



CURRENT ISSUES WITH FIDIC DISPUTE ADJUDICATION BOARDS

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A Introduction

When we conceive of the possibilities of human achievements, and the extraordinary capabilities of human willpower, we can scarcely do better than contemplate the construction of the Egyptian pyramids. The greatest of them all – the Great Pyramid of Giza – towered over the ancient world and held those who beheld it spellbound. Completed in around 2,560BC, it was the tallest man-made structure in the world for more nearly four millennia.² It consists of more than two million stone blocks, and has a mass of almost six million tons.

One of the reasons that we marvel today at the Giza pyramid is that it was constructed during a period of early human history which was unmechanised. The ancient Egyptians had no excavators, no cranes, no dumper trucks or mixers. They had no mining or blasting equipment for quarrying stone. We can only conclude that construction took place through the considerable toil and sweat of human and beast.

Of the arrangements that were made for building the pyramid, we know virtually nothing. Was it built by workers of the Pharaoh, or were private contractors involved? How was it funded? Were there time limits for construction, and if so were they met or exceeded? Were there any legal disputes arising from the project, and if so how were they resolved? We do not know the answers to these questions, and perhaps we never will.

What, however, we may say with reasonable confidence is that construction and engineering projects in the ancient world proceeded from a very different basis to those of today. The main differences between construction works then and now are largely technological. Additionally, the legal landscape for construction projects offers devices to contracting parties for avoiding or resolving disputes which were not available (or, at least, not widely used) until only relatively recently.

1 The author is grateful for the very helpful comments on this paper from both his colleague Mr Christopher Seppälä of White & Case LLP, Paris, and from Mr Gordon Jaynes. The views expressed in this paper are, however, those of the author, who accepts all responsibility for any errors, shortcomings etc.

2 That is, until the completion of the central tower at Lincoln Cathedral, England, in the early 14th century.

B FIDIC Dispute Adjudication Boards: a brief overview

This immediately takes us to the subject of this paper, namely Dispute Adjudication Boards (DABs) under FIDIC contracts. A DAB is a form of dispute board. Dispute boards are a modern invention used in commercial contracts in a number of industries, including construction. Contractual terms now abound to create and give effect to dispute board mechanisms.³

In essence, the term ‘dispute board’ describes a person or a panel of individuals (usually three in number) who, pursuant to the agreement of contracting parties, provide (a) non-binding advice or recommendations to the contracting parties on legal issues which they face; and/or (b) a binding decision on such matters. When acting in a non-binding or advisory mode, a dispute board may be referred to as a ‘dispute review board’, to denote the fact that it is not making a decision which binds the parties.⁴ By contrast, where a dispute board’s decisions are agreed to take legal effect as between the parties, so as to bind them to the board’s decision, it may be referred to as a ‘dispute adjudication board’.

In the 1999 suite of FIDIC contracts (and later forms), it is DABs which are used as the primary means of intermediate dispute resolution before arbitration.⁵ FIDIC contracts are the dominant life form in the international contracting market. They are widely used across the globe, including in Egypt and other parts of Africa and the Middle East.⁶ Given this, and FIDIC’s choice of DABs as a dispute-resolution tool, the legal character of DABs becomes a matter of considerable importance to contracting parties.

Before examining the legal aspects of DABs under the current FIDIC suite, it is necessary to outline where DABs fit into the FIDIC dispute resolution

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- 3 There are numerous dispute board rules published by industry and international bodies, including (inexhaustively) the ICC’s Dispute Board Rules (September 2004): <www.iccwbo.org>. The Chartered Institute of Arbitrators (UK) published Dispute Board Rules in November 2014: <www.ciarb.org/das/009-dispute-boards>. Furthermore, dispute board procedures have been developed on a bespoke basis for certain large-scale projects, such as the ‘Dispute Review Panel’ used in the Hong Kong airport expansion project of the 1990s (see, eg *Downer & Co Ltd v The Airport Authority* [1999] HKCFI 820), and for the London 2012 Olympics an ‘Independent Dispute Avoidance Panel’ was created to assist in preventing disputes from arising under the various infrastructure contracts for the construction of Olympics facilities.
 - 4 The dispute review board model is the dominant form of dispute board used in the United States. This may be of some significance in considering the success of dispute adjudication boards, as much of the available information concerning the operation of dispute boards emanates from the US: see note 49.
 - 5 For the background to FIDIC’s use of DABs, see Christopher Seppälä, ‘The new FIDIC provision for a dispute adjudication board’ [1997] *International Business Law Journal* 967.
 - 6 However, it is important to recognise that contracting practices throughout Africa and the Middle East are such that parties do not invariably use the latest FIDIC forms. It is still relatively common for parties to use the FIDIC Red Book 3rd ed (from 1977) and 4th ed (from 1987). Neither edition of the Red Book utilised a dispute board procedure (although in 1996 FIDIC did publish a Supplement to the 4th ed (1987) which introduced wording allowing for the use of a DAB). The procedure under these forms was for the Engineer to make a binding decision on a matter in dispute; if the Engineer’s decision was not accepted, the relevant dispute could be referred to arbitration.

