

Exploring Technical Congruence in the Conduct of Dispute Boards

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ABSTRACT- *Dispute Adjudication Board (DAB) provisions in FIDIC 1999 are aimed at harmonizing multilateral relationships in complex international built environments. It is thus worth to find out whether DAB can and does live up to its intended pursuits. The research approach is literature survey while utilizing extensive experience of the author in the field of dispute resolution. To achieve the chore of this undertaking, FIDIC 99 ADB provisions have been reviewed in depth.*

The findings witness that although adjudication is deemed to provide rough and ready justice as a result of an inquisitorial function, disputants tend to challenge DAB decision. The conclusion is that DAB provisions are not up to the 'expectations' to resolve disputes in international construction contracts. This research paper finally recommends that DAB provisions need a holistic relook along with the context in which it occurs.

INTRODUCTION

FIDIC 99 Sub-Clause 20.2 and 20.3 provide DAB procedures and Sub-Clause 20.4 frames out the decision making process of the DAB. While summary enforcement of DAB Decision is under Sub-Clause 20.7, the Sub-Clause 20.8 determines dispute resolution where no DAB in place. Indeed, DAB conditions should be interpreted not in isolation but with reference to other clauses and appendices of the contract conditions.

In common law countries such as UK and Australia where statutory adjudication is taken place, it can be witnessed adjudication principles are subjected to filtering and elaboration with the considerable instances decided by courts.

Contrary to standard contracts based adjudication, such as FIDIC 99 DAB that intended for use in international contracts, are hardly developed through case law.

However, where gaps remain for interpreting standard FIDIC 99 DAB provisions, English case law experience in statutory adjudications can be one of the options available due to the common law background of FIDIC and DAB, and

due to the usage of FIDIC mostly by common law countries¹.

The basis of the DAB is Dispute Adjudication Agreement². The power of the DAB is the tool of the adjudicators for the conduct of adjudication³. In principle, the DAB may only exercise such power as the parties⁴ may have entered to confer and do confer⁵ together with any additional or supplementary which may be conferred by the Contract.

Important requirement for adjudicators to act in *good faith*, while exercising power has been implied under Clause 5(c) GCDA. DAB is obliged to give the fair resolution of disputes as an impartial tribunal without unnecessary delay and expense. Accordingly, adjudicators exercising power under Civil Procedural Rule 8(a) must adapt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matter to be determined. It also provides for the removal of an adjudicator when there are justifiable deficiencies as to impartiality or reasonable dispatch. According to *Richard Wilmot Smith*⁶ a contractual term which has not been individually negotiated shall be regarded as *unfair* if, contrary to the requirements of *good faith* and it causes a significant imbalance of the Parties' right and obligation, so cannot be enforced. A question of interest is where the parties are the masters of their own fate, courts generally prefer adherence to the principle of freedom of contract. However, when court finds unfair deals, may recommend incremental solution rather than adopting a broad overarching *good faith* principle. However, if DAB exceeds

¹ ELLIS, B. & BEN, M., (2009) 1st ed, The FIDIC Contracts: Law and Practice, London, Informa Publishers.

² hereinafter called as "Adjudication Agreement"

³ This is to be distinguished from jurisdiction of the DAB panel, which defines the scope within which the panel may act.

⁴ means the Employer or the Contractor under Sub-Clause 1.1.2.1

⁵ Expressly or by implication in the Adjudication Agreement

⁶ RICHARD, W.S. (2010) 2nd Edi, Construction Contract: Law and Practice, London, Oxford University Press.

its powers the decision may still be valid, as the validity will depend on whether DAB has acted in a way that has rendered DAB process substantially unfair⁷. If either party has been seriously prejudiced by the acts of DAB, then subsequent award will be set aside⁸.

THE EXTENT OF JURISDICTION

The Parties confer the necessary jurisdiction on adjudicators through expressed provisions under Sub-Clause 20.4 concerning the resolution of disputes by adjudication. The relationship between Parties and DAB panel is formed out of an adjudication agreement, and it is from these adjudication agreement⁹, Procedural Rules and the law to which adjudicator is subjected to that the DAB derives its jurisdiction. Adjudicators have such jurisdiction as Parties agree to give and none they do not¹⁰. The DAB deriving its jurisdiction from the adjudication agreement with Parties, the scope and mandate of the DAB is also determined by the wording of the adjudication agreement prepared in compliance with GCDAA. It is the wording of the adjudication agreement that determines whether the DAB has jurisdiction to hear the dispute.

Although DAB is a creature of Contract, its role is quasi-judicial: Parties have agreed on to bestow quasi-judicial powers including judicial-immunity under GCDAA Clause 5(c) for any liability claim arising from while discharging its functions in good faith; and Under Sub-Clause 20.4 the DAB Decision is final & binding unless Notice of Dissatisfaction (NOD) is duly issued; and the decision can be referred to arbitration for summary enforcement under Sub-Clause 20.7.

