

ENFORCING A DISPUTE BOARD'S DECISION: ISSUES AND CONSIDERATIONS*

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INTRODUCTION

There has, for many years, been some considerable international interest in Dispute Review Boards (“DRBs”) and Dispute Adjudication Boards (“DABs”), collectively referred to as Dispute Boards (“DBs”). The North American concept of a panel of three experts assisting with the smooth running of substantial projects and then making recommendations to resolve issues, disagreements and disputes that arise along the way was shown to have some success when initially introduced.

The concept spread and developed internationally, initially gaining support as an option to the FIDIC Orange Book in 1994 and as an option to the Red Book in 1996, then as a mandatory requirement throughout the 1998 Test Edition of the FIDIC suite of contracts. Jaynes notes that FIDIC retrenched without much explanation from the position of a mandatory DAB in the Red Book to it being merely optional in the Yellow and Silver books.¹ However, by this stage the non-binding recommendation had changed into a binding decision, thus transforming the recommendation process, which was often honoured because of the parties’ respect for the board members, into a binding dispute resolution procedure.²

In 1999 FIDIC settled the terms of its DAB procedure, and introduced the concept of a Dispute Review Expert (“DRE”), which is basically a single-person DB. The FIDIC DAB procedure became a permanent fixture, and was included in all of its revised contracts. The World Bank then introduced a new edition of its Procurement of Works Procedure making the “recommendation” of the DRB or DRE mandatory, unless or until that recommendation was superseded by an arbitrator’s award. In 2004 the World

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¹ See C Seppälä, “The New FIDIC Provision for a Dispute Adjudication Board” [1997] ICLR 443 and Gordon Jaynes, “FIDIC’s 1999 Editions of Conditions of Contract for ‘Plant and Design-Build’ and ‘EPC Turnkey Contract’: Is the ‘DAB’ Still a Star?” [2000] ICLR 42.

² Jaynes notes and records the development and expansion in the use of DAB internationally in 2002, see Gordon Jaynes, “‘A Dispatch from the Front’: Dispute Boards at 2002” [2002] ICLR 135.

Bank, together with other development banks and also FIDIC, started to work towards a harmonised set of conditions for DABs. FIDIC released, in 2005, the Multilateral Development Bank (MDB) Harmonised Edition of General Conditions, containing a three- or one-person DAB.³

The DRB used in North America as a system for the avoidance of disputes arising during the course of a project and then helping to resolve disputes by agreement and recommendation has, in effect, been replaced (at least for the world outside North America) by a decision-making dispute-resolving function.⁴ Initially, the process that was to provide a recommendation, now delivers a decision that is binding and apparently immediately enforceable, although susceptible to later challenge. DBs are now an internationally recognised concept, and are frequently included by default in many substantial international contracts, simply by the use of FIDIC or by imposition of the development banks by virtue of their procurement pathway. On the other hand, Mahnken considers that a DB need not be permanent and that an *ad hoc* DB could provide an economic solution for a project that is not “very large”.⁵ The Japan International Cooperation Agency (JICA) does not agree, and considers that the *ad hoc* approach fails to make use of the dispute avoidance function of a DB.⁶

The initial questions about the use of DBs in practice, establishing, appointing, working with and using them, have already received much debate.⁷ The key question at the moment is how to enforce a DB's decision.⁸ Dering, in 2004, notes that some difficult jurisdictional issues can arise when a DB decision has not been accepted by the parties as finally resolving the issues in dispute.⁹ From a general legal perspective one might ask: what is the nature and standing of a DB's decision? In particular, and by reference to FIDIC and other international construction and engineering contracts, the development banks' procurement requirements and other institutional DB rules, the more specific questions that arise are:

³ See also Gordon Jaynes, “Dispute Boards—Good News and Bad News: The 2005 ‘Harmonised’ Conditions of Contract Prepared by Multilateral Development Banks and FIDIC” [2006] ICLR 102.

⁴ Nisja considers the role of the engineer in the FIDIC 1999 Red Book, asking whether the engineer is now expected to act as agent (of the employer when certifying, etc.), mediator (for the purposes of amicable settlement discussion—although the better view is that an independent mediator should be considered), and even adjudicator (when exercising judgment under the determination clause 3.5). Ola Nisja, “The Engineer in International Construction: Agent? Mediator? Adjudicator?” [2004] ICLR 230.

⁵ Volker Mahnken, “Why International Dispute Settlement Institutions Should Offer *Ad Hoc* Dispute Board Rules” [2006] ICLR 433.

⁶ JICA (2012) *Dispute Board Manual*, version 1.0, March.

⁷ See, e.g.: N Gould, “Establishing Dispute Boards: Selecting, Nominating and Appointing Board Members” (2006) SCL paper 135, given at the Society of Construction Law's International Conference in Singapore 16–17 October; and P M Genton, “The Role of the DRB in Long Term Contracts” (2002) 18(1) Const LJ 9.

⁸ See in particular C Seppälä, “Enforcement by an Arbitral Award of a Binding but Not Final Engineer's or DAB's Decision under the FIDIC Conditions” [2009] ICLR 414; and the related article C Seppälä, “The Arbitration Clause in FIDIC Contracts for Major Works” [2005] ICLR 4.

⁹ Christopher Dering, “Dispute Boards: It's Time to Move On” [2004] ICLR 438.

1. In what sense is a DB's decision binding? Or final and binding? Or final, and conclusive and binding? Is there any difference, and does it matter?
2. If a decision is binding, then does that mean that it can be enforced where, for example, money is to be paid or some action is to be taken, and if so, how? Alternatively, is a party simply in further breach of contract by failing to honour the decision, but if so, how does the aggrieved party obtain redress?
3. Must an aggrieved party refer a failure to comply with the DB's decision to international arbitration under the contract? If so, does that party ask the arbitral tribunal to enforce the DB's decision, or the underlying dispute which resulted in the decision? In effect, can the tribunal give an interim award for the immediate enforcement of the DB's decision, without considering the merits?
4. Can a party bypass the arbitration agreement and ask a court to immediately enforce the DB decision, perhaps on the basis that there is no dispute (a prerequisite to arbitration) but simply an enforcement (perhaps the payment of money) of a contractually binding DB's decision?

Should, or could, a court treat a DB's decision as an arbitral award? Would such an approach help or hinder the temporary enforcement of DBs' decisions, or simply introduce additional problems, for example restrict the ability of an arbitral tribunal properly to hear at some later date the underlying merits of the original dispute?

5. How is all of this affected if one, or both, of the parties fails to issue a written notice of dissatisfaction with the DB's decision, or fails to serve a notice of intention to commence arbitration within the timescale set out in the contract? Consider further the possibility where a party disputes only part of the DB decision. Can that party only pursue that part which has not become final? What is the impact on the responding party who may find that their key defence to the "live" claim has not been disputed and is now apparently unavailable for consideration by the arbitral tribunal?

These are some of the fundamental questions that are (or should be) considered either when drafting international construction contracts, or, more pertinently, when dealing with disputes that have arisen during the course of the works. In part, some of these issues can be analysed by reference to the particular terms in the contract. In this paper consideration is given to FIDIC, but in reality very careful consideration will need to be given to the particular words in the applicable contract.

However, the contract cannot be considered in isolation. The substantive law of the contract will establish the ground rules for the interpretation of the contract and, in particular, its dispute resolution procedure. The procedural law that applies to the arbitration will also have an impact.

Further, substantive and procedural laws of the country or countries where the enforcement will take place cannot be ignored. Quite clearly, if a DB decision is to be immediately enforced by a court then it is a consideration of the substantive and procedural laws of the applicable country or countries that will determine whether there is any chance of success. Hök identifies the categories of applicable law that could impact on the agreement to refer a dispute under the main contract, in respect of the DB members' agreements, the DB decision, the requirement to comply with it and also the enforcement of the DB decision. It is not simply the law of the contract, but potentially a number of legal systems that could apply to the substantive agreement, the classification of the applicable law, jurisdiction, the proper law of the contract, the procedural law, evidence, *lex fori*, and enforceability.¹⁰

Before turning to each of these key issues, it is important to establish the contextual background, and so the next section deals briefly with the rise and development of DBs. There is then an overview of the particular DB provisions of FIDIC, followed by a review of two reported cases touching on the enforcement of decisions made under FIDIC contracts. A number of key issues are then distilled and considered: the scope of the referral of a dispute to a DB, the status of a DB's decision, the importance of time limits, distinguishing "binding" and "final and binding", enforcement under the New York Convention 1958, statutory adjudication, direct enforcement in a local court, and jurisdictional challenges. The analysis of these key issues is then summarised before a brief conclusion is presented.

I. THE DEVELOPMENT OF DISPUTE BOARDS

The terms and acronyms "dispute review board", "DRB" or "dispute adjudication board", "DAB", collectively "dispute boards" ("DBs"), are relatively new ones. They are used to describe a dispute resolution procedure that is normally established at the outset of a project and remains in place throughout the project's duration. The board may comprise one or three members who become acquainted with the contract, the project and the individuals involved with the project, in order to provide informal assistance, provide recommendations about how disputes should be resolved, and provide binding decisions.

¹⁰ G-S Hök, "Dispute Adjudication in Civil Law Countries—Phantom or Effective Dispute Resolution Method?" [2011] ICLR 412 at 431 and 432.

The one-person or three-person DBs are remunerated throughout the project, most usually by way of a monthly retainer, which is then supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents, attending hearings and producing written recommendations or decisions, if and when appropriate.

More recently, DABs have come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of DRBs, which originally developed in the domestic North American major projects market. The use of DRBs has grown steadily in North America, but they have also been used internationally. However, DRBs predominantly remain a feature of domestic North American construction projects. As adjudication developed, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the DAB was born from the DRB system; the DRB provides a recommendation that is not binding on the parties.

