



## FIDIC issue Guidance on DAB Decisions

by Nicholas Gould, Partner

The FIDIC Contracts Committee has issued a Guidance Note dealing with the powers of, effect of and the enforcement of Dispute Adjudication Board (DAB) decisions. The purpose of the Guidance Note is to clarify clause 20 of the General Conditions in the 1999 Conditions of Contract. Clause 20 deals with claims, disputes of the DAB and arbitration. The contractual machinery at clause 20 makes a distinction between DAB decisions that are binding and those that are final and binding. There is then a dual pathway to arbitration, depending upon whether a decision has become binding or final and binding. If one party issues a notice of dissatisfaction within 28 days then the decision is simply binding. In the absence of a notice of dissatisfaction the binding decision becomes final and binding.

This all seems relatively straightforward; however, there is scope for confusion in the nature of the decision, and the manner in which a dispute about a DAB decision is then dealt with in arbitration. In the Singapore case of *CRW Joint Operation v PT Perusahaan Gas Legara (Persero) TBK* [2001] SGCA 33 an arbitration award, which in itself was enforcing a DAB decision, was not enforced because the arbitral tribunal had acted outside of their jurisdiction. The tribunal appears to have assumed that they should not open up, review and revise a DAB decision which was the subject of a notice of dissatisfaction. The judge concluded that the arbitral tribunal did not have the power to simply enforce the law without recognising the scope of their jurisdiction. Perhaps in hindsight they could have recognised that they had power to open up, review and revise, but then concluded that the amount set out in the DAB decision should be paid. In any event, and in order to avoid similar problems in the future, FIDIC has issued a Guidance Note which suggests amendments to clause 20.

The Guidance Note sets out a new sub-clause 20.4, and amends the wording to clause 20.7 as well as providing further provisions at clauses 14.6 and 14.7. The amendments can be used for the Red Book, Silver Book and Yellow Book. The Gold Book adopts a different approach, and so the amendments could not be used in their current state.

FIDIC's recommendation is the introduction of a new penultimate paragraph of sub-clause 20.4:

*"If the decision of the DAB requires a payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment."*

In effect, this is simply giving the DAB a further power. It is a contractual power to order one party to provide security. The DAB cannot force a party to comply, and so once again a party may seek to rely upon arbitration in order to obtain an appropriate sanction and then seek to enforce that award in an appropriate court.

In relation to the payment provisions in clause 14, a payment under sub-clause 14.6 "shall" now include any amounts due to or from the contractor in accordance with the DAB's decision. Sub-clause 14.7 requires amounts due under a DAB decision to be included within any Interim Payment Certificate that is to be issued. This new approach therefore

requires any amount ordered by the DAB to be paid should be included within an assessment of payment made by the engineer or the Employer's Representative, and then included within the Interim Payment. Failure to do so is simply a further breach.

More importantly, sub-clause 20.7 is deleted and replaced with a new sub-clause 20.7 as follows:

*"In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.4 [obtain Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference."*

Sub-clause 20.7 relates to decisions that are either binding or final and binding. So regardless of any notice of dissatisfaction, or more importantly any arguments or issues as to the adequacy or timing of any notice of dissatisfaction, a valid referral can be made to arbitration. The amendment also clarifies that the parties expect a summary or expedited relief to be used if and as appropriate.

Interestingly, the ICC's emergency arbitrator provisions are unlikely to be appropriate. This is because the ICC's emergency arbitrator provisions are to be used when the contract does not provide an expedited procedure. A DAB dispute resolution procedure in itself is an expedited procedure. In any event, the emergency arbitrator procedure leads to an order rather than an award. It is probably more appropriate to commence an arbitration and seek an immediate award for payment as a result of the failure to honour the DAB decision.

The amendment to the FIDIC provisions should be included in future contracts, and should assist a party to obtain an arbitration award that will avoid the problems of the Singapore *CRW v PT Perusahaan* case.

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**Reference:**

FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1 April 2013.