procedure. Under the principal construction contracts in the FIDIC suite⁷ – the Red Book,⁸ the Yellow Book⁹ and the Silver Book¹⁰ – the procedure for resolving disputes (raised by the Contractor) is multi-tiered, with the following steps to be taken (in chronological order, and in simplified form):

1. *Engineer's decision*: the Contractor is to notify the Engineer (or the Employer, in the case of the Silver Book) of its claim and send details of it to the Engineer, following which the Engineer is either to agree or failing that render a determination of the Contractor's claim: Sub-Clause 20.1.¹¹
2. *DAB decision*: if the Engineer's determination is disputed, the particular dispute may be referred to a DAB to adjudicate upon it. The DAB is to give a reasoned decision within 84 days (or possibly a different period) of the dispute being referred to it: Sub-Clause 20.4.
3. *Notice of dissatisfaction*: if either party is dissatisfied with the DAB's decision, it is entitled within 28 days of the decision to give a notice of dissatisfaction, which has the effect of (a) rendering the DAB's decision binding but not final; and (b) seeking to have the dispute resolved in another way. If a notice of dissatisfaction is not given within the 28-day period, the DAB's decision becomes final and binding on the parties: Sub-Clause 20.4.
4. *Amicable settlement*: if a notice of dissatisfaction is given, the parties are required to attempt to settle the relevant dispute amicably before either party may commence an arbitration. If they do not amicably resolve the dispute within 56 days of the

7 For the purposes of simplicity, this paper will not consider the DAB procedure under the FIDIC Gold Book: the Design-Build-Operate Contract, published in 2007/2008. The Gold Book's DAB differs in some ways from that used under the Red, Yellow and Silver Books, however the Gold Book itself is seemingly little used in practice. Nor is consideration given to the Construction Contract MDB Harmonised Edition (1st ed, 2006), which also applies a slightly different dispute board mechanism to that under the Red, Yellow and Silver Books. There is much scope for reviewing the respective FIDIC dispute board procedures against each other, and examining how they may be improved upon. This paper's objectives are, however, more modest.

8 FIDIC Conditions of Contract for Construction (1st Edition, 1999).

9 FIDIC Plant and Design-Build Contract (1st Edition, 1999).

10 FIDIC EPC/Turnkey Contract (1st Edition, 1999).

11 It may be, however, that if a 'standing' DAB has been appointed at the outset of a project, as is contemplated by the FIDIC Red Book, the DAB may have had some knowledge of the matter submitted to the Engineer before it occurs. One of the principal functions of a standing DAB is to become familiar with a project through regular involvement with it. However, under the Red Book the DAB only starts to exercise its principal contractual function (adjudicating upon disputes) once a dispute has been referred to it under Sub-Clause 20.4. This may give rise to a curious paradox for a DAB: it could be in a position whereby it is well placed to advise the parties on the resolution of a contractual issue (before it becomes a 'dispute'), yet because the DAB under the Red Book is not empowered to give non-binding advice to the parties, it may be unable to prevent a dispute from arising by proffering such advice.

notice of dissatisfaction, an arbitration may be commenced: Sub-Clause 20.5.¹²

5. *Arbitration*: if a dispute has not been resolved by a final and binding DAB decision, and if it has not settled amicably, it is to be decided by international arbitration: Sub-Clause 20.6. The FIDIC forms are not prescriptive either as to when an arbitration may be commenced or by when it must be concluded. Arbitration under the FIDIC forms is, therefore, somewhat open-ended.