DAB is a mere contractual dispute review method, which in principle does not replace jurisdiction of courts or arbitration unless agreed otherwise. However, an example for such a substitution and supplementation of country law with FIDIC rules can be seen in *Romanian* law where employer and contractor are allowed to choose the applicable law *Lex-Voluntatis*. Under English law and Rule 8(b) of Procedural Rules, however, adjudicators are bound

to the DAB provisions, including law governing the contract and have to make a legal decision. There is authority for the view that DABs have *quasi-judicial* powers meaning that they have to apply the procedural law of the Contract and should follow the principle of '*natural justice*'¹¹. *Natural justice* requires that all Parties have the right to be to a fair hearing and has the right to be heard by an impartial tribunal, which has been incorporated to FIDIC 99 DAB under Procedural Rule 5(a).

Breaches of *natural justice* may include *bias*, failure to act *impartially* and/ or procedural irregularities¹² and so the FIDIC 99 DAB provisions. Bias is an attitude of mind, which prevent the adjudicators from making an objective determination of the issue that has to be resolved. An adjudicator may be *biased* because he has reasons to prefer one outcome over the other. Adjudicator may be biased because adjudicators have reasons to favour one Party than another. Bias can come in any form. It may consist of irrational prejudice or it may arise from particular circumstances, which, for logical reasons, predispose adjudicators towards a particular view of the evidence or issue before him¹³. The requirement is clearly provided under Clause 4 of GCDAA and if adjudicators fail to comply under Clause 9 of GCDAA, shall not be entitled for any fee. While Procedural Rule 5(a) provides that DAB to be *impartial* at all times, Clause 5(e) of GCDAA require DAB to comply with Procedural Rules annexed to adjudication agreement. The adjudicators independence and impartiality is further assured over Warranty Clause in GCDAA.

In the case of *Amec Capital Projects Lts v White Friar City Estates Limited*¹⁴ suggested that where the duty to comply with the rules of *natural justice* exists, a contravention of any these rules will be a ground to vitiate the decision. However, it is very important to note that Parties have not empowered the DAB under Sub-Clause 20.4 to disregard

⁷ Bay Hotel & Resort Ltd v Cavalier Construction Co Ltd (2001) UKPC 34, (Eng.)

⁸ Carillion Construction Ltd v Devonport Royal Dockyard [2005] EWHC 778 (TCC)

⁹ See Fastrack Construction Ltd v Morrison Construction Ltd (2000), BLR 168; KNS Industrial Services (Birmingham) Ltd v Sindall Ltd (2000), 75 Con. L.R. 71; and Edmund Nuttal Ltd v R G Carter Ltd (2002) BLR 312, which contain very useful distillation of the applicable principles.

¹⁰ Ashville Investments v Elmer Contractors (1988) 2 All E.R. 577

¹¹ Improving Adjudication in the Construction Industry, A Consultation Document by Scottish Executive (January 2003), provides "Natural justice is about ensuring fairness as between the Parties, that they know the case against them and are able to submit their own arguments and documents within the procedural framework and to have enough time to do so commensurate with the timescales of adjudication. It also involves the adjudicator ensuring that acts impartially as well as having no interest in the outcome of the adjudication"

¹² Recent Developments in Adjudication, Barry Hembling (2009). Available at www.fenwickelliott.com.

¹³ Re Medicaments v Related Classes of Goods (No.2), (2002) 1WLR 701 at paragraph 37.

¹⁴ (2004) EWHC 393 (TCC)

any provision of the contract and make a Decision on principles of *natural justice* alone.

If adjudicators' failure to comply with *natural justice*, decision becomes void and ineffective, and under Clause 9 of GCDA DAB has to return full amount of money received from Parties with respect to that adjudication.

As a private dispute resolution mechanism, DAB is expected to maintain the confidentiality during and after proceedings. In order to make Decision, the Procedural Rule 9(a) provide that DAB member shall meet in private after hearing to keep the confidentiality till the Parties agree for final conclusion. Further, confidentiality of DAB is further maintained after the Decision is delivered imposing bar on FIDIC DAB members neither to hold a position of arbitrator nor to be called as a witness in a subsequent arbitration.

Like most judges in alternative dispute resolutions, DAB is also given a privilege of *judicial immunity* under Adjudication Agreement Rule 5(c) so that none of the Party can be sued claiming remedy for DAB's negligence to deliver its obligation with due care. This provision is encouraging for adjudicators mostly with construction background than legal background who expect to make a speedy delivery of Decision within limited time allowed expending minimum cost.

CONSTITUENCY OF THE DAB PANEL

The combination of Sub-Clause 20.2 and Procedural Rules provide two (2) important initial choices to form a DAB. The first, as given in second paragraph of Sub-Clause 20.2, is the choice between a suitably qualified "*sole member*" DAB and a "*three person members*" DAB. It is suggested that the nature of the project vis-a-vis the complexity required determine the preferred option. It is reasonable to assume that for smaller and less complex contracts *sole member* DAB is sufficient. The more varied and complicated a project the more the case to appoint *three person members* DAB. However, it is often the case that on large complex projects, such as multibillion Hong-Kong airport project, involving a number of disciplines the tribunal may consist of five persons of whom any three, selected by the chairman of DAB, will sit at any time on a particular dispute. With the increase of number of members of DAB cost of project also goes up, and so the decision of number of members should be taken after careful analysis on the complexity in future disputes.

