looking beyond the literal meaning of the contract to seek to establish the Parties' real and common intention. The Court determined that submitting a dispute to a DAB is a mandatory requirement, rather than an option. It considered that 'shall' in subclause 20.2 is directory, and 'may' in subclause 20.4 simply means that it is open to either party to initiate DAB proceedings. In respect of the provision in subclause 20.8 that a dispute may be referred directly to arbitration if 'there is no DAB in place', the Court considered that this cannot refer to the situation where there is no DAB in place when a dispute arises, inevitably the case when the Contract provides for an ad hoc DAB.

Notwithstanding that the Court found that referral of a dispute to a DAB was a precondition to arbitration, it accepted that there are exceptions to this requirement, arising from subclause 20.8 and the general principle of good faith, to be assessed on a case-by-case basis. The circumstances of this case included that the attempt to constitute an ad hoc DAB had only begun after completion of the Works, the DAB was not operational fifteen months after the initial referral of the dispute, and the party's failure to sign the DAB agreement meant that the DAB was not 'in place' within the meaning of subclause 20.8. Accordingly, the Court concluded that the fact that there was no DAB decision was not fatal and it rejected the Employer's challenge to the arbitral tribunal's jurisdiction.

This decision was based on Swiss civil law which entails a more subjective approach to construction of contract terms than under the common law. Nevertheless, it is suggested that the Court's reasoning would generally be applicable under the objective approach to construction of contract terms in common law jurisdictions also. This observation supports the view that, in many aspects of construction law, civil law and common law, courts will arrive at a similar conclusion, albeit via different routes.<sup>18</sup>

A number of recently reported ICC arbitration cases also generally conclude that it is mandatory to refer disputes to a DB prior to arbitration.<sup>19</sup>

#### **IV. A DISPUTE BOARD DECISION IS (PROVISIONALLY) BINDING**

##### **a) Relevant Provisions in the FIDIC Contracts**

As noted above, subclause 20.4 contains the following provisions in relation to the enforceability of a DAB decision:

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 the DAB has given its decision as to the matter in dispute to both Parties, and no notice of dissatisfaction has been given by either

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<sup>17</sup> *A. SA v. B. SA*, [2014] Swiss Federal Supreme Court 4A\_124/2014.

<sup>18</sup> Donald Charrett, 'A Common Law of Construction Contracts – or Vive la Différence?' 29(1) *International Construction Law Review* 23 (2012).

<sup>19</sup> ICC Cases 14431, 16155, 16262 and 16765, reported in 1 *ICC Dispute Resolution Bulletin* (2015).

Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

Taken in isolation of other provisions of clause 20, the above extracts state unequivocally that a DAB decision is *binding*; if no notice of dissatisfaction is given within twenty-eight days, it becomes *final and binding*. If notice of satisfaction is given within twenty-eight days, the decision remains binding, but it is *provisionally binding*, i.e. it is binding 'unless and until it shall be revised in an amicable settlement or an arbitral award'.

If a Party fails to comply with a binding DAB decision, subclause 20.7 provides that the other Party can refer that non-compliance directly to arbitration. However, the situation in respect of a party's failure to comply with a provisionally binding DAB decision is not so clear from the provisions of clause 20, demonstrated by the long saga of litigation between PT Perusahaan Gas Negara (Persero) TBK and CRW Joint Operation in the Singapore High Court and the Singapore Court of Appeal between 2010 and 2015.

#### **b) PT Perusahaan Gas Negara (Persero) TBK (PGN and CRW Joint Operation (CRW))**

PGN entered into a contract with CRW to design, procure, install, test and pre-commission a gas pipeline project in Indonesia (the Contract). The Contract adopted the General Conditions of the 1999 FIDIC Red Book.

#### **c) 2008 DAB**

A dispute arose between the parties regarding thirteen different variation proposals issued by CRW to PGN. The dispute was referred to a DAB pursuant to subclause 20.4. The DAB issued a decision in favour of CRW for the sum of USD 17.3 million.

#### **d) 2009 Arbitration**

PGN issued a NOD alleging the amount awarded by the DAB was excessive and refused to pay CRW the adjudicated amount. CRW filed a request for arbitration pursuant to subclause 20.6 with the ICC. The seat of the arbitration was Singapore.

CRW referred to arbitration not the underlying dispute that formed the basis of the DAB decision (the First Dispute), but rather the issue of whether PGN was obliged to comply with the DAB decision and pay the sum of USD 17.3 million (the Second Dispute). CRW sought a declaration that PGN had an immediate obligation to pay the adjudicated sum, in order to give prompt effect to the DAB's provisionally binding decision.