According to the Dispute Review Board Foundation (“DRBF”) the first documented use of an informal DRB process was on the Boundary Dam and Underground Powerhouse project north of Spokane, Washington, during the 1960s.¹¹ Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four-member “Joint Consulting Board”, in order that the Board could provide non-binding suggestions.

Subsequently, the US National Committee on Tunnelling Technology, Standing Sub-Committee No 4 conducted a study and made recommendations for improving contractual methods in the United States.¹² Further studies were carried out, and the first official use of a DRB was made by the Colorado Department of Highways on the second bore tunnel of the Eisenhower Tunnel Project. This was as a result of the financial disaster encountered in respect of the first tunnel between 1968 and 1974.¹³

According to the DRBF, the records from December 2003 show that there were 340 contracts comprising DRBs that were currently active in 2003.¹⁴ In regard to those projects, 1,261 recommendations were given by the DRBs and, according to the DRBF’s records, only 28 matters went beyond the DRB process. In other words, only 2.2% of those disputes referred to the DRB progressed to arbitration or litigation. Harmon updated the DRBF database, recording that out of 2,753 disputes referred to the DRB panels 327 (12%) disputes went on to a further dispute resolution process

¹¹ DRBF, *DRBF Manual* (2007), January, p. 1.

¹² 1972. See also National Academy of Sciences, *Better Contracting for Under Ground Construction* (1974), Contracting practices of the US National Committee on Tunnelling Technology and National Research Counsel, Standing Sub-Committee No 4, National Committee of Washington.

¹³ A A Matthews, “The First Dispute Review Board”, DRBF Foundation (1997) 1(1) *Forum*; K M J Harmon, “A Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project” (2009) 1(1) *J Profl Issues Engineering Education Practice* 18–31.

¹⁴ Harmon, *op. cit.* n. 13.

(mediation, arbitration or litigation).¹⁵ A more positive way of looking at this is that DRBs seem to work well in dealing with disputes at first instance.

More recent statistics have been compiled by the DRBF, and reported by Harmon.¹⁶ DBs have been used on at least 2,150 projects between the DRBF's inception in 1975 and 2010. They have been used on projects for, amongst other things, tunnels, highways, rail, light rail, bridges, airports, container ports, buildings, schools, hospitals, sports stadiums, metro systems, pipelines, pumping stations, water treatment works, shopping centres, power plants, nuclear power plants, oil platforms, and waste facilities. This includes projects not just in the USA but worldwide (and therefore DRBs and DABs).

In 2002 the International Chamber of Commerce ("ICC") Task Force prepared draft rules for DBs. The ICC DB Rules require a party to submit their dispute first to the DB before making a referral to arbitration, although this is not, in Dorgan's view, entirely clear from the drafting.¹⁷

Genton, adopting the terminology of the ICC, describes the DAB approach "as a kind of pre-arbitration requiring the immediate implementation of a decision". He goes on to state that: "The DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions."¹⁸

Building upon this distinction, the ICC developed three alternative approaches:

1. Dispute review board—the DRB issues recommendations in line with the traditional approach of DRBs. An apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period then the parties agree to comply with the recommendation. The recommendation therefore becomes binding if the parties do not reject it.
2. Dispute adjudication board—the DAB's decision is to be implemented immediately.
3. Combined dispute board ("CDB")—this attempts to mix both processes. The ICC CDB Rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests it and the other party does not object. If there is an

¹⁵ K M J Harmon, "Using DRBs to Maintain Control of Large Complex Construction Projects" (2012) 67(1) *Dispute Resolution Journal* (Feb–Apr) 70–75.

¹⁶ DRBF (2010), "Database of Projects", http://www.drb.org/manual/Database_2005.xls, 22 April 2010. K M J Harman, "To be or not to be—that is the question: Is a DRB Right for Your Project?" (2011) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Feb, 10–16.

¹⁷ Carroll Dorgan, "The ICCs New Dispute Board Rules" [2005] ICLR 142.

¹⁸ Genton, *op. cit.* n. 7, para. 7-029.

objection, the CDB will decide whether to issue a recommendation or a decision.

Genton suggests that the third stage of a CDB would be the referral of a dispute leading to a binding decision, which would need to be implemented immediately. The ICC's approach is that the DB decides (if either party requests a decision) whether to issue a recommendation or an immediately binding decision at the second stage of the process.

According to the ICC the essential difference is that the parties are required to comply with a decision immediately, whereas the parties must comply with a recommendation but only if the employer and contractor express no dissatisfaction within the time limit. The combined procedure seems at first glance to be a somewhat cumbersome approach, attempting to build upon the benefits of the DRB and DAB, without following a clear pathway. Nonetheless, it may prove useful for those parties who cannot decide whether they need a DRB or a DAB.

At the other end of the spectrum, a DB could be considered as a flexible and informal advisory panel. In other words, before issuing a recommendation, the DB might be asked for general advice on any particular matter. The DB will then look at documents and/or visit the site as appropriate and, most usually, provide an informal oral recommendation, which the parties may then choose to adopt. If the parties are not satisfied, the DB will proceed to the issue of a formal, albeit non-binding, written recommendation after following the formal procedure of exchange of documents and a hearing. This raises interesting questions (beyond the scope of this paper) about the extent to which a DB should act in a conciliatory manner, make informal recommendations, and be able to proceed to a formal rights- and obligations-based reasoned decision.

II. THE FIDIC DAB PROVISIONS

The introduction of DABs in the FIDIC suite of contracts in 1999 represented a major international turning point in the area of construction dispute resolution. In respect of the DAB, the FIDIC standard conditions of contract include:

- (1) clauses 20.2 to 20.8—the Dispute Adjudication Board;
- (2) Appendix—General Conditions of Dispute Adjudication Agreement;
- (3) Annex 1—Procedural Rules; and
- (4) Dispute Adjudication Agreement (three-person DAB or one-person DAB).

This paper focuses on the specific DAB and arbitration provisions of the FIDIC Red Book 1999 Edition in order to consider the position in respect of enforcement of a DAB decision, with reference mainly to English law.

FIDIC clause 20

The process for a referral of a dispute to the DAB commences with clause 20.4:

“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 evaluation 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.”

This clause is widely drafted, but perhaps limited by the word “including” because of the provision of a closed list. However, the clause goes on to state:

“The DB shall be deemed to be not acting as arbitrator(s).”

What then is the nature of a DAB? Is it a replacement of the engineer's decision-making function? Is it the same or similar in nature to an expert determination? Clearly the DAB does not have the powers of an arbitral tribunal, nor can the decision be enforced in its own right as if it were an award. The New York Convention 1958 does not apply to the decision of a DAB, and so cannot assist in the enforcement of a DAB's decision. This is further considered below.

The DAB's powers arise from the contract. The parties have agreed in the contract to abide by the DAB's decision. Failure to comply is simply a breach of contract by the defaulting party. The contractual remedy is a referral to arbitration. The question is: does one refer the failure to abide by the DAB's decision or, does one refer the underlying substantive dispute for a rehearing or as an appeal?¹⁹

If the failure to comply is referred, then the request is simply for an immediate award (without any consideration of the merits of the original dispute) so that the award can be enforced. This may be appropriate where there is no notice of dissatisfaction. Alternatively, the actual dispute between the parties could be referred and, in effect, reheard by the arbitral tribunal. A party could of course refer both, but then request an immediate interim award.

The referral of a dispute to the DAB and the binding nature of the DAB's decision are dealt with in clause 20.4. The important part at paragraph 5 of clause 20.4 is:

“Within 84 days after receiving such reference . . . the DB shall give its decision, which shall be reasoned and shall state that it is a decision 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 . . .* Unless the Contract has

¹⁹ See the judgment of HHJ Lloyd, QC, in *David McLean Housing Contractors Ltd v. Swansea Housing Association Ltd*, unreported, 27 July 2001; N Gould, “The Status of an Adjudicator's Decision; Does it Create a Cause of Action in its Own Right? (2005) 21(6) Const LJ 435–455.

already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.” (My emphasis.)

The decision must contain reasons. It is then contractually binding on the parties who are to “give effect” to the decision “promptly”. The immediate use of “unless and until” in the same sentence is perhaps unfortunate. One reading of the clause is that it is not binding at all if the decision is subject to potential revision in an arbitration that has or is being commenced. If the time limits for challenging the DAB’s decision have passed, it would then become final and binding and so should be enforced.

There is a useful distinction between the use of the term “binding” in this sub-clause and the term “final and binding” in the last paragraph of sub-clause 20.4. In the absence of a valid notice of dissatisfaction, the decision is not only binding but also final. So, once final, the assumption seems to be that the DAB’s decision cannot be challenged, but nonetheless, where a valid notice of dissatisfaction has been given, the DAB’s decision is *temporarily* binding.

Notice of dissatisfaction

The parties could accept the decision of the DAB as resolving their dispute, presumably honouring it or negotiating a different but acceptable resolution. If either party does not accept the DAB’s decision, that party must serve a notice of dissatisfaction (NOD) in accordance with paragraph 5 of clause 20.4 which states:

“If either Party is dissatisfied with the DAB’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 DAB 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.”

In order to avoid the DAB’s decision becoming “final and binding” either party may serve a notice of dissatisfaction. The notice shall:

- (1) state that it is given under sub-clause 20.4;
- (2) set out the matter in dispute; and
- (3) set out the reason(s) for dissatisfaction.

The substance and form of the notice must be adequate, in that the party serving it must make it objectively clear that it is dissatisfied with the DAB’s decision, and why it is dissatisfied.