The second is the choice between and "*ad-hoc*" panel appointed if and when a dispute has arisen and a "*full time*" panel appointed before contractor commences executing the Works under Sub-Clauses 20.2. Although *ad-hoc* DAB

panel is cheaper option than *full-time* DAB panel, an important point of note is that an *ad-hoc* DAB panel does not have the expressed authority for preventing disputes between Parties that is vested with *full-time* DAB panel. However, this omission does not prevent both Parties agreeing with an *ad-hoc* DAB to follow a similar procedure to *full-time* panel. In addition, although it can understand giving the *ad-hoc* DAB panel 84 days period to give a Decision, it is difficult to see logic behind giving same 84 days deadline for the *full-time* DAB that has already gained knowledge of the project and potential disputes. On the other hand, 84 day period for giving Decision seems too long compared to 28 days period allowed at the beginning of DAB concept to achieve immediate resolution of disputes to maintain project cash flow, although the nature of international projects may justify longer period for DAB proceedings. An *ad-hoc* DAB is recommended in mostly for projects under P&DB and EPCT forms where initial time is devoted for procurement related works and work done at contractor's workshop, but actual construction commence only at a later stage of the contract period, resulting less disputes related to the Works. As *ad-hoc* panel is appointed after disputes have arisen, there is all reason to believe that the responding Party's motivation to appoint members to DAB will be very less and may create additional disputes on the appointment of DAB.

The FIDIC Guidance Notes for the preparation of Particular Conditions include an alternative paragraph for Sub-Clause 20.4, which enables the Engineer to be appointed as the DAB. This cannot be recommended, as in practice the Engineer is an employee of the Employer, he may be influenced any shortcomings in his own administration of the Contract and will not be perceived to be either independent or impartial contrary to requirement under Procedural Note Rule 5(a).

The detailed procedures for selection of the DAB members are mentioned in number of different documents. The FIDIC Guidance for the Preparation of Particular Conditions states the important principle, which should govern the process, as it is essential that either Party on the other Party does not impose candidates for this position. However, as stated in fourth paragraph of Sub-Clause 20.2 if potential lists of members are provided Parties are bound select members from the list. The fourth paragraph of Sub-Clause 20.4 and FIDIC standard form for Letter of Tender to be submitted by the Contractor include reference to a list of members for the DAB being included in the Contract. The list appears to have been prepared by the Employer and the Contractor can either accept or reject or add to the suggested list in his Tender. For the Employer to suggest names in the Tender documents, to be accepted or rejected by the Contractor before his Tender has even been considered will inevitably imply, right or

wrong, that these people are being imposed on Contractor by the Employer. To ensure that the procedure is seen to be fair, and hence to establish confidence in the DAB, it is preferable that names are not accepted or rejected until Tender has been accepted. The Parties can then exchange names and details of candidates and negotiate on the equal basis.

From a practical point of view, to insert the names of candidates in the documents at too early stage can cause problems. The work of a DAB member requires a commitment to be available to spend time for the project as and when required. Most potential members also may have other commitments and will only be available to accept a limited number of DAB appointments at any one time. This requirement has become so difficult in international projects where Parties are from different countries most often select respective members from their own countries. To be asked to allow one's name to be put forward involves some commitment and so the time between the names being put forward and the appointment being confirmed should be kept to a minimum.

Sub-Clause 20.2 anticipates that *sole member* DAB, or chairman of *three member* DAB panel, is mutually agreed, and that the first two members of a *three member* DAB are each nominated by one Party and approved by the other. Under Sub-Clause 1.3, approvals for DAB members shall not be unreasonably withheld or delayed by Parties. Each Party should endeavour to nominate a truly independent expert with the ability and freedom to act impartially, develop a team spirit within the DAB and make unanimous decisions. It may therefore be reasonable to withhold approval of a proposed member if it appears unlikely that he will not endeavour to reach a unanimous decision. This reason for disapproval may be based upon reasonable grounds for anticipating that he will decline to discuss matters constructively within the DAB.

In the event of failure to agree nominations under Sub-Clause 20.2, the provisions of Sub-Clause 20.3 will apply. Accordingly, the appointing entity named in the Appendix to Tender shall appoint *sole member* or *three member* DAB panel after due consultation with both Parties. Sub-Clause 20.3 provides a default appointment procedure in the event that the Parties fail to agree nominations by particular dates. The specific "*failure*" dates are: failure to appoint a *sole member* by the date stated in the appendix to tender; or failure to nominate members by the date stated in the appendix to tender; or failure to agree on the appointment of chairman by the date stated in the appendix to tender; or failure to agree member replacement within 42 days of vacancy.

The default appointment procedure allows the appointing entity named under Appendix to Tender to appoint members upon a request by either or both of the Parties for such appointments. The Clause allows for due consultation with both Parties, but not the Parties agreement, by the appointing entity on prior to its determination of the appointment. This provision may prove problematic in the case where one Party is already resisting the appointment of anyone on to the DAB. The consultation process may be seen as a further opportunity for delay and veto.

From practical point of view, in order obtain the nomination of a board member it is necessary to make a request to the DAB appointing body together with the submission of a fee. The request should contain sufficient detail of the Contract and of the problems to be decided by adjudication, in case of *ad-hoc* member, to enable the DAB appointing body to make a suitable nomination. It is expected that the Parties respond with no delay with either their acceptance or rejection of the names put forward under Sub-Clause 1.3.