The Arbitral Tribunal issued a final award in favour of CRW, entitling CRW to immediate payment of the sum of USD 17.3 million. In reaching this conclusion, the Arbitral Tribunal found that PGN was not entitled in the arbitration to request the Arbitral Tribunal to open up, review and revise the DAB's decision as it had not submitted a counterclaim in the arbitration.

### e) 2010 Singapore High Court

CRW sought to enforce the final award in Singapore and an order of court giving effect to CRW's application was made (the Enforcement Order). PGN filed a separate application in the Singapore High Court to have the Enforcement Order and final award set aside.

In *PT Perusabaan Gas Negara (Persero) TBK v. CRW Joint Operation*,<sup>20</sup> the Singapore High Court set aside the final award under the Singapore International Arbitration Act (IAA)<sup>21</sup> on the basis that:

- The majority members of the tribunal had issued a final award on the Second Dispute even though that dispute had not been referred to the DAB in accordance with the provisions set out in the Contract.
- Even if the Second Dispute was referable to arbitration, the Contract did not entitle the Arbitral Tribunal to make the DAB's decision final without first hearing the parties on the merits of the decision.

### f) 2011 Singapore Court of Appeal

In *CRW Joint Operation v. PT Perusabaan Gas Negara (Persero) TBK*,<sup>22</sup> the Singapore Court of Appeal upheld the High Court decision to set aside the final award issued by the majority members of the arbitral panel under the IAA. The Court of Appeal held that the scope of the arbitral tribunal's jurisdiction was defined by subclause 20.6 of the Contract and the terms of reference of the arbitration.

The Court of Appeal dismissed CRW's application on the basis that the majority members of the arbitral tribunal had exceeded their jurisdiction and breached the rules of natural justice by failing to review the merits of the DAB's decision and afford PGN the opportunity to defend its position.

The Court of Appeal held that it was plain that a reference to arbitration under subclause 20.6 of the Contract in respect of a *'binding but non final DAB decision'* is clearly in the form of a rehearing so that the entirety of the parties' disputes can be resolved afresh, and therefore, the majority members had not issued their final award in accordance with subclause 20.6 of the Contract. The Court of Appeal noted that whilst the DAB's decision was enforceable under a partial award, the subject matter of the DAB decision was required to be opened up, reviewed and revised by the arbitral tribunal in the *same arbitration* in accordance with subclause 20.6 of the 1999 Red Book.

The Court of Appeal noted the majority members of the tribunal should have made an interim award in favour of CRW for the amount assessed by the DAB and then proceeded to hear the parties' substantive dispute afresh before making a final award. Accordingly, the Court of Appeal held that the final award was not issued in accordance with subclause 20.6 of the Contract.

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<sup>20</sup> [2010] SGHC 202.

<sup>21</sup> Cap 143A.

<sup>22</sup> [2011] SGCA 33.

### g) 2011 Arbitration

CRW commenced a second arbitration, following the guidance provided by the Court of Appeal. CRW placed both the First Dispute and the Second Dispute before the tribunal.

The tribunal issued an *'interim or partial'* award compelling compliance with the DAB's 2008 decision. The tribunal decided unanimously that the DAB decision was binding, even though PGN had issued a NOD. The majority of the tribunal determined that CRW was entitled to enforce the DAB decision by way of an interim award (the Interim Award), which was made, ordering PGN to 'promptly pay' CRW 'pending the final resolution of the parties' dispute raised in these proceedings'.

### h) 2013 Singapore High Court

PGN refused to pay CRW the amount of the Interim Award. CRW sought and obtained an Enforcement Order from the Singapore High Court. PGN filed a summons to set aside the Enforcement Order.

In *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Venture Operation*<sup>23</sup>, the Court considered the provisions of the DAB and the arbitration provisions in the Contract in detail (clauses 20.4 to 20.7 of the RB), which were largely unamended from the Red Book standard.

The Court considered whether the First Dispute and the Second Dispute were in fact one dispute or two. If there were two disputes, the effect would be that the Second Dispute and the First Dispute would be decided in separate proceedings. This would mean that it would be necessary for every dispute that was to be referred to arbitration to be preceded by a DAB decision in respect of that dispute. The result would be that once an Employer serves a notice of dissatisfaction, the Contractor would have to refer the Second Dispute to the DAB before it could proceed to arbitration, resulting in a never-ending loop. Clearly, such a result would conflict with the accepted intention of the Contract to implement the DAB's decision pending final resolution of the issues, thereby preserving the cash flow of the Contractor.