Arbitration: selecting the applicable pathway

There are two pathways to arbitration under the standard FIDIC form. The first (under clause 20.6) is in order to resolve disputed DAB decisions or

where no DAB decision has been issued, and the second (under clause 20.7) is to deal with the situation where there has been a failure to comply with a DAB decision. In terms of enforcing a DAB decision this means that the party referring the matter to arbitration has to select the applicable arbitration clause, and draft a referral that reflects the requirements of that provision. The key here is whether a notice of dissatisfaction has been given. The timely service of a notice of dissatisfaction is a condition precedent to the referral of a dispute to arbitration under clause 20.6.

The condition precedent to arbitration under clause 20.6

The route to enforcement by way of arbitration in respect of a DAB decision that either party is dissatisfied with, requires a consideration of the interrelationship between clauses 20.4 and 20.6. Importantly, paragraph 6 of sub-clause 20.4 states:

“Neither party shall be entitled to commence arbitration of a dispute *unless a notice of dissatisfaction* has been given in accordance with this Sub-Clause.” (My emphasis.)

The words are restrictive, in that a prerequisite to arbitration under clause 20.6 is the service of a notice of dissatisfaction (NOD). A failure to serve a notice has other ramifications, which are set out in the last paragraph of clause 20.4:

“If the DAB 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 DAB's decision, then the decision shall become *final and binding* upon both parties.” (My emphasis.)

The arbitration agreement at clause 20.6 states:

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

In order to commence arbitration under clause 20.6 a notice of dissatisfaction must be issued within time. If the notice is not issued, then the DAB's decision becomes “final and binding”, and any failure of either party to “promptly give effect” to the DAB's decision can be referred to arbitration under clause 20.7. It is “the failure itself” to comply that is referred to arbitration. Nonetheless, the reference under clause 20.7 is made without the need to return to the DAB or to engage in amicable dispute resolution.

Arbitration under clause 20.7

What is the scope of the arbitral tribunal's jurisdiction in respect of a referral under clause 20.7? Is it merely one of checking to see if the DAB itself had jurisdiction to decide the dispute, and then simply confirm the DAB decision in an arbitration award without considering the merits? This

may seem like a narrow interpretation, but it is only the “failure itself” that is referred under clause 20.7. However, the “open up review and revise” provisions in clause 20.6 apply, even to a reference under clause 20.7. These provide that:

“The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute.”

Adopting a broader interpretation, does the “open up, review and revise” power mean that the tribunal can in any event then revisit the merits and substance of the dispute and come to its own decision as to the facts, law and relief? If so, the tribunal could, after a short or summary procedure, give effect to the DAB’s decision by issuing an immediate interim award (final in respect of determining whether the decision should have been complied with) before proceeding to hear the entire dispute, either as an appeal on specific points or simply by hearing the dispute “afresh” from the beginning.

This approach would allow the tribunal to give effect to the DAB’s decision, but then to consider the merits of the dispute before issuing a final award. The problem with this broad approach is that, while clause 20.6 provides for opening-up, reviewing and revising, the right to arbitrate at all is based on a failure to comply and is in respect of the “failure itself”. The initial gateway to arbitration is in respect of that failure, not dissatisfaction with the DAB’s decision. Rehearing the original dispute seems to go beyond a consideration of just the failure to comply with a DAB’s decision that has become “final and binding”.

How important in practice is the distinction between a DAB decision that is “final” and one that is “final and binding”? This is clearly an important consideration, but before turning to that, a brief review of two reported cases dealing with enforcement of decisions made by a third party under a FIDIC contract is helpful.

III. ENFORCEMENT OF A DECISION MADE UNDER A FIDIC CONTRACT

The first of these cases deals with a decision of an engineer made under the older FIDIC 1987 provisions, while the second deals with the issues directly because it relates to the enforcement of an arbitration award, which in turn dealt with a failure of a party to promptly give effect to a DAB’s decision.

ICC Case 10619: the reference to arbitration under the Red Book Fourth Edition

The interim and final awards in ICC Case 10619 relate to the binding nature of an engineer’s decision given in respect of clauses 11 and 67 of the

FIDIC Red Book, Fourth Edition (1987).²⁰ The awards were dated March 2001 and April 2002, respectively. The place of arbitration was Paris, France. The works comprised the construction of a road in an African state. The key parties comprised an Italian contractor as claimant, and a public authority employer in an African state as respondent. The engineer was a German organisation.

The claimant contractor commenced arbitration for damages, claiming payment of the engineer's decisions under the contract. The claimant filed a request for arbitration with the International Court of Arbitration of the ICC on 11 August 1999. The claim related to delay, disruption, a failure to grant possession of the site, exceptionally adverse weather, and other delaying and disruptive events. On 11 February 2000 the claimant requested the arbitral tribunal to issue an interim decision declaring that the respondent should give effect to the engineer's decision given under sub-clause 67.1. Importantly, the claimant was seeking an interim award for immediate payment of that decision regardless of the pending arbitration of the merits of the underlying dispute.

The claimant's position

The claimant argued that clause 67.1 of the FIDIC Contract gave the engineer power to decide, albeit on a provisional basis, applications made by the claimant to the engineer. Those decisions were binding and should be honoured. In this case four decisions had been given. The first two of 17 November 1998 dealt with two applications for an extension of time and additional payment. Further submissions for the time extension and additional payment were also made. The engineer made a decision in respect of all four applications, but the respondent refused to execute the decisions.

The claimant was seeking an interim award for payment of the amounts set out in the engineer's decision, together with interest at an earning rate of 7%. The amounts were expressed in the local currency, and the claimant also sought conversion to US\$ at the contractual rate.

The respondent's position

The respondent resisted the request for interim relief on a number of grounds:

1. There was no urgency for the payment to be made as the project was concluded, and the parties were now in arbitration. The tribunal should focus on the substantive dispute. Once the entirety of that dispute had finally been decided, the claimant

²⁰ (2008) 19(2) ICC Arb Bull 85. See also C Seppälä, "Enforcement by an Arbitral Award", *op. cit.* n. 8.

could be adequately compensated by an allocation of interest in the final award.

2. The claimant had not in fact established its case. It simply made an application to the engineer, and the engineer made a decision. The decision was disputed, and the claimant had yet properly to prove its case.
3. To develop this argument further, the purpose of clause 67.1 was to prevent disruption of the works pending a final resolution of the dispute. In other words, a decision would be given allowing the works to continue. That did not apply in this case as the decisions had been made after completion of the works.
4. The decisions would only become binding in the absence of a NOD. Both the parties had set out their disagreement with the decisions. As both parties did not accept the decisions this deprived the decisions of any binding nature.
5. In addition, there were some manifest technical errors with the decisions in any event:
 - 5.1 The decisions had to be made within 84 days of the claimant's application. The first two made on 5 May 1999 were late. They had been provided after the time period set out in clause 67.1. They were therefore void.
 - 5.2 The engineer identified the amount to be paid in local currency. However, the claimant had brought a claim in US\$. The claimant was therefore not claiming the amounts nor in the currency set out in the decisions.
 - 5.3 The engineer stated in his decisions that they were subject to the respondent's prior approval. The engineer, therefore, had not made a final decision. Further, no payment was possible in the absence of certificates of payment, which require prior approval of the employer.

For all of the above reasons, the respondent therefore asked the arbitral tribunal to dismiss the application.

The tribunal's reasoning

The starting point was the procedure envisaged under clause 67.1 of the FIDIC Red Book. This, in summary, comprises:

1. If any dispute arises out of or in connection with the contract the matter shall in the first place be referred in writing to the engineer. A copy is also provided to the other party.
2. The engineer is to notify the parties of its decision within 84 days of the application. The engineer must expressly refer to clause 67 in order to make it clear that it is a decision under that clause of the contract.

3. If the engineer fails to notify its decision within 84 days then either party, within a further period of 70 days, may notify the other of its intention to commence arbitration in respect of the matter in dispute.
4. If the engineer notifies its decision within 84 days then either party can, within 70 days, serve a notice of its intention to challenge the decision by way of arbitration. That notice must be sent to the engineer and the other party.
5. If a Notice of Intention to Challenge has not been served within 70 days then the engineer's decision shall become "final and binding on both parties", and cannot be challenged in arbitration.
6. If the party serves a NOD within the 70-day period the engineer's decision is not final. However, it is still binding on both parties and they shall comply with it. The second paragraph of clause 67.1 specifically states:

"The Contractor and Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award."

The arbitral tribunal paid specific attention to the deadlines, and therefore the dates on which a decision and NOD were issued. The engineer's decisions of 5 May 1999 were late, in that they had been issued more than 84 days after the contractor's request for a decision. The tribunal decided that those decisions could not bind the parties. This meant that the first two decisions were not binding.

The unfortunate ramification of this finding is that an employer will be relieved from compliance with an engineer's decision simply because the engineer's decision was late. Further, the contractor cannot be said to have any control over the matter. Surely it is, in effect, the employer's breach if the decision has been provided late, as the engineer has been engaged by the employer. Why should a breach by the employer relieve the employer of its duties under the contract? Is this not a case of the employer being able to rely upon a breach that was within its commission?

However, an adjudicator's decision could be distinguished from that of an engineer. While an engineer is to be impartial between the parties when rendering a decision, the engineer is still engaged and paid by the employer to conduct the contract. On the other hand, an adjudicator is engaged to make a binding decision and must not just follow the procedures under the contract but also be, or should be, truly impartial and independent of both parties.

Nonetheless, the tribunal then went on to consider the previous decisions of 17 November 1998. They held that as the 5 May decisions were ineffective, those of November 1998 survived. They had been made within the 84-day period and so were valid decisions.

The claimant had filed a NOD within the 70-day period. It was also arguable that the employer had expressed its disagreement within the time period. So, both parties had expressed their dissatisfaction with the decision. It was not as if only one party had expressed dissatisfaction. Both parties did not accept the decision.