The last paragraph under Sub-Clause 20.2 defines the duration of the DAB appointment, subject to the Parties agreeing otherwise, either in the Dispute adjudication agreement or thereafter. *Full time* DAB's appointment expires per the terms contained in the Discharge under Sub-Clause 14.12. The expiry of *ad-hoc* DAB when the Decision is delivered. However, under last paragraph of Sub-Clause 20.4 *ad-hoc* DAB may undertake second dispute if a Party decide to do so and referred to DAB under Sub-Clause 20.4, before first DAB appointment is expired.

With respect to resignation of DAB members, although *full-time* DAB members are entitled to resign given notice under Clause 2 of GCDAA, the *ad-hoc* DAB members are not stated as having entitlement to resign except under Clause 6 of GCDAA. Sub-Clause 20.2 provides for a procedure for the selection of a replacement DAB member or for the termination of the appointment of any member. The clause safeguards against any unilateral decision of a Party. For the termination of a member it is required that the both Parties agree. The conditions of termination are defined within the tripartite agreement entered into with the DAB members and the Parties.

It is notable that the Sub-Clause 20.2 notes that a replacement member shall be installed due to the member having *unable to act* because of death, disability, resignation or termination. If the inability to act is due to disability, it must be the case to show that the disability actually prevents a member from undertaking the full gambit of his role on the board.

Under the penultimate sentence of Sub-Clause 20.3, the appointment shall be final and conclusive. After the appointment, the Parties are therefore required to enter into tri-party agreement in accordance with fifth and subsequent paragraphs of Sub-Clause 20.2.

DAB AS AGREED

An agreement by the Parties to submit to adjudication any dispute arisen under Sub-Clause 20.4 between them is the foundation stone of adjudication agreement. Each of the tri-party agreements is the contractual mechanism establishing the rights and responsibilities of the contracting Parties and a member of DAB. The agreement should state that its conditions comprise GCDA. It details the scope of the work for the DAB, which may develop its own routine operating and hearing procedure, subject to approval by the Parties and in compliance with Procedural Rules. Further, the agreement mandates that all DAB members act impartially and independently, but not advocate for Parties. The neutral role of DAB members is supported by provision of immunity and indemnification under GCDA Clause 5(c) for their actions or decisions associated with hearing and making recommendation with respect to disputes. Obligations with respect to compensation and expenses are contained in the tri-party agreements. The Parties share equally the fee and expenses of the DAB.

The role of the DAB chairman is mentioned but remains undefined. The chairman undertakes an important role within the procedure, which may determine the success or failure of the process. He must retain the confidence and respect of the Parties and his fellow board members and must ensure that the administration of the DAB runs smoothly and the ethics of the board remain unchallengeable. The main procedural function of the chairman is to chair meetings and site visits and ensure that any jurisdictional issues are dealt with without any undue delay. He takes the lead role in the drafting of Decisions and ensures that the viewpoints of the other members are taken into consideration during all discussions of the board. He ensures that the composition of any recommendations and decisions of the board are procedurally correct and reflect all the viewpoints of members. In the case of a majority decision he ensures that, the reasoning of both the majority and minority view comply with the requirements of the contract.

Clause 3 of GCDA requires DAB members to be qualified to resolve the referred Dispute. On the other hand, DAB members must be selected carefully because: the Parties empower the DAB to reach Decisions with which they undertake to comply, and the DAB members cannot ordinarily be removed, except with the agreement of both

Parties. Therefore, the DAB must comprise of adjudicators having the ability and experience to wield these powers wisely, honestly and who are willing to do so.

The first vital ingredient is that the adjudicator is a person who has considerable experience in the construction industry and experience of the discipline in which the disputes has occurred or may occur. He is then able to understand the problems, which face the Parties during the execution of the works and better appreciate the skills needed to undertake the works in a professional manner. When problems occur, knowing the difficulties that each Party faces, he has a better understanding of the solutions required.

Second, but just as important, the Adjudicator must be experienced in the interpretation of the Contract. An understanding of the rights, obligations and liabilities of the Parties is of fundamental importance for DAB members. International projects upon which DAB's are used are normally large complex works involving many disciplines and skills. In order for a project to be successfully undertaken it is vital that the coordination and dispersal of information between the Parties involved runs as smoothly as possible. Often Parties involved in complex projects employ large numbers of staff, many of whom are unaware of the detailed responsibilities and risk allocation between the Parties.

Under Procedural Rule 9 (a), DAB should reach unanimous decision. The members of the board should also have the respect of the Parties in order to fulfil their obligations adequately. The board acts as a team and not as individual representatives of the Parties. As such, the board should exhibit a balance of experience and professional expertise. Each of the members of the board requires a working knowledge of the language of the contract. The ruling language of the contract may be defined in the appendix to tender. However, FIDIC considers that the official and authentic texts to be the versions in the English language. Care should be taken that the selected adjudicators may be from different countries is proficient enough of these languages

The success of any DAB will be measured against any finality it achieves. Thus proceeding to arbitration may be an indication that the Decision of the DAB is to be challenged. The process of dispute resolution is one involving techniques and understanding not normally provided to project participants during the course of their working lives. As with all other aspects of the project successful use of these tools require skill and experience. Formal qualifications on the other hand are always an emotive issue when comparing standards from one country to another. It is the case that DAB members

probably originate from a broad spectrum of experienced practitioners whose seniority and industry based experience is qualification enough. However a basic criterion in the modern world when dealing with matters relating to either technical complexity, legal obligation, programming or financial issues is that the qualifications of the member provides a theoretical and informed background for the basis of any opinion. The qualification process is also an opportunity to learn from, and be assessed by, specialist experts in the subject matter.