By contrast, in the 'one dispute' approach, the reference to 'dispute' in the DAB clause is intended to mean only a 'First Dispute', rather than a dispute about the dispute-resolution regime. It follows that the failure to pay the amount determined as due by the DAB can be considered to be an aspect of the First Dispute and does not in itself need to be referred to the DAB for a decision before it is arbitrated.

The Court accepted the 'one dispute' approach. The Court noted that this was the approach adopted by CRW in the 2011 arbitration.

The Court took the view that the award, although expressed as 'Interim', was final and binding on its subject matter and therefore, compliant with the IAA. The subject matter of the award was the right to be paid immediately (i.e. the Second Dispute), not the DAB's 2008 decision (i.e. the First Dispute). The Court noted that the award was not provisional in the sense that it would not be 'varied', 'amended' or 'revoked' at a future stage. If the final decision on the First Dispute was that a different (or no) sum

was payable by PGN, then the appropriate accounting exercise would be set out in the final award on the First Dispute. The Court dismissed PGN's application to set aside the Interim Award.

### **i) 2015 Singapore Court of Appeal**

In May 2015, the majority of the Singapore Court of Appeal dismissed PGN's appeal.<sup>24</sup>

PGN's appeal was based on two arguments:

1. The 2011 Interim Award is inconsistent with s19B of the IAA because it is an award that only has interim finality.
2. The effect of clause 20.4 of the Contract is that the DAB decision ceases to be binding as soon as the arbitral tribunal makes any award on the Parties' underlying dispute.

The Court of Appeal comprehensively dismissed all of PGN's submissions on its two arguments, based on a careful construction of the relevant contractual terms. The Court of Appeal dismissed PGN's first argument because it failed to appreciate the distinct contractual obligation of subclause 20.4 for the Parties to comply promptly with a DAB decision. That obligation applies irrespective of whether or not the DAB decision is subsequently revised or opened up. It also applies whether or not the arbitral tribunal eventually concludes that the receiving party is entitled to a different amount from that awarded by the DAB:

Without derogating from the obligation of the parties to immediately implement and give effect to the DAB's decision, an arbitral tribunal may, usually at a significantly later point in time (and only if the parties fail to settle their differences over the DAB's decision), open up and revise the DAB's decision. In doing so, the tribunal would be considering a conceptually distinct question, namely, the state of the final accounts between the parties.<sup>25</sup>

The issuance of a NOD does not and cannot displace the binding nature of a DAB decision or the parties' concomitant obligation to promptly give effect to and implement it. The non-issuance of a NOD within twenty-eight days means that the DAB decision becomes *final* as well as binding and an arbitral tribunal does not have jurisdiction to consider the merits of the decision. The Court of Appeal determined that it was unnecessary to refer a dispute over the 'binding' effect of this DAB decision back to the DAB to enable it to be referred to an arbitral tribunal.

The key to the Court of Appeal's reasoning was as follows:

- There was an inherent premise embedded in the DAB's decision that the Adjudicated Sum (i.e. the sum that the DAB determined was payable) was payable *forthwith*.
- If, for any reason the DAB had intended that its decision ordering payment should only take effect later, it would have had to make this explicit.
- 'The point, in essence, is that dissatisfaction expressed in an NOD already

<sup>24</sup> *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2015] SGCA 30.

<sup>25</sup> *Ibid.*, para. 54.

inherently extends to the requirement that payment of the adjudicated amount be made forthwith, and there is nothing further to be referred back to the DAB.<sup>26</sup>

- ‘Given the purpose and context of the DAB scheme, it would not be commercially sensible to interpret cl 20 as requiring the receiving party to satisfy the conditions precedent in cll 20.4 and 20.5 before it can refer a dispute over the paying party’s non-compliance with a binding but non-final DAB decision to arbitration.’<sup>27</sup>

Importantly, in respect of the following issues, the Court of Appeal respectfully disagreed with the 2011 Court of Appeal decision:

- There is no requirement that all differences between the parties must be settled in a single arbitration. It is possible to refer the dispute over the paying party’s failure to promptly pay the Adjudicated Sum to a separate arbitration.
- PGN’s submissions on the merits of the DAB decision were not a defense to the claim for immediate payment of the adjudicated amount.
- The 2009 arbitral tribunal was correct to limit its final award to giving prompt effect to the DAB decision and to decline to review the merits of that decision.