The arbitral tribunal held that, regardless of whether the decision had been subject to a NOD or not, the contract required the engineer's decision to have an immediate binding effect on the parties. The parties should therefore have complied with it. If the employer failed to pay money in accordance with that decision then the employer was in breach of contract. More importantly, the arbitral tribunal took the view that the possibility that the decision may end up being opened up, reviewed, revised or set aside in the arbitration should not stop the tribunal from giving immediate effect to the decision. They considered that this was the purpose of the terms in the contract.

There were, however, several other issues that needed to be considered before the tribunal could issue an award to that effect. First, the award would not be one of a conservatory or interim measure, but would give full and immediate effect to the decision. Neither the provisions of Article 23 of the ICC Rules nor the *référé provision* of the Rules of the French Nouveau Code de Procédure Civile were, in the tribunal's view, relevant.

First, sub-clause 2.1 (b) of the FIDIC contract required the employer to give specific approval in circumstances where the engineer was certifying additional costs before payment. The employer had given no such approval for payment of these decisions. The arbitral tribunal did not accept that this provided a defence to the employer.

Second, sub-clause 2.1 (b) of Part II of the FIDIC Conditions did not apply to decisions of the engineer. The fact that the engineer had mistakenly believed that consent was required did not invalidate the engineer's decision. The engineer was required under clause 67.1 to make a decision and this was regardless of any prior approval of the employer.

Alternatively, if the arbitral tribunal was wrong and the engineer's decision did require approval then that would only affect the validity of the payment certificate. It would not affect the validity of the engineer's decision and the substance of it. The employer was required under the contract to give immediate effect to that decision and so by refusing to approve a certificate for payment the employer was simply in further breach of contract.

This, then, left the issues relating to currency and interest. The tribunal considered that they could only really give effect and force to the decisions in their current state. The contract provided for payment in a specific ratio between the local currency and US\$. The parties were therefore bound to make payment in accordance with the contract provisions. The tribunal was not prepared to grant any interest. The engineer's decision did not deal with interest, and the tribunal considered that further facts would be

required in order to ascertain whether interest should be paid and for what period.

As an interim award the tribunal therefore ordered payment, but reserved judgment with regard to interest, costs and fees. Provisional enforcement of the award was ordered.

In the final award the arbitral tribunal affirmed their interim decision. They also noted that they had the power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the engineer, and so as part of the substantive dispute they could review the entirety of the underlying dispute and adjust or set aside the decision if and when necessary.

A reference to arbitration under the Red Book 1999 Edition: CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK (PGN)

In July 2010 the enforcement of an arbitration award, concerning an order for payment in respect of the DAB's decision, came before the High Court in Singapore, and then the Court of Appeal.²¹ The key issue was whether the arbitrators had jurisdiction to make the award, or whether the award should be set aside. PT Perusahaan Gas Negara (Persero) TBK (PGN) and CRW Joint Operation (CRW) entered into a contract for an onshore gas transmission pipeline. The contract was based upon a modified FIDIC First Edition 1999 Red Book. Disputes arose which were referred to the DAB. The DAB issued several decisions, the majority of which were accepted except for one which was given on 25 November 2008, requiring PGN to pay CRW US\$17,298,834.57.

PGN issued a notice of dissatisfaction. Attempts at settlement failed. CRW referred to arbitration, under clause 20.6, the question of whether the DAB's decision was correct. As a second dispute they referred PGN's refusal to pay immediately the amount from the DAB's decision. The key questions for the tribunal were, first, should they order immediate payment of the amount in the DAB's decision, and, secondly, should they open up, review and revise the decision.

The tribunal issued a majority decision, concluding that the DAB's decision was binding and that PGN should make an immediate payment. The majority tribunal award also concluded that they should not open up, review or revise the DAB decision, as this would amount to a defence of the tribunal's order for immediate payment.

PGN sought an order from the Singapore court to set aside the tribunal's award, under section 24 of the International Arbitration Act 2002.

The power of the tribunal to determine the question of how to deal with the issues referred to them required interpretation of clauses 20.4, 20.6 and

²¹ *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2010] SGHC 202, and the Court of Appeal decision *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33.

20.7. Under clause 20.4 a DAB's decision "shall be binding on both Parties".

"If the DAB has given its decision as to the matter in dispute between the 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." (My emphasis.)

Clause 20.6 provided 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."

The tribunal is given power under clause 20.6 to "open-up, review and revise any . . . decision of the DAB . . ." However, if neither party serves a notice of dissatisfaction the decision will become final and binding, and failure to comply with the decision can be referred to arbitration under clause 20.7.

Before a dispute can be referred to arbitration it first has to have been referred to the DAB. This is because clauses 20.6 and 20.7 anticipate that once a DAB decision has been given, it will either be subject to a notice of dissatisfaction (so being binding, but not final and binding), or in the absence of a notice it will become final and binding. If a notice of dissatisfaction is given the dispute that was the subject of the DAB decision can be opened up, reviewed and revised. Under clause 20.7 it is the failure to comply with the DAB's decision that is referred to arbitration. Dissatisfaction with the decision is the trigger under clause 20.6, while a simple failure to comply with a final and binding decision is the trigger under clause 20.7.

In this case NODs were issued by PGN. The DAB decision was therefore binding but not final and binding.

The claimant, CRW, pleaded the case on the basis that there were two disputes. The first was in regard to the subject-matter of the dispute that was referred to the DAB. The second was in regard to the defendant's failure to pay the amount ordered to be paid in the DAB decision. The High Court judge said at paragraph 31:

"Given the opening words of sub-cl. 20.6, the Second Dispute was plainly outside the scope of sub-cl. 20.6 of the Conditions of Contract. It follows that the Majority Tribunal, and hence the Majority Award, exceeded the scope of the Arbitration Agreement; the Majority Award is therefore liable to be set aside under Art 34 (2) (a) (iii)."

CRW referred the disputes to arbitration under clause 20.6. The arbitral tribunal awarded payment on the basis that they could enforce promptly the DAB's decision, so ordering immediate payment. The Singapore court took the view that the arbitration tribunal did not have jurisdiction in the first place, because:

- (1) the failure to pay had not been referred to the DAB (the second dispute theory); and

- (2) the arbitral tribunal (seemingly according to the case report) did not recognise that it had the power to open up, review or revise.

The disputed DAB decision had been referred to arbitration, and so the tribunal had jurisdiction to open up, review or revise the DAB decision, but had simply enforced the “failure to comply” with the DAB decision under clause 20.7. The tribunal had issued a final arbitration award apparently treating the DAB decision as if it were “final and binding” and so acted beyond their powers. Soimulescu and Brown comment on *CRW v. PGN*, stating that the arbitral tribunal issued a final arbitral award without considering that a review of the merits was necessary. That might be so, but the tribunal still has to recognise the contractual provisions that give the tribunal jurisdiction in the first place.²²

Whether the arbitral tribunal had an obligation to open up, review and revise was not relevant; the tribunal had taken the view that they should just award payment on the basis that the DAB decision should be complied with promptly. The High Court of Singapore therefore set aside the tribunal's award. The tribunal had to recognise that it had the power to hear the merits of the dispute (and so assume jurisdiction under the contract) before giving a final award in respect of the dispute that was the subject matter of the DAB's decision.

The High Court of Singapore suggests that the better practice, for a winning party faced with a notice of dissatisfaction, is to submit the dispute to arbitration requesting the arbitral tribunal to:

- (1) review and revise the decision; and/or
- (2) review and confirm the decision.

In addition, the referring party could ask for an interim payment reflecting the amount of the DAB decision that the tribunal believe should be paid forthwith. The tribunal could then decide on an immediate interim basis how much, if anything, should be paid.

The arbitral tribunal could then adopt a short timetable in order to deal with the question as to whether an interim payment should be made. This approach can be accommodated within the ICC's Arbitration and ADR Rules although there are also some specific fast-track arbitration procedures available.

The Singapore Court of Appeal found it difficult to understand how an arbitral tribunal could ignore the clear language of clause 20.6 and instead abruptly enforce the DB's decision.²³ The Court of Appeal concluded that the arbitral tribunal had “neither the jurisdiction nor the power to make

²² O Soimulescu and D Brown (2012) “Enforcement of a Binding DAB Decision: A Fresh Approach to Clause 20 of the 1999 FIDIC Conditions of Contract” [2012] ICLR 19.

²³ *CRW v. PGN*, Court of Appeal, [79].

the Adjudicator's decision 'final' without following the prescribed procedure".²⁴

It has been suggested that the Singapore court seemed to confuse the power given to the tribunal to "open up, review and revise" with an obligation for the tribunal to exercise this power as a duty before issuing an award. The judgment is not entirely clear, although the appeal court stated that what the arbitral tribunal should have done "was to make an *interim* award in favour of CRW for the amount assessed by the adjudicator (or such other appropriate amount) and then proceed to hear the parties' substantive dispute afresh before making a *final* award".²⁵ Seppälä notes the many inconsistencies of the Singapore court in *CRW*. Apart from the detail of those inconsistencies (which he carefully sets out), he also notes that the purpose of the DB process is to provide the contractor with an expedited dispute resolution process.²⁶ This can be achieved providing that a payment-related dispute is referred to the DB in the first place.

It is probably right that any interim award would have been final in respect of the matters that it determined, but the matter being determined should have been: how much should be paid now as a result of the adjudicator's decision and the breach of the contractual requirement to "promptly" comply with the DB's decision? Consideration could then have been given as to whether the adjudicator has jurisdiction to make the decision at all, whether the decision was in fact a decision about the matters in dispute, and then whether an amount should, in the determination of the arbitral tribunal, be awarded. Simply transferring the decision of the adjudicator into an award could not be sufficient because the arbitral tribunal would not be exercising its independent decision-making function. However, a full consideration of the merits of the matters in dispute would be for a later date.