The members are not permitted to be commercially linked in any way with the Parties nor have any financial interest in the project. This restriction stretches to both direct financial relationships such as employment or consulting services, as well as other financial dealings such as share ownership. In the FIDIC form this restriction does not apply to past relationships. However any such relationships are to be declared in writing to the Parties prior to the execution of any DAB contract or agreement. It is incumbent upon the potential board member to declare any interest which he has or as ever had with the Parties as soon as possible. The Parties may then decide by agreement whether they perceive the declared interest to be of any significance.

ENFORCING DAB DECISION

Enforceability of a DAB Decision is a critical thing, if a Party refuses to implement a DAB Decision. According to Sub-Clause 20.4: *"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 settled under Rules of Arbitration of the ICC¹⁵"* Thus, the Parties to the Contract have promised to each other to comply with any of the DAB Decision whether "final & binding"¹⁶ or "provisional & binding"¹⁷. According to Sub-Clause 20.7 of FIDIC 99 all the books, in the event of Parties fail to comply with this "final & binding" Decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to international arbitration for summary judgement under Sub-Clause 20.6. However, FIDIC 99 is not descriptive of enforcing a Decision that is "provisional & binding". Therefore, a large part of the enforceability problem may be encountered due to the fact that the wording and significance of the relevant FIDIC

provisions for enforcing provisional & binding are not fully understood¹⁸.

In the recent decision of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (2010)*¹⁹ in Singapore High Court had the opportunity to consider this issue. Apart from the key aspect of this case, court highlighted both the potential pitfalls posed by language of the relevant FIDIC provisions and practical solutions that may be adapted to avoid the problems. It also illustrated importance of appreciating that not all arbitration agreements operate in the same manner and that in some, there might be conditions to be satisfied before a dispute become referred to arbitration.

In reaching its decision, the court discussed two broad categories of disputes referred to arbitration contemplated under FIDIC 99 Sub-Clause 20.6 and one contemplated under Sub-Clause 20.7. The Sub-Clause 20.7 is confined to that narrow category of cases where a DAB Decision has become "final & binding", and such a "final & binding" decision is sought to be enforce against the non-complying Party by means of arbitration under Sub-Clause 20.6. This Sub-Clause expressly exclude Sub-Clause 20.4 (Obtaining DAB Decision) and 20.5 (Amicable Settlement). This provision does not involve an inquiry into the merits of the DAB Decision. Sub-Clause 20.7 does not confer any right on a successful Party to bring an arbitration against a non-complying Party for a DAB Decision that is merely "provisional & binding" (as opposed to "final and binding"); and On the other hand, Sub-Clause 20.6 sets out the procedure for Parties to bring a "fresh" arbitration, which will be decided on the merit. An arbitration under Sub-Clause 20.6 will have to be referred to a DAB in the first instance for its Decision, but whose Decision has been challenged giving NOD and hence, not "final & binding".

The above case further observed that there appear to be a lacuna in the FIDIC in so far as it does not confer an express right on the winning Party to refer the matter to arbitration in such situation as enforcing "provisional & binding" Decision. To address this Court stated in obiter *"it would be possible for a successful Party such as CRW to rely upon Sub-Clause 20.6 to obtain an interim or provisional award, pending a final determination of the dispute at large, as a means of sought an interim or provisional award and the majority tribunal had also proceeded to render a final award in the matter."*

A Party now can rely on this Case and refer for arbitration under Sub-Clause 20.6 to enforce a "provisional & binding"

¹⁵ International Chamber of Commerce

¹⁶ So, neither Party has submitted a Notice of Dissatisfaction after the receipt of the DAB decision and that the unsuccessful Party has failed to comply with that decision

¹⁷ So, a Party has submitted a Notice of Dissatisfaction after the receipt of the DAB decision and that a Party has failed to comply with that decision

¹⁸ *Talking Point: Engineering and Construction*, HORGON, L., (2010).

¹⁹ SGHC 202

Decision of DAB. As can be seen from the PGN case, it is critical to ensure that the DAB Decision is enforced by arbitration under the correct provision, so that the eventual award will be less susceptible to being challenged by the unsuccessful Party and set aside by the courts. Adjudicators' decisions will be enforced even if it contains errors of law and facts²⁰. The possibility of such errors is inherent in adjudication system and is not ground for refusing to enforce the adjudicator's decision. The errors of the adjudicators should be ones made as part of answering the right question wrongly rather than in answering the wrong question.

The alternative method of enforcement of payment related Decision, during a course of the contract, is by the inclusion of the Decision within an interim payment application in accordance with Sub-Clause 14.6. Under Sub-Clause 14.6 the Engineer is required to certify interim payment certificates in an amount which he fairly determines to be due. Clause 14.3 (f) states that interim valuations shall include any additions or deductions which may have become due under Sub-Clause 20. The inclusion of any sums due from any Decision of the DAB in any interim valuation certificate should be made irrespective of any notice of dissatisfaction issued by either Party. This is due to the wording in the fourth paragraph of Clause 20.4 which states that the Parties shall promptly give effect to the decision of the DAB until it has been revised by an amicable settlement or by an arbitration award. Any further failure by a Party to comply will leave the remedies of suspension or termination in accordance with Sub-Clause 16.1 and 16.2.