The DAB process, therefore, sits between the earlier Engineer's (or Employer's) decision (if any) and takes place (and must take place) before any arbitration finally resolves the relevant dispute. Subject to limited exceptions, what a party is not generally entitled to do is to skip or ignore the DAB process and simply commence an arbitration in respect of a matter in dispute between the parties. The DAB process is an essential intermediate step in the dispute resolution process.

Before examining the legal features of DABs under the FIDIC forms in more detail, there is one further aspect of the structure of the dispute resolution procedure under Clause 20 which should be noted. Under the Red Book, the DAB is to be appointed shortly after the commencement of the project – and before any dispute has arisen.¹³ Such a DAB is referred to as a 'standing DAB', to denote its constitution and operation even if no disputes arise. This, as may be expected, comes at an ongoing cost to the parties: the DAB members will be paid what is usually a monthly retainer for the provision of their services, which may include visiting the site or at least being kept abreast of progress and events occurring during the project. By contrast, under the Yellow and Silver Books, the DAB is only constituted once a dispute arises under the contract which a party wishes to refer to a DAB. An advantage of the DAB being appointed on an *ad hoc* basis is that it may be perceived as less expensive as far as the parties are concerned.¹⁴

Let us now consider the types of issue which may arise in relation to DABs, as used under the major FIDIC forms. It should be emphasised, however, that the potential problems with a DAB process, as discussed in this paper, are by no means exhaustive. The variety of circumstances concerning a project, and the ingenuity of the parties and their advisers, leaves open a huge field of opportunity for creating issues (justifiably or otherwise), just as they do in arbitration or litigation.¹⁵

12 Although it is open to the parties to extend any amicable settlement process *beyond* the 56-day period.

13 See also Edwards-Stuart J in *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3139 (TCC), para [13] (considering a DAB procedure under a modified Silver Book form): note 21 and its linked main text.

14 Whether such perceptions are accurate is another matter (in terms of the total cost of using a DAB for any given project).

15 The success of the DAB process under any FIDIC contract depends much upon the parties' attitude towards it. If one of the parties to a contract wishes to avoid the DAB process or its outcome, it will naturally seek to exploit actual or even *potential* weaknesses in the DAB mechanism.

C Problems with the DAB's appointment

(i) Introduction

A DAB is a creature of contract. It has no independent or freestanding legal existence outside of the contract pursuant to which it is created. The consequence of this is that if the contract does not make provision for all of the matters legally necessary for the DAB's appointment, or if it does but those provisions are not instated (possibly due to the conduct of the parties to the contract), any DAB which may (notionally) have been appointed will lack the power to render a legally effective decision.

The procedure for appointing a DAB under the FIDIC Red, Yellow and Silver Books may be summarised as follows:

- The number of persons constituting the DAB is to be either one or three. The default position (that is, absent any agreement to the contrary) is that the DAB is to consist of three members. If the parties specifically agree, the DAB may consist of a sole member (referred to as an 'adjudicator'). Whether there is an adjudicator or a DAB consisting of three members, there is to be an agreement between the Parties and the DAB which is to incorporate by reference the General Conditions of Dispute Adjudication Agreement set out in the Appendix to the FIDIC forms: Sub-Clause 20.2.
- If the DAB is to consist of three members, the Employer and the Contractor are each to nominate a DAB member for the other Party's approval. Once the identities of the parties' nominees are agreed, the parties are then to consult with these two members and each other with a view to agreeing upon a third member of the DAB, who is to act as chairman: Sub-Clause 20.2.
- If a contract calls for a DAB consisting of a sole member/adjudicator, and the parties fail to agree upon the identity of that adjudicator, the adjudicator is to be appointed by the appointing entity or official named in the Particular Conditions: Sub-Clause 20.3.
- If, where a contract calls for a three-member DAB, and (a) either party fails to nominate a member for approval within the time for doing so; or (b) the parties fail to agree upon a third member / chairman of the DAB, the member is to be appointed by the appointing entity or official: Sub-Clause 20.3.
- The appointing entity or official is also to nominate a replacement member if the parties are unable to agree upon such a person, in the event of an original member of the DAB declining or being unable to act as a result of death, disability, resignation or termination of appointment: Sub-Clause 20.3.