Surely, then, the appropriate approach for an arbitral tribunal faced with a request to promptly give effect to the decision of a DB is:

First, to consider and recognise their own jurisdiction

Do they have power under clause 20.7 to consider the failure to comply promptly? Or does the arbitral tribunal have power, under clause 20.6, to open up, review and revise the disputed DB decision, and, crucially, to come to their own view about whether they give effect to all, or some of, the relief set out in the DB's decision. There might be good reason why the arbitral tribunal decides to award some other immediate relief or none at all. There is a third possibility: that there are partial or unclear NODs. Perhaps the matter has been referred to arbitration under clauses 20.6 and 20.7, and so

²⁴ *Ibid.* [101].

²⁵ *Ibid.* [79].

²⁶ C Seppälä, "How Not to Interpret the FIDIC Dispute Clause: the Singapore Court of Appeal Judgment in *Persero*" [2012] ICLR 4.

it is a matter for the tribunal to decide under which clause, if any, their jurisdiction arises, although the terms of reference might resolve this issue.

Second, consider the scope of the dispute

If the arbitral tribunal's task is to consider a request to give effect promptly then the tribunal might consider the question in two main parts:

1. Was the DB's decision validly made (procedural validity)?
2. Are there any material reasons why effect should not be given to the DB's decision?

This second question arises because of the "unless" wording in clause 20.4. The first procedural validity question might require the tribunal to consider a variety of questions including (this is not an exhaustive list):

1. Did the DB have jurisdiction to issue the decision?
2. Was the DB validly appointed?
3. Were the tri-party agreements completed such that the DB was constituted?
4. Was a dispute validly referred?
5. Did the DB answer that particular dispute referred, and not something else?
6. Did the DB answer all of the matters in dispute?
7. Was the DB's decision adequately reasoned?
8. Were the rules of procedural fairness or natural justice complied with?
9. Was the decision delivered within the timetable, etc.?

Assuming that the DB's decision is valid, then there should be a presumption of giving effect to it. That is unless there is some substantial or material reason that goes to the heart of the decision. Adopting a summary judgment approach of an English court, the tribunal could come to the conclusion that, provided the DB answered the issues in dispute with a reasoned decision, that decision should then be "enforced". This is so, regardless of any errors of law or fact, the merits of the issues before the DB being irrelevant. However, there could be issues that a tribunal might take into account. For example, if there is a defence or counterclaim and there are serious financial doubts about the claimant being able to repay any money as a result of the interim award then the tribunal might take that into account.

IV. KEY ISSUES

A number of issues are worth further consideration. These include the power or jurisdiction of the DB arising from the referral of the dispute. The

status of the DB's decision, the importance of observing time limits, and the distinction of "binding" and "final and binding" lead also to a consideration of whether a DB's decision can just be enforced as if it were an arbitral award in its own right, or perhaps whether a local court might enforce a DB's decision regardless of the arbitration agreement. Finally, a brief consideration of the approach of the courts in England in relation to domestic adjudication is useful.

1. The referral

It is unlikely (but not impossible) that a referral to a DAB will contain the entirety of the issues that have arisen (or might in the future arise) between the parties throughout the entire project. The purpose of a DAB is to assist in the management and avoidance of disputes, and the resolution of any disputes that arise during a project. The resolution of disputes in "real time" provides the DAB with the benefit of seeing the construction work as it progresses and hearing from those involved in the works while matters are recent and fresh in the memory of the construction team. One of the main purposes of the DAB is to resolve disputes in manageable packages.

Further, the nature and scope of disputes may change over time. For example, further extension of time requests might be made arising from the continuation of an event, or more facts may come to light in respect of the original delay, or a more detailed analysis might be carried out that was not possible in the short time scale of the initial request, assessment and referral. A crucial distinction between a dispute that is referred to arbitration some time after a project has been completed and a dispute referred to a DAB during a project is that the former most likely will (or certainly can) comprise the entire issues between the parties, while the latter is most likely to comprise only some of the issues. The first consideration is, therefore, the nature and scope of the matters comprising the dispute that has been referred to the DAB. The referral to the DAB crystallises the matters in dispute, and the jurisdiction of the DAB. The DAB is obliged to consider and issue a reasoned decision that deals with all of the matters (and nothing further) in dispute.

A separate, but related, consideration is the extent to which the mechanics of the FIDIC contract have been exhausted before a matter is referred to the DAB. If a claim has been made, but not rejected, then there is no dispute. See for example, *Maxi Construction Management Ltd v. Morton Roles Ltd* in which the contractor asked the project manager for a valuation.²⁷ The project manager certified the value, in his opinion, of the works. The contractor took the view that the works were under-certified and referred the matter to an adjudicator, who issued a decision ordering the owner to pay a more substantial sum. The owner refused. On enforcement the court

²⁷ Court of Session, unreported, 7 August 2007.

held that there was no dispute. The contractor had got what he had asked for: a valuation. It would have been different if the contractor had applied for a specific amount and received a certificate with a lower value. For a dispute to form or “crystallise”, a claim needs to be made and rejected.

There are many possible claims that could be made under the FIDIC contract; for example, a request for an extension of time under clause 8 of the FIDIC provisions, the valuation of change, or a claim for time and money under clause 20.1. Claims that are rejected might be referred to the engineer under clause 3.5 for a determination of the amount of time due or the value of a claim. That determination could then be referred to the DAB for a decision. A decision might therefore only be declaratory. In other words, it might set out the DAB's binding decision by way of confirming or revising the engineer's determination in respect of time or value, but not order any payment. As the parties are bound by the DAB decision, the relief set out in the decision should be reflected in the subsequent application for, and then certificate for, payment.

A failure to certify properly any sum due arising from the DAB decision might then need to be referred to the DAB a second time so as to obtain an order for payment in the decision. This has been described by Professor Bunni as the *lacuna* in the FIDIC terms.²⁸ Bunni explains that if a DB decision is only binding (not final and binding) and is not complied with then there is a dilemma. The referral to arbitration is not an appeal, but a new or fresh submission. The fresh submission amounts to a new case and so the detail of that case needs to be properly considered by the arbitral tribunal. There cannot be automatic enforcement if a NOD has been served. This Bunni refers to as the “gap” in clause 20.7.

It manifests itself as the “second dispute”²⁹ theory as the DAB's decision would only be declaratory, and so a second dispute is required (about the same subject-matter, or more precisely the failure to give effect promptly to the first DAB decision when considering the next payment certification) to be referred back to the DAB simply to obtain an order for payment. This of course takes time and defeats the purpose of the rapid dispute resolution process. Gillion notes that a second referral to the DAB under FIDIC in order to make a decision that a party should make a payment will take some four or five months, and so defeat the rapid resolution of disputes that was envisaged by the DAB process.³⁰ But surely this delay is avoided by making appropriate applications for payment, and then referring the disputed payment certificate to the DAB?

An application for a payment certificate could include a claim for money due in respect of variations, prolongation costs (in respect of extensions of

²⁸ See N G Bunni, “The Gap in Sub-clause 20.7 of the 1999 FIDIC Contracts for Major Works” [2005] ICLR 272.

²⁹ *PGN v. CRW*, [30].

³⁰ F G Gillion, “Enforcement of DAB Decisions under 1999 FIDIC Conditions of Contract: A Recent Development: *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*” [2011] ICLR 388.

time requested), and disruption or other financial claims arising in respect of the work carried out up to the valuation date. If the contractor is not satisfied with the amount certified, then the dispute (the difference between the application and the certificate) can be referred to the DAB. The DAB's decision, by its very nature, would be able to order payment of any shortfall arising for the review of the certificate as the time for payment of that certificate would have passed.

2. Status

The scope and status of the DAB's decision can therefore be affected by the actions of the parties, and in particular those of the referring party. This is beyond the control of the DAB, who have little choice but to deal with the referral presented to them.

The jurisdiction of the DAB arises under the contract and in respect of the dispute. The DAB needs to be properly appointed under the contract in order to have any jurisdiction at all. Assuming that has taken place, it is the referral that establishes the matters in dispute that the DAB must consider. Providing that the DAB has crossed this threshold, then the challenge is to maintain its jurisdiction.

The applicable law will affect the duties and obligations of the DAB, but this will include following due process or the rules of natural justice such as providing both parties with an equal opportunity to put their case and address the case put by the other party. The tribunal will not only need to maintain impartiality between the parties, but also must be seen to be acting, and act, impartially. Further, the DAB must issue its decision within 84 days, or some other period agreed between the parties and the DAB. The procedural rules under FIDIC do not allow the DAB to extend time.

There are many circumstances in a FIDIC contract when a time limit should be observed. For example, the right to bring a claim for time or money can be affected by clause 20.1. For present purposes there are two time limits that are of interest: the service of the DB's decision and the NOD.

3. Time limits: the late service of a DB's decision

The effect of an adjudicator's decision given outside the 28-day time frame has been the subject of a number of judgments of the English court. It has also been the subject of debate, with different decisions given in the English and Scottish courts. In *Barnes & Elliott Ltd v. Taylor Woodrow Holdings*,³¹ His Honour Judge Lloyd, QC, held that a decision reached on day 28, but not communicated until day 29, was a valid decision.

³¹ [2003] EWHC 3100.

His reasoning was based upon the express terms of the contract with which he was dealing, which do not apply here. Moreover, the judge stressed that section 108 of the Housing Grants Construction and Regeneration Act 1996 (HGCRA 1996) “only confers authority to make a decision within the 28-day period”. However, in *Simons Construction Ltd v. Aardvark Developments Ltd*,³² it was held that a decision that was reached over a week beyond the 28-day period was binding because the adjudication agreement had not been terminated by the time the late decision was provided.