A Party may raise an issue of validity of *ex-parte* DAB proceedings due to a Party's refusal to appoint DAB, to attend the proceedings or to enforce DAB Decision claiming that DAB has been improperly constituted and illegitimate. The dispute related to arbitration appointment should be referred to arbitration as given under Clause 9 of GCDA. This situation is further discussed in recent case²¹. In deciding this case, the arbitral tribunal answered that Parties who included DAB provisions in a contract but fail to comply with them should expect to find arbitral tribunal *unsympathetic* to non-compliance with the DAB procedure, including any failure by one of the Parties to participate in the DAB process. Arbitral tribunal are likely to be *sympathetic* to

application to bifurcate proceedings to hear arguments about enforcement of DAB Decisions as soon as possible in the arbitration. Notwithstanding any NOD having been given by either or both Parties, DAB Decisions are likely to be enforceable by partial or interim arbitral awards being made early in the arbitration, albeit usually in circumstances where they are subject to the power of arbitral tribunal to open up, review and revise any Decision of a DAB later in the arbitration. An attempt by an unsuccessful Party to avoid compliance to enforce with a partial or interim award enforcing DAB Decision by seeking an "interim measure" to suspend the effect of such partial or interim award is likely fail under Article 23(1) of the current ICC Rules of Arbitration. In the author's opinion, this useful and timely case should provide some much needed clarity, if not certainty, regarding the enforceability of DAB Decisions. It is submitted that all Parties involved in international construction projects can have greater confidence that the DAB process will lead to Decisions that will be given "teeth" by arbitral tribunal. That is so even when DAB Decisions are forced to be conducted on an *ex-parte* basis due to the unwillingness of a Party to participate.

The task of the adjudicator is not to act as an arbitrator²². So, adjudicator is not expected to make final decision, although parties can select the decision as *final & binding* under sub-Clause 20.4. The time constrain within which adjudicators expected to operate are another proof of that²³. The task of adjudicators is, therefore, to find an interim solution which meets the needs of the case. The needs to have right answer have been subordinated to the need to have an answer quickly. Opposing the enforcement of DAB's Decision will be rarely an easy task, with very limited ground available. However, case law shows exceptions exception as follows:

Most probably, starting point of this kind of challenges is dispute as to whether there is a dispute for an adjudication to occur. So the first method of challenging adjudicators decision will be where the dispute has not crystallised by the time of reference to DAB²⁴ or the referred dispute is not related to or not arising out of Contract or executing the work²⁵, adjudicators lack jurisdiction under FIDIC 99 DAB to resolve the dispute. However, case law experience

²⁰ Bouygues (UK) Ltd v Dahl-Jesen (UK) Ltd (2001) 1 All ER 1041

²¹ Enforcement of DAB Decision through an ICC Final Arbitral Award, Kennedys Legal Advice in black and white, Giovanni Di Folco & Mark Tiggeman., (October 2010).

²² See Sub-Clause 20.4 third paragraph.

²³ See Sub-Clause 20.4 fourth paragraph

²⁴ *Halki Shipping Corp v Sopex Oils Ltd* (1997) All ER (D) 130.

²⁵ *Allen Wilson Shopfitters v Buckingham (Anthony)* (2005) CILL 2249

shows that it is very difficult to argue on these grounds successfully²⁶.

The adjudicators' right to decide more than one dispute have been discussed in recent cases²⁷. The FIDIC 99 is not providing jurisdiction for adjudicators to decide more than one dispute. The Sub-Clause 20.4 state that: "if a dispute of any kind arises between parties....refer the dispute in writing to DAB for its decision". The right is limited to referring "a dispute" not "a dispute or disputes". Therefore, adjudicators who decide more than one dispute will be going outside jurisdiction. However this should separate from a dispute having several elements. In the case of *David McLearn Housing Construction Ltd v Dwanea Housing Association Ltd*²⁸ the court decided that in deciding whether notice referrers to one or more disputes, it was appropriate to adapt a "sensible" approach, bearing in mind that a single dispute well consist of several discrete elements.

Where the adjudicators' jurisdiction is contested, Procedural Rule 8(b) shows the approach is for the adjudicators to enquire into his jurisdiction and if he is satisfied that he has jurisdiction, he should continue with the adjudication unless and until arbitrator appointed under Clause 9 GCDA orders otherwise. After DAB reach a Decision, the unhappy Party can voice their challenge to the court at latter stage. Arguable challenge to jurisdiction would result in an adjudicators' decision that is not summarily enforceable²⁹ and that this in turn would have the effect of undermining one of the prime objective of DAB, namely prompt resolution of disputes.

A Party contemplating a challenge to an adjudicators' decision must decide whether to agree with such challenge or alternatively to accept an adjudicator's decision³⁰. It is not open to Parties to argue that a decision is both "valid" and "invalid".