#### **j) Conclusions on Enforcing a Provisionally Binding DAB Decision**

The 2015 Singapore Court of Appeal judgment is an important outcome for the application of the 1999 FIDIC DAB and arbitral process. The carefully-reasoned majority judgment confirms various academic writings on the intention behind the FIDIC DAB provisions and provides clarity on issues that have vexed arbitral tribunals, such as the ability to render a final award on payment pursuant to a provisionally binding DAB decision.<sup>28</sup>

A DAB decision must be complied with promptly, even if a NOD is submitted and a party wishes to dispute the merits of the decision. The failure to promptly pay an amount in a DAB decision can be referred to an arbitral tribunal as a single issue, whether or not a NOD has been issued. The failure to pay an adjudicated amount does not have to be referred back to the DAB as a precondition to arbitration.

FIDIC issued a ‘Guidance Memorandum to Users of the 1999 Conditions of Contract’ dated 1 April 2013 with revisions to the standard form wording in clauses 14 and 20 of the 1999 editions. This was intended to enable the failure to pay any decision of the DAB, whether (provisionally) binding or final and binding, to be referred to arbitration for summary or other expedited relief as appropriate. Whilst the latest Court of Appeal decision indicates that the existing wording achieves the same effect, use of the proposed revised wording would put the issue beyond doubt.

The dissenting 2015 Court of Appeal judgment and the 2011 Court of Appeal judgment may still provide arguments against enforceability in other jurisdictions if the

<sup>26</sup> *Ibid.*, para. 66.

<sup>27</sup> *Ibid.*

<sup>28</sup> E.g. in the ICC Case 16119, the tribunal held that it could not issue a final award ordering payment of the sums ordered in the (binding but non-final) decision of the DAB, although it recognised it could issue a final partial award declaring the binding force of the DAB’s decision ((2015) 1 *ICC Dispute Resolution Bulletin*, 70).

existing wording is not amended.

## V. COSTS OF DISPUTE BOARDS

The direct costs of standing DBs include a daily fee per member for site meetings and dispute determinations, travel time and expenses. Standing DB members are also frequently paid a monthly retainer for those months in which there is no DB meeting, as remuneration for keeping up to date with progress of the Works by reading site minutes, monthly reports etc. A monthly retainer is also recompense for being available to conduct dispute determinations at short notice and for constraining the member's employment in any other role by either the Employer or the Contractor for the duration of the project.

There are also indirect costs for the Parties in employee time in preparing for and participating in DB meetings.

These costs may appear to be large in absolute terms in a major project that runs for a number of years. The daily fee rates for experienced DB members with the necessary technical and legal expertise and experience will be significant and such members frequently have to travel internationally for DB meetings. However, when put in the context of the tens or hundreds of millions of dollars of a major international construction contract, the cost of a DB is usually considerably less than 0.15% of the final contract price.

In this writer's view, the costs of a standing DB make commercial sense as 'insurance' against the risk costs of significant disputes. The experience of projects with DBs around the world is that less than 3% have disputes that are not resolved by the DB process and require arbitration or litigation for final resolution. Over the last twenty or so years in Australia there have been around fifty projects with DBs, typically major infrastructure projects. Many of these DBs have not had any formal disputes to adjudicate on, as their dispute-avoidance role has been very effective. In the small number of disputes adjudicated by DBs, none have gone on to arbitration or litigation.

The 'insurance' value of DBs can be demonstrated by the following metrics:

- In 10% of projects, 8-10% of the total project cost is legal cost.<sup>29</sup>
- 50% of the legal cost is expended in connection with disputes.

Thus, the risk cost of disputes on any construction contract (legal fees only) is 10% x 8% x 50% = 0.4% of project cost.

As noted above, the typical DB cost is ~0.15%. Based on the track record of DBs being overwhelmingly effective at avoiding disputes or containing the costs of dispute resolution within the costs of the DB itself, the 0.15% 'insurance' cost of a DB is significantly less than the 0.4% risk cost of disputes if there is no DB.

Put another way, without a DB there is a 10% chance that the legal costs of disputes will amount to 4 – 5% of the project cost.

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<sup>29</sup> Peter Chapman, 'Dispute Boards for Major Infrastructure Projects', paper presented at the Seminar on the Use of Dispute Boards in Australia, (Queensland, 30 November 2006).

If there is insufficient project funding for a three member standing DB, the Parties could contemplate a single member for smaller projects. Although an ad hoc DB cannot perform the important role of assisting the Parties in avoiding disputes, such a Board is preferable to no DB at all, as it provides a mechanism for dispute resolution that is substantially quicker and cheaper than the alternatives of litigation or arbitration.

In this writer's view, it does not make commercial sense to remove the DB provisions from a FIDIC contract. Whilst it may appear to avoid cost, it introduces (perhaps significantly greater) costs in other areas: tender prices may be higher because of the Contractor's perception of increased costs in pursuing claims and resolving disputes and there is a significantly greater risk of major and expensive disputes.