In contrast, the Scottish Inner House of the Court of Session, in *Ritchie Brothers plc v. David Phillip Commercial Ltd*,³³ held that the 28-day limit meant what it said. Accordingly, they held that a decision that was not provided until a day after the expiry of the 28 days was a nullity, despite the fact that the delay in the provision of the decision had been just that one day. This decision was referred to favourably in the case of *Hart v. Fidler*.³⁴

However, two more recent decisions (*Epping Electrical Co v. Briggs & Forester*³⁵ and *Aveat Heating Ltd v. Jerran Faulkus Construction Ltd*³⁶) of His Honour Judge Havery, QC, have confirmed that adjudication decisions given outside the 28-day time limit are not valid. His Honour considered that it would be undesirable for the HGCRA 1996 to be interpreted in different ways in England and Scotland and therefore he ought to follow the decision of *Ritchie Brothers*. The arbitral tribunal in *ICC Case 10619* adopted the same mandatory approach to the time limits in the FIDIC Red Book with regard to service of an engineer's decision.

However, a decision communicated out of time was enforced by His Honour Judge Coulson in *Cubitt Building & Interiors v. Fleetglade*³⁷ as His Honour held that there was a distinction between reaching a decision and communicating a decision. A decision which was not reached within 28 days or any agreed extended date is probably a nullity, but a decision which is reached within 28 days or an agreed extended period, but which is not communicated until after the expiry of that period, will be valid, provided that it could be shown that the decision was communicated forthwith.

4. Time limits: the late service of a NOD

Anglian Water Services Ltd v. Laing O'Rourke Utilities Ltd^{37a} considered whether the time for issuing a notice of dissatisfaction in respect of an adjudicator's decision should be extended under the Arbitration Act 1996 in order to allow a reference to arbitration. On a careful and detailed review of the exchanges between the parties the judge came to the conclusion that

³² [2003] EWHC 2474.

³³ [2005] Scot CSIH 32.

³⁴ [2007] BLR 30.

³⁵ [2007] EWHC 4.

³⁶ [2007] EWHC 131.

³⁷ [2006] EWHC 3413.

^{37a} [2010] EWHC 1529 (TCC).

the notice was received in time and that the referral to arbitration was made in time. Further, as the conduct of those acting for the defendant had materially contributed to the delay the judge would “have no hesitation” in exercising his discretion in granting an extension of time under section 21 of the Arbitration Act 1996.

While a notice that appeared to be late was, on careful factual analysis, not late, any delay that had been caused by the responding party would have meant that time would have been extended. The position might have been quite different if the notice had been clearly late, and the responding party had not materially contributed to any delay. A complete failure to issue a notice might, depending on the actual circumstances and the applicable law, be fatal. Unless, of course, the applicable law recognises that a subsequent tribunal has the power to consider an “appeal” from the “final and binding” decision of a DB. In *Anglian Water* clause 93.1 of the contract stated that any dissatisfaction about an adjudicator’s decision was “not referable to the *tribunal* unless the dissatisfied Party notified his intention within four weeks of” notification of the adjudicator’s decision. So the tribunal (in this case an arbitral tribunal) only had jurisdiction to consider disputes set out in the notice of dissatisfaction.

The standard FIDIC Red Book can clearly be distinguished as it provides two pathways to arbitration; first, where a NOD has been issued and, secondly, where a NOD has not been issued. Either way the arbitral tribunal has jurisdiction. However, it is crucial for the arbitral tribunal to identify and recognise the contractually based power conferred on them, which establishes the scope of their jurisdiction.

5. Distinguishing “binding” and “final and binding”

If a party is required by contract to issue a notice within 28 days, or lose a right, then the service of that notice is a condition precedent to the exercising of that right. The House of Lords case of *Bremer Handelsgesellschaft mbH v. Vanden Avenne Izegem PVBA*³⁸ provides authority for the proposition that, under English law, for a notice to amount to a condition precedent it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract. Very clear words are required. The extent of any right that is lost in the absence of a notice of dissatisfaction is not immediately apparent. The binding decision also becomes final. Does finality mean that the right to challenge the rationale of the DAB’s decision is the right that has been lost? If so, then a party cannot dispute the DAB’s decision, and the arbitral tribunal cannot consider the original dispute, only the dispute about the failure to honour the decision. The tribunal’s function would be limited to either enforcing or refusing enforcement by way of award.

³⁸ [1978] 2 Lloyd’s Rep 109 (HL).

In *Essex County Council v. Premier Recycling Ltd*³⁹ the terms for the appointment of an arbitrator provided that he should give a “final and binding decision”. Ramsey J held that this did not exclude the parties’ right of appeal under section 69 of the Arbitration Act 1996. He accepted that an express reference to section 69 was not required, but an intention to exclude a process of appeal by a court must be very clear.

In *Shell Egypt West Manzala Gmbh v. Dana Gas Egypt Ltd*⁴⁰ an application for permission to appeal a point of law was made, arising from an award made under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The arbitration clause provided that the arbitral tribunal’s award “shall be final, conclusive and binding on the parties”. Mrs Justice Gloster, DBE, held that this term did not preclude the right of appeal. She agreed with the approach in *Essex County Council*, and considered that the additional term “conclusive” was simply confirmation that the award creates a *res judicata* and issue estoppel. It did not exclude the right of appeal.

However, parties could agree to exclude a right to appeal. For example, Article 34.6 of the ICC Arbitration and ADR Rules 2011 provides an express exclusion (from an appeal of the arbitration award to a court, not an appeal from the DAB procedure):

“Every Award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”

The UNCITRAL Rules adopt a more simple approach and do not go as far as excluding a right of appeal:

“All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.”⁴¹

A distinction can be made between an award that is to be carried out without delay, but still subject to appeal, and one that is truly final because the right to appeal has specifically been waived. Nonetheless, these articles relate to an appeal in respect of an arbitral award, not a DAB’s decision. There are, however, some English cases dealing with contractual certifiers and domestic adjudicators.

In *Balfour Beatty Civil Engineering Ltd v. Docklands Light Railway Ltd*⁴² the contract provided that the employer’s representative could carry out the usual functions of the engineer. The arbitration clause had been deleted. The Court of Appeal held that despite there being no provision, the decisions of the engineer (in this case the employer who had taken on the role of the engineer) were to be “binding or conclusive”; the court,

³⁹ [2006] EWHC 3594.

⁴⁰ [2009] EWHC 2097 (Comm).

⁴¹ UNCITRAL Arbitration Rules (as revised 2010), Art 34.2.

⁴² (1996) 78 BLR 42 (CA).

nevertheless, had no power to “open up, review or revise” those decisions. The contractor’s entitlement was therefore dependent upon the employer’s judgment. However, this cannot be said to now represent current English law.

The later case of *Beaufort Developments (NI) Ltd v. Gilbert Ash NI Ltd*⁴³ concerned the binding nature of final certificates issued under a construction contract. The contract provided that the final certificate was conclusive evidence as to some of the matters under the contract. It had been thought that only an arbitrator with an express power to “open up, review and revise” a certificate could carry out such a function, but a court could not in the absence of an express power.⁴⁴ The House of Lords in *Beaufort* took the view that a judge either had the power to open up, review or revise a final certificate, or could award damages in order to compensate a party for a certificate that was found to be incorrect. In so doing they considered that the decision in *Balfour Beatty* was wrong. Under English law, then, it seems that a judge can reconsider a certificate given under a contract that is expressed as being final and binding, or conclusive.

In *Beaufort* Lord Hoffmann recognised the potential for a two-tier dispute resolution process, stating:

“It is less usual, though certainly theoretically possible, to add a second tier to arrangements of this kind, and to provide that a party who is dissatisfied with the view of one expert shall be entitled to call for the opinion of another, which shall then be final and binding. From the point of view of the court, the final outcome is no different from that in the case of a single expert. The contractual obligations of the parties depend upon the opinion of the one expert or the other and not upon its own view of the matter.”⁴⁵

Regardless of the number of opportunities for a decision to be made, the court will consider the contractual terms to determine whether it can replace the view of the contractual decision-maker with its own. In any event the final decision of the third-party decision-maker binds the parties.

This should be contrasted with a decision of an expert given under a contractual expert determination provision. In those circumstances the court will consider that the decision is final and cannot be reconsidered or appealed. Provided that the neutral expert has “answered the question”, then the decision will be final and binding, regardless of any errors of fact or law.⁴⁶ So, if the parties clearly and expressly agree that a decision of a neutral expert is to be final, binding and conclusive, then the court will treat the parties as being bound by that decision. Very clear words are needed for a party to be bound by an expert determination.

⁴³ [1998] BLR 1 (HL).

⁴⁴ *Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd* [1984] QB 644.

⁴⁵ [1998] BLR 1 at 10.

⁴⁶ See *Jones v. Sherwood Computer Services plc* [1992] 1 WLR 277; *Nikko Hotels (UK) Ltd v. NEPC* [1991] 2 EG 86; *Mercury Communications v. Director General of Telecommunications* [1996] 1 All ER 575.

Separately, how can a DB make a final and binding decision about a dispute involving ongoing matters during the course of a live project? The decision might be final and binding in respect of the actual dispute at that point in time, but related factual issues may develop and change. This is especially the case where a DB decision deals with a valuation that, by its very nature, must be superseded by subsequent valuations of the gross value of the progressing works. On the other hand, what is the scope of a DB's jurisdiction if a further referral is made, but the issues relate to a previous decision, for example, in respect of a request for an extension of time? Surely it cannot be possible to settle a dispute absolutely at one point in time if a later dispute is entwined with matters that were dealt with in an earlier DB decision.