In the recent case of *GPS Marine Contractors Ltd. v Ringway Infrastructure Services Ltd (2010)*³¹ the Judge HH Ramsey considered the relevant authorities in relation to adjudicators' jurisdiction and went on to set out following circumstances, in which a responding Party may find

²⁶ *Amec v Secretary of State for Transport (2005) CILL 2228*

²⁷ *David and Theresa Bothma t/a DAB Builders v Mayhaven Healthcare Ltd (2006) Bristol TCC*

²⁸ (2002) BLR 125

²⁹ *Project Consultancy v Trustees of the Gray Trust (1999) (TCC) BLR 377*

³⁰ *PT Building Services Ltd v Rockbuild Limited (2008) EWHC 159 (TCC)*

³¹ EWHC 283 (TCC)

themselves: A Party might raise no objection to jurisdiction and participate in the adjudication. In these circumstances, even if there were valid grounds upon which to challenge, the Party will have conferred jurisdiction on the adjudicator and waived their right to object to any Decision on jurisdictional ground. Alternatively, a Party might raise specific jurisdictional challenges, that a court will decide are unfounded, the Party cannot rely on other grounds that were available but not specified during the adjudication. Finally, a Party might make a "general objection" and, while that may be valid, it is certainly not desirable as it causes a number of practical difficulties. The adjudicator is not able to fully investigate the objection and, similarly, the referring Party cannot assess whether it needs to abandon the adjudication and start new proceeding.

In other words, although FIDIC DAB have expressed authority to decide his own jurisdiction, if a Party raise a jurisdictional objection, there will not be agreement as to the adjudicator's jurisdiction. In *Dalkia Energy and Technical Services Ltd v Bell Group UK Ltd*³² the Judge held that in the enforcement of proceedings it was interested in the broader picture as to whether or not a Party reserved its position on jurisdiction. This case nevertheless serves to highlight that a Party must be clear in the language that it uses when reserving its position on jurisdiction.

Therefore, the question is how specific does the responding Party have to be about their reasons for challenging the adjudicator's jurisdiction? Can they just cry foul and leave it at that, or do they have to give reasons for doing so? This is discussed in the case of *Bothma (t/a DAB Builder) v Mayhaven Healthcare Ltd (2006)*³³ that although the specific reasons originally given by respondent for objecting adjudicator's jurisdiction were not the reasons that they subsequently relied on when the question of the adjudicator's Decision come before the courts, as the respondent have included *general reservation* of their position, can rely on the new reasons to challenge adjudicators jurisdiction.

If DAB make errors in their submissions, and in the absence of any remedy under FIDC 99, decided court cases give the way English court thinks. In *VGC Construction Ltd v Jackson Civil Engineering Ltd*³⁴ and *Mrs. Sandra Williams v Abdul Noor*³⁵ it was held that despite errors in the submissions courts is prepared to adapt a purposive approach considering the broader perspective of the errors in the submissions. The willingness of courts to

³² (2009) EWHC 73 (TCC)

³³ EWHC 2601 (TCC)

³⁴ (2008) EWHC 282 (TCC)

³⁵ (2007) EWHC 3467 (TCC)

allow Parties and DAB greater leeway in this manner makes challenging adjudicators Decision more difficult.

Although, *Final & binding* Decision of an adjudicator is enforceable summarily regardless of any procedural irregularity, error or breach of natural justice³⁶, even where an adjudicator had answered the question put him in the wrong way, the arbitrator would not interfere with that decision but would enforce it, even if the mistake was of fundamental importance³⁷. However, there are limitations to this approach. It is only if the adjudicator has answered the wrong question, or acted obviously in excess of jurisdiction, that the decision would be a nullity.

One of the most important development has been where jurisdictional challenge on the ground of a breach of natural justice on account of adjudicators failure to consider all the evidence and/or address all the issues. The obiter in the judgement of *Quartzelec Limited v Honeywell Control Systems Limited*³⁸ court accepted that if the adjudicator had consider and then rejected the defence evidence on its merit, then the Decision would be enforceable. The decided that an adjudicator must not ignore a submission but must in fact expressly deal with all the issues and arguments before adjudicators. If an adjudicator overlooks an issue in its Decision then the risks having that award challenged on the basis that it has failed to consider all the issues before him.

Another ground on which to challenge the enforcement of an adjudicator's decision is to challenge the decision on the basis that the adjudicator is in breach of natural justice under adjudication agreement. That is where the DAB has not acted in accordance with procedural fairness in the conduct of adjudication. Given the difficulty in challenging adjudicators' decision on the other grounds set out above, a challenge on the basis of natural justice has been seen as the most likely challenge to be succeeded.

In recent past there have been interesting developments in case law concerning challenges to adjudicators Decisions in this area related to alleged breaches of *natural justice* and it have both narrowed the grounds on which to challenge for breaches of *natural justice* can be brought and potentially opened new front on which adjudicators Decisions might be open to as successful challenge. In the case of *Bovis Lend Lease v London Clinic*³⁹ indicate the difficulty in challenging an adjudicators Decision on

the grounds that a Party had insufficient time to respond to a dispute referred that breach the a Party's *natural justice* to an effective opportunity to make representations before the decision is made. The court held that the key factor here was whether or not sufficient time was requested, given and taken by the respondent, while giving due consideration to the adjudicators role of quick and less costly temporary dispute resolution.