The mechanism for appointing a DAB may therefore, in summary, be said to hinge upon (a) the agreement of the parties as to the persons constituting the

DAB; or failing that (b) appointment of the DAB member (or members) by an appointing entity or official named in the contract (eg the Cairo Regional Centre for International Commercial Arbitration).

(ii) No DAB in place

Each of the Red, Yellow and Silver Books contemplates a DAB being constituted *after* the contract has been entered into. The Red Book, as noted, envisages the DAB being created shortly after the contract is entered into, whereas the Yellow and Silver Books anticipate the DAB being created usually at some later point in time, once a dispute has arisen which either party wishes to refer to a DAB. In either case, there will be a period of time in which there is no DAB in place. If both parties wish for a DAB, they will usually take the steps contemplated by the FIDIC contract to constitute the DAB, following which any extant or future dispute will be referred to the DAB for its decision.

But what, however, happens if during the interregnum one party decides that it does not wish to put its claim through the DAB process? A Contractor may, for example, believe that it has an iron-clad claim to which the Employer has no real defence. Rather than expend time and money on a DAB process and *then* seek to enforce the DAB's decision through arbitration, the Contractor may prefer to take its claim straight to arbitration, thus bypassing the DAB altogether. Is the Contractor permitted to take such a course of action? Contractors have often attempted to do so – sometimes with success – despite the plain intention of Sub-Clauses 20.2-20.4 of the FIDIC contracts being that disputes should be decided at the DAB tier before they are heard in arbitration. The primary justification for Contractors taking such an approach is that Sub-Clause 20.8 permits them to go to arbitration where no DAB is in place.

The title of Sub-Clause 20.8 is 'Expiry of Dispute Adjudication Board's Appointment'. This suggests that it is concerned with the situation where a DAB has been in place, but its appointment has expired. However, when read literally, the text of Sub-Clause 20.8 permits a wider application:

'If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply, and
- (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [*Arbitration*].'

If one fastens on the words 'or otherwise', Sub-Clause 20.8 could be interpreted so as to permit a Contractor to bypass the DAB process where no

DAB has ever been appointed, not merely where a previously-constituted DAB's appointment has expired.¹⁶

Sub-Clause 20.8 is self-evidently a necessary provision in a contract which includes a dispute board as an intermediate tier of dispute resolution before arbitration. As we have seen, the constitution of a DAB depends upon either (a) the agreement of the parties; or failing that (b) the appointment of the DAB (or at least the chairman of the DAB)¹⁷ by a third party. There may be various reasons why neither of these steps are fulfilled. The parties may be unable to agree upon the constitution of the DAB. Furthermore, an appointing authority may fail or refuse to appoint a DAB member, even if properly requested to do so.¹⁸ If the DAB appointment process fails, a clause such as Sub-Clause 20.8 acts as a release valve of sorts, because it permits dispute resolution (in the form of arbitration) under the contract to continue, even though an anterior step in the dispute resolution process (ie the DAB process) has failed.

But where a party has not actually attempted to engage with the DAB process at all, despite it forming an integral part of the agreed dispute resolution procedures under the contract, so that a DAB is not constituted because of that party's action (or inaction), does Sub-Clause 20.8 permit a party to ignore the DAB process and head straight to arbitration? As a matter of contractual interpretation, it is suggested that the answer must be 'no'. The clear intention of the FIDIC forms is that the parties will take such steps as are necessary on their parts to constitute a DAB, and if despite their efforts a DAB is not formed, an arbitration may be brought in respect of any particular dispute. To construe Clause 20 otherwise would render nugatory (or, at least, *optional*) the DAB mechanism in the FIDIC forms.¹⁹

Interestingly, two recent decisions confirm this to be the case:

The first comes from the Swiss Federal Supreme Court.²⁰ The case concerned a roads project in Romania. The Contractor had attempted to appoint a DAB, although the Employer was less enthusiastic about the DAB process and caused some delay in the DAB appointment procedure. Frustrated at this delay (and, no doubt, by what it perceived to be the Employer's stalling tactics) the Contractor commenced an arbitration pursuant to Sub-Clause 20.6 of the FIDIC form. Under the contract, the seat of the arbitration was Geneva, and Swiss law therefore applied to the arbitration. The question before the Swiss court was whether the arbitral tribunal which had been formed was

16 See Dimitar Kondev, 'Is dispute adjudication under FIDIC contracts for major works indeed a precondition to arbitration?' [2014] ICLR 256, page 265.