In addition, what might be the position if a DB's decision or an adjudicator's decision deals with the issues referred, but there are other claims, counterclaims or set-offs which are to be determined? In the case of *Parsons Plastics (Research & Development) Ltd v Purac Ltd*⁴⁷ a dispute was referred to an adjudicator.⁴⁸ The contract stated that the adjudicator's decision would be "final and binding" on the parties. The adjudicator found in favour of Parsons. Purac sought a set-off against that decision. The contract provided that Purac could serve a contractual withholding notice, but there was an argument that this procedure had not been followed. On appeal Lord Justice Pill stated, at paragraph 15:

"It is open to the respondents to set-off against the adjudicator's decision any other claim they have against the appellants which had not been determined by the adjudicator. The adjudicator's decision cannot be re-litigated in other proceedings but, on the wording of this sub-contract, can be made subject to set-off and counterclaim. It is accepted that the respondents' counterclaim, if they are entitled under the terms of the sub-contract to set it off against the claim, is arguable."

The adjudicator's decision was final and binding, but only in respect of the disputed matters that had been referred. The Court of Appeal was not prepared to accept that an adjudicator's decision under a contractual procedure should be enforced without taking into account a set-off. The judges were particularly concerned to see that the defendant had an opportunity to have its claims considered in a subsequent adjudication, because the adjudicator's decision was final and binding, in order to produce an overall final and binding balance due between the parties as a result of dealing with *all* disputes between the parties.

Applying this logic, then surely a DAB's decision that has become "final and binding" might still be subject to being "opened up, reviewed and revised", not just because that power is set out in clause 20.6, but because there is no express bar against an appeal of the decision.

⁴⁷ [2002] EWCA Civ 459.

⁴⁸ In England, Wales and Scotland the Housing Grants, Construction and Regeneration Act 1996 provides a statutory adjudication procedure for "construction contracts" as defined in the Act. However, *Parsons'* case arose outside of the Act purely as a contractual dispute resolution process.

Finally, an arbitral tribunal's duty is not simply a "rubber stamping" exercise. The tribunal first has to recognise the jurisdiction that it has and then exercise it. If a NOD has been issued then the tribunal under FIDIC has the power to open up, review and revise. That does not mean that the tribunal has to delay the issue of a *first* award to recognise and give effect to the intentions of the DB. However, the tribunal needs to recognise the path that it is on. Much of this will be determined by the referral, and in particular the terms of reference. If the responding party raises issues about the jurisdiction of the DB, then the tribunal may be able to deal with the matter quickly. If there is a detailed substantive defence or a counterclaim then those matters should be dealt with properly after the initial considerations arising in respect of the DB's decision.

6. Enforcement of a DAB decision as if it were an arbitral award

The New York Convention 1958 recognises and provides for the enforcement of "arbitral awards" which are made by an arbitral tribunal appointed by the parties.⁴⁹ The arbitration agreement can be recorded in writing in the contract between the parties.⁵⁰ Clauses 20.6 and 20.7 are clearly arbitration clauses. The decision of a DAB under the FIDIC contract cannot be said to be an arbitral award because the DAB comprises members, not arbitrators, who are expressly acting as DAB members because they "shall be deemed to be not acting as arbitrator(s)".⁵¹

A court could not then be expected, under the NYC, to enforce the decision of a DAB as if that decision were an arbitral award, but a local court might come to the summary conclusion as a matter of fact that all issues between the parties have been decided by the DB decision and that it should be directly enforced; for example, under an interim relief or summary judgment procedure. Many decisions of adjudicators have been enforced in the English courts by this method. However, if there is an arbitration clause then an English court would most likely stay the matter under section 9 of the Arbitration Act 1996. The court of a country that has adopted the UNCITRAL Model Law is also likely to stay court proceedings because of the arbitration agreement.

7. Statutory adjudication

A growing number of common law countries are familiar with rapid binding and enforceable statutory adjudication procedures, namely, England, Scotland, Wales, Australia, New Zealand and Singapore. The English courts first encountered statutory adjudication in the context of construction disputes

⁴⁹ United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art I (2) (New York, 10 June 1958).

⁵⁰ *Ibid.* Art II (2).

⁵¹ FIDIC Red Book, 1999, cl. 20.4, para. 3.

under legislation brought into force on 30 May 1998 by the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). Before considering the obvious route for enforcement (seeking an arbitration award, and then enforcing that), some consideration of how the courts in England have dealt with domestic adjudication is useful.

Once the HGCRA was brought into force, the key question was whether the courts would enforce a decision of an adjudicator. Section 108 (3) of the HGCRA states that the “contract shall provide that the decision of the adjudicator is binding . . .”. At the time, there was some concern about the appropriate way to enforce a decision of an adjudicator, and in particular whether summary judgment would be available or whether the court would hear the matter afresh in a full trial, thus defeating the purpose of adjudication.

The first case of *Macob Civil Engineering Ltd v. Morrison Construction Ltd*⁵² swept away those concerns. Dyson J delivered his judgment on 12 February 1999 confirming that the decision of an adjudicator was enforceable summarily regardless of any procedural irregularity, error or breach of natural justice. The judge adopted a purposive approach to the construction of the word “decision”, refusing to accept that the word should be qualified.

The judges in the majority of the cases following *Macob* adopted a similar approach, enforcing adjudicator's decisions that had found their way to the courts. The robust and purposive approach was reinforced by the first Court of Appeal decision of *Bouygues v. Dahl-Jensen (UK) Ltd.*⁵³ The Court of Appeal delivered its judgment on 31 July 2000, upholding the first instance decision of Dyson J. It confirmed that the purpose of the adjudication procedure set out in section 108 of the HGCRA was to provide the parties to a construction contract with a speedy mechanism for resolving disputes, which although not finally determinative, could and should be enforced through the courts by way of summary judgment.

More importantly, even where an adjudicator had answered the question put to him in the wrong way, the court would not interfere with that decision but would enforce it. The decision of an adjudicator was and is being treated much like the decision of an expert resulting from an expert determination. Providing that an expert, and by analogy an adjudicator, has answered the right question then the decision will be enforced regardless of any errors made along the way. Only if the expert and therefore the adjudicator were to answer the wrong question would the decision be a nullity, because the adjudicator would not have jurisdiction to answer that “wrong” question. The emphasis under English law is very much one of “pay now—argue later”.

⁵² [1999] BLR 93.

⁵³ (2001) 3 TCLR 2.

However, immediate summary enforcement of an adjudicator's decision does not stop a party from repeating the dispute "afresh" in subsequent court proceedings or arbitration.

8. Direct enforcement of a DB's decision in a local court

*Collins (Contractors) Ltd v. Baltic Quay Management (1994) Ltd*⁵⁴ concerned section 9 (4) of the Arbitration Act 1996, and the meaning of "dispute". Collins (Contractors) Ltd carried out work for Baltic Quay Management under a JCT Minor Works Building Contract. Baltic did not pay an interim certificate and also amounts in respect of the final account but failed to serve a withholding notice. The contractor then determined the contract and issued proceedings in respect of the amounts.

Baltic applied to the court for a stay of the litigation pursuant to section 9 (4) of the Arbitration Act 1996 on the basis that the contract between the parties contained an arbitration agreement. The contractor argued that there was no arguable defence to the proceedings in the absence of the service of a withholding notice, and therefore there was no "dispute" which was a prerequisite to the operation of section 9 of the Arbitration Act 1996. Baltic argued that a dispute arose for the purposes of section 9 quite simply by a refusal to pay.⁵⁵

The Court of Appeal held that the arbitration clause in the JCT Minor Works Building Contract was drafted in extremely wide terms such that if there was a dispute then it must be referred to arbitration. A dispute would be found to exist once a claim had been made that was not admitted. Discussions and negotiations in respect of issues were more likely to demonstrate the existence of a dispute.

It was clear to the Court of Appeal that Baltic did not admit the contractor's claim and as a result there was a dispute. Baltic was, because of the existence of a dispute, entitled to stay the litigation proceedings pursuant to section 9 (4) of the Arbitration Act 1996. The appeal was therefore dismissed. Collins was left to pursue the failure of Baltic to pay the interim certificate and the final account by way of arbitration pursuant to the JCT Minor Works Contract.

So, if the contract contains arbitration provision, then an English court would grant a stay of litigation. It is very unlikely that the court would consider enforcing a DB decision, because the contractually agreed procedure between the parties would be to refer any dispute about (even a bare refusal to comply with it) to arbitration. Jurisdictions following the UNCITRAL Model Law arbitration usually come to the same conclusion as the Model Law and the English Arbitration Act 1996 provide that the court "shall" grant a stay of the litigation or refer the parties to arbitration

⁵⁴ [2004] EWCA Civ 1757, [2005] BLR 63 (CA).

⁵⁵ Adopting the rationale of *Halki v. Sopex* [1998] 1 WLR 726.

“unless the arbitration agreement is null and void, inoperative or incapable of being performed”.⁵⁶

However, direct enforcement of a DAB decision has been achieved in particular circumstances in the Romanian court.

9. Jurisdictional challenges

In respect of adjudication in the English courts the cases relate to the summary enforcement of the adjudicator's decision. In the absence of a stay to arbitration, the courts are very willing to enforce an adjudicator's decision. The valid challenges that can be made relate to the jurisdiction of an adjudicator. Providing that an adjudicator has jurisdiction to make a decision then there is a good chance that the decision will be enforced.

Jurisdiction can be considered under two main headings. The first relates to the initial jurisdiction of the adjudicator. In other words, the crossing of the threshold in the first place. Essentially, does the adjudicator, or in our case the DAB, have jurisdiction to consider the dispute and make a binding decision? This requires consideration of whether the DAB has been properly appointed, and whether a dispute has been properly referred to the DAB.