As decided case of *AMEC Capital Projects Ltd v White friars City Estates Ltd*⁴⁰ suggest, it can be particularly difficult to establish a breach of natural justice by reasons of, for example, an adjudicator's *bias*. In this case the judge set out why allegations of a breach of the rules of natural justice have to be examined critically. He restates that the whole purpose of adjudication is to provide a speedy mechanism for settling disputes, on a provisional basis, interim basis. If the allegation of bias is not treated caution, it would undermine this purpose.

This test was applied recently in the case of *Fileturn Ltd v Royal Garden Hotel*⁴¹. In this case conclusion was that in assessing what the 'fair-mined' and 'informed observer' would decide, it is important to take a range of factors into account, including working, social and financial relationship between DAB members and Parties. So, the arbitrators would be reluctant to oppose the enforcement of adjudicator's Decision on the ground that the adjudicator was '*bias*'.

Another area of jurisdictional as well as natural justice objection can be seen in case law is where the dispute includes several parts, and whether DAB's Decision could indeed be served. It arise a natural question whether the Decision could effectively be enforced in relation to one part, but not the other. The court held in *Cantillon KLtd v Urvasco Ltd*⁴² and *Bovis Lend Lease Ltd v The Trustees of London Clinic*⁴³ that a successful challenge on the ground of jurisdiction or natural justice in respect of one part of the Decision will not undermine the other part of the Decision. The exception to this principle is in relation to those Decisions that are simply not severable in practice and/or where a breach of the rules of natural is so severe or all-pervading that the remainder of Decision is tainted. These decisions established law on jurisdiction enforcement and develop a limited but potentially useful doctrine of *severability*. That will mean that the arbitrators will be able to salvage an enforceable Decision, even if only in part, from the ruins of a successful challenge on the ground of *jurisdiction* and /or breach of *natural justice*.

³⁶ See *Macob Civil Engineering Ltd v Morrison Construction Limited* (2001) 3 TCLR 2.

³⁷ *Bouyhues UK Limited v Dahi-Jenson UK Limited* (1999) EWHC 182 (TCC)

³⁸ (2008) EWHC 3315 (TCC)

³⁹ (2009) EWHC 64 (TCC)

⁴⁰ (2004) 96 Con LR 142 and [2005] BLR 1 CA

⁴¹ (2010) EWHC 1736 (TCC)

⁴² (2008) EWHC 282 (TCC)

⁴³ (2009) EWHC 64 (TCC)

CONCLUSION

The purpose of adjudication procedure set out under FIDIC 99 DAB provisions was to provide Parties with speedy mechanism for resolving disputes, which, although not finally determinative, could and should be enforced through the arbitration by way of summary judgement, however, in case of *provisional & binding decision*, arbitrators have not been authorised to give summary judgement to enforce decision.

Enforcement of adjudicators' decision is not a foregone conclusion under FIDIC 99. However, case law experience shows that successful challenges to enforcing DAB decisions are becoming ever more difficult. That is not to say that every decision will always be enforced. The approach only to cases that are valid, namely those decisions which the adjudicator was authorised to reach or where the decision was not undermined by a material failure to comply with the basic concept of fairness, shall generally be enforced.

However, as one door closes another opens and new opportunities to stay of execution in respect of adjudicator's decision that fails to address all issues and/or defences will be a development. The extensive review of the literature on the nature of disputes, unique challenges in resolving those disputes and new development of dispute resolution contained in Chapter 1 established foremost concerns in international standard construction contract based *rough* dispute resolution mechanisms as being: common law approach for contract interpretation is different to the civil law approach; International standard contract principles may conflict with principles of law governing the contract; and interpretations given for international standard contracts clauses may be varied due to legal cultures of multilateral participants.

DAB cannot always be anticipated by understanding the principles of DAB provisions alone; it is also necessary to understand trend in judicial attitude. Thus, in respect of *natural justice* decided case law suggest that *natural justice* has small relevance to how adjudications must be conducted through a fairly strict compliance with natural justice principles. The balance appears currently to rest at a point which suggest that natural justice must be applied in adjudication but in a way that is more *rough & ready* than other final dispute solution mechanisms. The competing requirements are, on the one hand, the requirement to uphold adjudicators' decision whenever possible and, on the other, to ensure that decisions are made with an underlying degree of fairness.

Similar to tension on *natural justice* can be observed with regard to the timetable for adjudication between, on the one hand, the same need to uphold adjudicators' decision and, on the other hand, the need to ensure that decisions is reached swiftly. As in above finding DAB is not a correct application at all for dispute resolution at the final stage of the project as none of Parties expect temporary binding decision with rough justice at this stage, rather Parties expect *final and binding* decision. DAB at final stage is an additional as well as unnecessary compulsory hurdle for resolving dispute, which may delay project finalisation and create unnecessary expenses to Parties.

It is also clear from the finding that enforcing DAB decision is a challenge at some situation as Sub-Clause 20.6 provides for the requisites that must be undertaken before referring a matter to arbitration and defines the scope of the dispute that may be referred to arbitration. Non-compliance with the agreed arbitral procedure is a ground to set aside an arbitration award. So, only a *final & binding* DAB Decision may be enforced by arbitration. There appear to be lacuna in FIDIC 99 where a DAB Decision may be binding but may not be final.

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