

A Step by Step Guide to Enforcement of Binding DAB Decisions under the 1999 FIDIC Conditions of Contract

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Two ways to consider enforcement

There are two possible ways to consider enforcement of binding but not final DAB Decision and a lot has been already said in relation to both:

- the enforcement of DAB Decisions by way of an interim arbitral award, pending a decision on the underlying dispute
- the enforcement of DAB Decisions by way of a final arbitral award, without consideration of the underlying dispute

This presentation focuses on the second type of enforcement

When to consider enforcement of a DAB Decision in ICC arbitration?

- A valid DAB decision is given
- At least one of the Parties served a valid notice of Dissatisfaction and the DAB Decision did not become final and binding
- The Decision had not been revised by amicable settlement and an arbitral procedure has not been initiated by the dissatisfied party following the service of the Notice of Dissatisfaction. If the latter happens, enforcement by way of an interim award should be considered.

The Essentials

- The main reason why enforcement of DAB Decision needs to be considered is that, in most cases, the dissatisfied party does comply with the DAB decision but does not take the required actions to pursue the revision of the challenged DAB Decision either in a time which is **reasonable**
- The arbitrators are not the obligation to open up revise and review *“any DAB Decision that is relevant to the dispute”*. Regarding the failure to comply with SC 20.4. a new dispute has accrued between the parties in respect of which a Second Referral to the DAB should be considered.

The Enforcement Tool Kit

- ✓ Limitation as it relates to the underlying dispute
- ✓ Service of a Notice of Dissatisfaction
- ✓ Realistic assessment of the chances of having the Decision revised in amicable settlement or in arbitration vs. the abuse of right
- ✓ Second Referral to the DAB in relation to the failure to comply with a binding DAB decision

Timing

- ✓ DAB Decision on the underlying dispute +28 days
- ✓ Notice of Dissatisfaction + 56 days
- ✓ Notice of Referral +14 days
- ✓ Referral to the DAB in relation to the failure to comply with SC 20.4 +84 days
- ✓ DAB Decision +28 days
- ✓ Notice of Dissatisfaction+56 days
- ✓ Request for ICC Arbitration

Steps before the Second Referral to the DAB

- Promptly after a DAB Decision is issued in relation to the underlying dispute, the winning party should submit a payment application under 14.3 in respect of the amounts determined by the DAB so that sufficient time is given to the other party to consider compliance with the DAB Decision
- During the amicable settlement period the winning party needs to be encouraged to show maximum availability to discuss possible amicable revision of the DAB Decision, with a view to reaching a commercial settlement.
- At the end of the 56 days, if settlement discussions fail or are never initiated, then the winning party should submit promptly Notice of Referral to the DAB in relation to the failure to comply with Sub Clause 20.4.

The Second Referral to the DAB

The dispute to be referred to ICC arbitration, in a case of enforcement is, after all, a dispute about a failure to comply with a binding DAB Decision

Like any other dispute it needs to follow the route prescribed under the Contract in respect of dispute resolution:

- Referral to the DAB under 20.4
- DAB Decision in respect of the second Referral
- Notice of Dissatisfaction under 20.4
- Amicable settlement under 20.5

Define reasonable

Between the date of the publication of the first DAB Decision in relation to the underlying dispute and the expiry of the 56 days provided for amicable settlement in relation to the second referral to the DAB there is a period of

266 days

i.e. 6 months after the date when the dissatisfied party could have effectively referred to ICC arbitration to seek revision of the challenged DAB Decision, under Sub-Clause 20.6.

Test your case

If, however, by the end of the 266 days the dissatisfied party :

- Failed to give effect to the DAB Decision
- Failed to agree on an amicable settlement agreement to revise the challenged DAB Decision
- Failed to initiate ICC arbitration to seek revision of the same

it is likely that the Notice of Dissatisfaction served was not necessarily served with the intention to effectively revise the DAB Decision but rather to prevent the immediate consequence of the DAB Decision becoming final and binding and the automatic recourse to the provisions of Sub-Clause 20.7.

Think Enforcement

Once all steps are carefully taken and reasonable time has been allowed to ensure all possibilities that enforcement is obtained amicably or voluntarily, one can refer to arbitration in relation to the failure to comply with sub-Cause 20.4 , with reasonable hope that at the end of that road a final award will be issued to confirm the entitlement to payment stated in the original DAB Decision

Issues for Arbitration

The main issues to be considered could well include:

- The validity of a Notice of Dissatisfaction served abusively, in bad faith. Possible consequences of an invalid Notice of Dissatisfaction; Sub-Clause 20.7
- The jurisdiction of the Arbitrator in relation to a case of failure to comply with a DAB Decision
- Obligation to open –up, review and revise the “merits”
- Which “merits”
- Damages vs. Enforcement

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