The second aspect of jurisdiction relates to the process itself. Assuming that an adjudicator has jurisdiction then it is possible to lose that jurisdiction along the way by some breach of natural justice, procedural error, or by simply issuing the decision outside of the time period. An adjudicator, and arguably a DAB, only has the power to deliver an award within the time set out in the contract. They do not have the power to extend the time, and therefore an award delivered late will be of no effect.

V. SUMMARY

In summary, it is useful to address the specific questions raised at the start of this paper, and also to reflect upon the best practice or perhaps more literally the traps for the unwary that need to be considered not just when enforcing, but when referring a dispute to a DAB. In respect of the specific questions:

1. In what sense is a DAB's decision binding?

A DAB's decision is binding, in that the parties have agreed by contract to be bound by the DAB's decision and give it prompt effect. A DAB's decision that is binding, binds both parties and the DAB in respect of their future

⁵⁶ S. 9 (4) of the Arbitration Act 1996 and Art 8 (1) of the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments adopted in 2006.

conduct. If a DAB has already made a decision in respect of a dispute, then, subject to any new facts, the DAB is bound by its past decision. This is clearly also the case if the decision is final and binding, or final and conclusive of binding.

2. Is a decision that is “final and binding” absolutely the last final and definitive decision in respect of the dispute?

In short the answer is most likely yes, but not necessarily. If a NOD has not been served then there is a strong argument that the DAB’s decision finally puts the dispute to rest. However, this general observation does not take into consideration the potential for the DAB decision to deal only with part of a wider dispute between the parties. Perhaps the second and final stage (even that is subject to court enforcement) of the dispute resolution process, namely, arbitration, can be seen as an appeal in any event. The tribunal has a duty to do more than promptly enforce without considering the content of the DAB decision to some extent.

3. Is there a distinction between enforcing a final decision and a decision that is final and binding?

The distinction, it is submitted, is in the nature of the arbitral tribunal’s jurisdiction and the manner in which that tribunal considers the DAB decision. If a NOD has not been served, the arbitral tribunal might then consider whether the DAB’s decision is, on the face of it, a valid one. Basically, did the DAB have jurisdiction to make the decision that it made? Similar perhaps to the enforcement criteria considered by the English courts when considering the summary enforcement of an adjudicator’s decision by applying the “pay now, argue later” rubric.

The tribunal might recognise the difference between a referral based on the “failure to comply” and a disputed DAB decision. Much will turn on the scope of the written referral to arbitration and the terms of reference, but this second pathway to enforcement by way of arbitration does not stop the tribunal from considering whether the amount due or some other amount, ought to be awarded as a result of an expedited procedure. The full issues in dispute will be dealt with in the remainder of the arbitration, assuming that there is anything left to be decided.

The important point is that a wide-ranging detailed defence and counter-claim should not stop a tribunal from considering the DAB decision and issuing early in the arbitral timetable an award that gives effect to the DAB’s decision.

The difference between a decision being “binding” or “final and binding” is that the arbitral tribunal can consider the failure to give effect promptly to a DAB’s final and binding decision and issue an interim award

for immediate payment. It is not simply the words “final and binding” that lead to this conclusion, but the drafting of clause 20 in general:

- (1) an interim arbitration award could provide for immediate payment in respect of the DAB's decision if the tribunal is satisfied that the DAB had jurisdiction to issue the decision; and
- (2) if the arbitral tribunal consider the underlying substantive dispute and come to the conclusion that some amount is certainly to be due and owing to one party then an arbitral tribunal could in any event make an interim award.

4. Is arbitration the only way?

Probably: but perhaps not in every jurisdiction. In many jurisdictions a court will stay proceedings started where there is a valid arbitration agreement between the parties. The extent to which courts might be persuaded to give immediate or summary judgment in respect of a DAB decision remains to be seen. The safe route is most likely to be arbitration, although of course careful consideration should be given to the particular terms of the applicable contract and law(s).

A failure to comply with a final and binding DAB decision will most likely have to be referred to international commercial arbitration rather than a local court. There may be some instances where a local court will consider that there is no material dispute about the DAB's decision, and therefore will award a payment, but that is likely to happen in the English court because a stay under section 9 of the Arbitration Act 1996 would be almost certain.

5. Could a DB decision be enforced as if it were an arbitral award?

In short: no. The FIDIC Red Book states that the DAB members are not acting as arbitrators. The DAB process, therefore, is not an arbitral process and so any decision cannot have the qualities of an arbitral award. As a result a DAB decision is not enforceable under the NYC.

It is not possible to treat a DAB's decision as an arbitral award. If the FIDIC contract was drafted to make a DAB's decision become an arbitral award in an attempt to make use of the New York Convention for the purpose of enforcements, it would most likely fail when the award came to be enforced. The New York Convention requires there to be a clear arbitration agreement at the outset, and that would not be present. On the other hand, there is little reason why the entire contractual dispute board procedure could not be transformed into a time-limited arbitration procedure, but that formality would dispense with the dispute-avoiding purpose of the DAB, and be unwelcome.

6. How important is the NOD?

The NOD procedure is very important in terms of the impact that it has on the enforcement of a DAB decision. It determines the pathway to arbitration. It defines the jurisdiction of the arbitrators. A partial NOD (one that notifies dissatisfaction in respect of only parts of a DAB's decision) can therefore create problems, but perhaps in those circumstances the answer is to refer under both clauses so that jurisdiction is conferred on the arbitral tribunal.

If either party fails to serve a NOD such that the DAB's decision becomes final and binding, then the initial assumption is that neither party can dispute the DAB's decision. However, the arbitral tribunal's role is not simply one of rubber stamping the DAB's decision. In respect of the failure to promptly give effect to the decision, the tribunal will need to consider the jurisdiction of the DAB not just at the outset of the DAB procedures, but also during the proceedings and then in respect of the giving of the decision itself.

Further, clause 20 does not specifically exclude the right to an appeal. Neither does clause 20 exclude any right of the tribunal to hear the dispute "afresh". In fact, quite the opposite is the case as under clause 20.6 the parties are not restricted in their arguments or evidence previously put before the DAB.

Other important factors that the party and the DAB should consider include:

1. The adequacy of the claim. The dispute arises when the claim has been rejected either expressly or by implication. The DAB only has jurisdiction to consider the dispute that is referred to it. It is therefore important that the initial claim is clearly expressed and well substantiated. A nebulous or unsubstantiated claim may lead to a DAB decision which rejects the claim in its entirety. That decision would then be binding, and it is unlikely that it would be possible to refer that dispute back to the DAB. In some circumstances it might be possible (with new facts) to refer a new but related dispute to the DAB. For example, a revised extension of time claim based upon additional facts.
2. The mechanics of the FIDIC contract need to be exhausted before the referral is made. The DAB could of course provide a declaration in respect of the mechanics of the contract or the value of certain items of work. However, an order for one party to make a payment to the other might be far more useful. For this to be effective the claim would need to have been made in an application for payment which is then subject to an unfavourable interim payment certificate. For an employer's claim for payment the employer will need to have followed the clause 2.5 procedure. A clause 3.5 determination by the engineer may also provide a

- useful opportunity to provide further information and request a more favourable outcome. This is often overlooked, before referring a matter to the DAB.
3. Parties often fail to comply with the conditions precedent in construction contracts. Care is needed to issue a notice of dispute within the time required by clause 20.1, and also to serve a notice of dissatisfaction if applicable, within 28 days.
 4. Any notices served must be clear and concise. Imprecise, incomplete or vague notices simply create further disputes.
 5. An uncertain or incomplete NOD can make it difficult to determine whether the appropriate route to arbitration is under clause 20.6 or clause 20.7. So clarity in a NOD is also crucial.
 6. The DAB needs to set a procedure that provides for it to deliver its decision within 84 days, or such period as may be extended by agreement with the parties.
 7. The DAB should also ensure that it deals with all of the matters in dispute, but does not act beyond its powers.
 8. The DAB needs to ensure that it complies with any rules relating to due process or natural justice. A failure to give either party a proper opportunity to respond to allegations made, albeit within a limited timetable, could amount to a fundamental breach of the DAB process.
 9. The DAB should also provide reasons for its decision. These need not be detailed and expansive, but should be sufficient for a third party to identify the logical steps from the matters in dispute to the relief awarded.
 10. Finally, the referral to arbitration needs to be carefully pleaded in order to make sure that appropriate and applicable relief is requested under the correct FIDIC clause.

VI. CONCLUSION

It is important and interesting to note in *ICC Case 10619* that the arbitral tribunal robustly enforced the engineer's decision by way of any interim award. This, then, provides a mechanism for a party to seek immediate enforcement of that award. In effect, the purpose of the engineer's decision is being achieved in the interim by the immediately enforceable arbitration award.

Perhaps the more important question is whether this logic can now be applied to the decisions of dispute adjudication boards under the new FIDIC contracts. The engineer has been replaced by a DAB that can make decisions that are binding unless or until they are revised in arbitration. While it may appear that a decision of a DAB should be honoured immediately and, in the event of a failure, an arbitral tribunal should

immediately provide an interim award allowing for enforcement, this approach has not been adopted universally.

The Singapore case of *PGN v. CRW* demonstrates that there are pitfalls for the unwary in the distinction between the commencement of arbitration under clause 20.6 and that under clause 20.7, although a request for interim payment may provide the tribunal with the jurisdiction to order immediate payment of an amount representing the DAB's decision. Nonetheless, what is really required is a move towards immediate enforcement (subject to some limited safeguards) by adopting the policy based on a "pay now, argue later" approach.

Much depends upon the nature and experience of the arbitral tribunal, its interpretation of the words of the contract and its domestic law experiences. Those who have experienced domestic adjudication in England, New Zealand, Australia and Singapore may feel more confident to enforce decisions immediately, following the approach of the domestic courts in those countries. No doubt, over time, a more consistent approach will develop and tribunals will have a greater level of confidence in the immediate enforcement of these awards.