17 That is, where the parties have each nominated members of a three-person DAB but there is no agreement as to the appointment of the chairman.

18 In the author's experience, this rarely occurs in practice. However, the author has experience of two cases where appointing authorities have failed to secure the appointment of a DAB member – largely due to their unfamiliarity with the dispute board process, and the requirements for appointment of DAB members.

19 See also Christopher Seppälä, 'The arbitration clause in FIDIC contracts for major works' [2005] ICLR 4, page 13.

20 Decision 4A_124/2014 (decision of 7 July 2014), accessible (in French) at <www.bger.ch>. An unofficial English translation may be found at <www.swissarbitrationdecisions.com>.

seised of jurisdiction over the Contractor's claim. The court held that, as a matter of Swiss law, the arbitral tribunal was seised of the matter and that the arbitration could proceed *even though the contract made the DAB process a mandatory precondition to commencing an arbitration*. The court held that it would be against 'good faith' – a mandatory requirement of Swiss arbitration law – for the Employer to insist on the DAB process being followed (as it submitted before the court), given that it was primarily the Employer's conduct which had driven the delay to the DAB appointment process.

The second recent case is that of *Peterborough City Council v Enterprise Managed Services Ltd*,²¹ a decision of the English Technology and Construction Court, where judgment was delivered on 10 October 2014. The case concerned a DAB procedure under a modified Silver Book form. The relevant modification was to make the final form of dispute resolution litigation before the English courts, instead of ICC arbitration. The Employer in that case (the Council) commenced court proceedings to claim liquidated damages from the Contractor. The Contractor applied to the court for a stay of the proceedings, on the basis that the Employer should have referred its dispute to an *ad hoc* DAB first.²² The Employer sought to justify its actions by contending that Sub-Clause 20.8 entitled it to commence proceedings, as there was no DAB in place. Edwards-Stuart J firmly rejected that argument, ordering that the proceedings be stayed:

[32] Reverting to sub-clause 20.8, my conclusions are clear. First, the words 'if a dispute arises ... and there is no DAB in place' apply to a situation where there is no DAB in place at the time when the dispute arises. If it were otherwise, as Miss Day pointed out, the provisions of sub-clauses 20.2 and 20.3 could never have any application because, by definition, under those sub-clauses there has to be a dispute in existence before the process of appointing a DAB can begin. Thus in every case where sub-clause 20.2 or 20.3 applies there will be in existence a dispute but no DAB. Thus, since under sub-clause 20.8 sub-clause 20.4 is disapplied, on Ms Sinclair's approach to the construction of sub-clause 20.8 there can never be a reference of a dispute to adjudication in any contract which provides that the DAB is to be appointed in accordance with the provisions of sub-clause 20.2 or sub-clause 20.3.

[33] It seems to me that sub-clause 20.8, which is in the same form in all three of the FIDIC Books, probably applies only in cases where the contract provides for a standing DAB, rather than the procedure of appointing an *ad hoc* DAB after a dispute has arisen. Ironically, Ms Sinclair said that the position was precisely the opposite: in her skeleton argument she submitted that the parties could prevent clause 20.8 from operating at all by appointing a standing DAB. I have to confess that I did not understand this point, but it shows that Ms Sinclair was not

21 *Peterborough City Council v Enterprise Managed Services Ltd*: note 13.

22 In the English courts, the court's power to stay the proceedings is inherent, but the court is not *obliged* to stay the proceedings in the face of an agreed, contractual form of dispute resolution. The court's decision to stay (or not) is discretionary, although the discretion will usually be exercised so as to hold the parties to their bargain, and (in effect) require the agreed dispute resolution procedure to be followed: see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, HL.

suggesting that the fact that, depending upon the dispute resolution procedure chosen, sub-clause 20.8 might not have any application was fatal to what I would otherwise consider to be the correct construction of the conditions.

