

Topics

Wording outside FIDIC Clause 20 that promotes compliance with DAB decisions

Two specific issues for Clause 20

Time limits for arbitration

Bank guarantees

Legislation supporting enforcement

How 1999 FIDIC forms encourage compliance

FIDIC 1999 Suite

No reference to DAB decisions outside Clause 20

However:

- Application for Interim Payment Certificate provisions (14.3(f)) encompass amounts payable under DAB decisions – *‘any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20’*
- If Engineer fails to certify, or Employer fails to pay
 - Clause 16.1 : Possibility to suspend or reduce rate of work on 21 days’ notice
 - Clause 16.2 : Possibility to terminate – (f) non payment. Arguably under (d) also *‘the Employer substantially fails to perform his obligations under the Contract’*

How 1999 FIDIC forms encourage compliance

FIDIC Gold Book 2008

Clarifies entitlement to payment of amounts awarded in DAB decisions

- Clause 14.7 : Interim Payment Certificates to include such amounts
- Clause 14.8 : Employer to pay amounts in Interim Payment Certificates in accordance with DAB decisions

No clarification of position under Clause 16 regarding suspension or termination

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

Recommends the introduction of the Gold Book modifications above

Time limits on starting arbitration

Not a feature of FIDIC or other international standard forms

Issue : is it appropriate to oblige a party that has filed a notice of dissatisfaction to then commence arbitration proceedings within a specific deadline, failing which the DAB decision becomes final as well as binding?

If civil principle of good faith applicable, could a party successfully argue that a failure to refer to arbitration constitutes an abuse of right, and that the right to refer is lost due to the failure to commence arbitration?

Attractive in principle, in order to deal with parties that do not comply with the DAB decision but appear to serve notice of dissatisfaction simply to avoid or put off enforcement

Period of three to four months from initial date for referral to arbitration after expiry of amical settlement period (Clause 20.5) recommended by International Beau-Rivage Palace Forum working group on 'Compliance with and enforceability of a DB Decision' – see (2012) 28 Const. L. J., Issue 1

Time limits on starting arbitration

Is the Gold Book solution (Clause 20.9) providing for direct referral to arbitration of a failure to comply with binding as well as final and binding solutions the best way forward?

Solution also recommended for 1999 Contracts by FIDIC guidance Memorandum of 1 April 2013

The time-limit alternative does not increase the chances of the losing party fulfilling its obligation to comply with the DAB decision

NB Gold Book solution fails to specify how soon referral to arbitration may take place

Bank Guarantees

Issue - would compliance with binding but not yet final DAB decisions be improved if successful party required to provide security in relation to any payment made?

History

Not foreseen under either the 'binding engineer's decision' regime (Clause 67 of FIDIC 4th edition), or in DAB regime in 1999 FIDIC forms

Introduced in FIDIC Gold Book (2008), Clause 20.6

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

Same wording recommended in FIDIC Guidance Memorandum of 1 April 2013 for 1999 Contracts

Bank Guarantees

Is such a provision justified in principle?

Appears to recognise and address Employer reluctance to include DAB stage or comply with DAB procedure

Acceptable to a majority of the members of International Beau-Rivage Palace Forum working group

No similar provision under ICC Dispute Board Rules

Is it fair that Contractor may have to provide yet another security under its contract?

Is wording satisfactory?

No detail as to how/when the provision is to be implemented - but is this necessarily a drawback?

Legislation supporting enforcement

Problem of direct enforcement

Could contract validly provide that a final and binding DAB decision is deemed to be an arbitral award?

Difficulty of DAB being considered as arbitrators

FIDIC forms understandably fail to refer to any specific legislation

But does Gold Book provision (Clause 20.9) for direct referral to arbitration for '*summary or other expedited relief, as may be appropriate*' in the event of non-compliance with any DAB decision exclude the possibility of referral to a national court?

Legislation supporting enforcement

What legislation might be applicable in appropriate circumstances?

Example of adjudication in English law under the Housing Grants, Construction and Regeneration Act 1996

- Driven by desire to ensure timely payment to sub-contractors – ‘pay now, argue later’
- *‘The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement’* (para 14 of Dyson J’s judgment in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93)
- Judgment made it clear that enforcement could be obtained by way of summary judgment even if the adjudicator’s decision could be challenged and the contract contained an arbitration clause

Legislation supporting enforcement

Could a FIDIC contract on a UK project fit within the HGCRA regime?

- No known cases
- Since HGCRA regime is mandatory for UK building and civil engineering operations on dry land, then under English law the regime would apply in any event
 - Effect on FIDIC provisions?
 - Time periods?
 - Would a three-member DAB be valid?

Legislation supporting enforcement

Legislation elsewhere

Specific adjudication legislation adopted in several Common Law jurisdictions eg Australia, New Zealand, Singapore

- Example of Singapore – Building and Construction Industry Security of Payment Act 2006
 - Any application for review of an adjudication decision will only be heard if the decision has been paid
 - Is this a requirement worth consideration by FIDIC?

Civil law countries?

- Different contracting practice and special regimes (eg French sub-contracting law) appear to reduce the call for specific adjudication regimes

Legislation supporting enforcement

Conclusion

Wrong to expect standard forms such as FIDIC contracts to address possibility of court enforcement in specific jurisdictions

Should Gold Book clause 20.9 be taken further and refer to possibility of summary judgment in courts, where appropriate, for final and binding DAB decisions, and provisional enforcement in court for binding but not yet final decisions?