[34] In addition, I do not accept Ms. Sinclair's submissions about what is meant by the phrase 'no DAB in place'. The right to refer a dispute to adjudication arises under sub-clause 20.4.1 as soon as a DAB has been appointed, whether under sub-clause 20.2 or 20.3. It is quite clear from the words 'final and conclusive' in sub-clause 20.3 that the process of appointment is complete once the nominating body has 'appointed' the adjudicator. That must mean the identification of a particular person as the adjudicator because the appointing body cannot make the Dispute Adjudication Agreement for the parties. In my judgment, therefore, a DAB is 'in place' once its member or members have been duly appointed in this way because from that moment onwards a dispute can be referred to it. Not even Humpty Dumpty would suggest that a dispute could be referred to a DAB that was not in place.

[35] For all these reasons, therefore, I reject the Council's submissions that sub-clause 20.8 gives it a unilateral right to opt out of the adjudication process, save in a case where at the outset the parties have agreed to appoint a standing DAB and that, by the time when the dispute arose, that DAB had ceased to be in place, for whatever reason. Further, I also reject the Council's submissions that the adjudication provisions in the contract are unenforceable.'

As a final and related point, it may be noted that the contractual obligation of a party to refer disputes to a DAB may be supplanted by mandatory laws affecting the contract or the project. This was the case in *Hutama-RSEA Joint Operations, Inc v Citra Metro Manila Tollways Corporation*,²³ where the Philippines Supreme Court held that arbitration before the Philippines Construction Industry Arbitration Commission (CIAC) – a body established under statute – was a mandatory available jurisdiction for the resolution of construction disputes, as an alternative to following the FIDIC dispute resolution procedure. On the facts of the case, Chico-Nazario J held that the CIAC had jurisdiction to determine a dispute referred to it by a subcontractor, notwithstanding that the subcontractor had not submitted that dispute to a DAB, as was required by the contractual terms.

(iii) Failure to agree upon a nominated member

In the case of a three-member DAB, Sub-Clause 20.2 provides that 'each Party shall nominate one member for the approval of the other Party'. If the other party approves the nominated person, there should be no particular issue as to that person being (or becoming) a member of the DAB. But what happens if the other party *does not approve* of the nominated person, or indeed *rejects*

23 *Hutama-RSEA Joint Operations, Inc v Citra Metro Manila Tollways Corporation* [2009] PHSC 447 (Republic of the Philippines Supreme Court, Manila, Third Division), GR No 180640.

that person as a nominated member? Does this prevent the nominated person from becoming a DAB member?

The FIDIC forms are silent on this issue. As mentioned, Sub-Clause 20.3 proffers a ‘deadlock breaker’ for the appointment of a DAB where (among other things) a party fails to nominate a DAB member within the time for doing so, or the parties fail to agree upon the identity of the chair of the DAB. But Sub-Clause 20.3 does not contain any mechanism to secure the appointment of a DAB member who has been nominated by one party ‘for the approval’ of the other party, where the other party refuses to accept the nominee. This is a lacuna in the drafting of Sub-Clause 20.3, and one that a recalcitrant party may seize upon as a pretext for scuppering the constitution of a DAB, or at least disrupting it so as to necessitate the appointment of the DAB by the relevant appointing entity or official.

It seems, however, that a solution to the potential issue posed is one which, unless the FIDIC forms are amended, is to be worked through a process of contractual interpretation. The starting point in this process is an untenable end point, namely a construction of the contract which would permit either party to prevent the constitution of a DAB (or unreasonably delaying its constitution) simply by refusing to approve the other party’s nominated member. If Clause 20 of FIDIC operated in such a way, the whole DAB process could easily be avoided or disrupted by a party refusing on unreasonable grounds to agree to the appointment of the other party’s nominee. Such an outcome clearly is unlikely to have been intended.²⁴

A more attractive interpretation is one which characterises the nomination process under Sub-Clause 20.2 as one which gives the other party the ability to identify reasonable grounds on which not to ‘approve’ a nomination. For example, if a Contractor nominates a particular person to become a DAB member, and the person has a financial interest in the Contractor’s business, the Employer would be justified in not approving the Contractor’s nomination.²⁵ The Employer’s voicing of its non-approval would then enable the nominee to decide whether or not it would be appropriate for him to act as a DAB member. If, upon consideration, the nominated person decided to continue to participate in the project as a DAB member (on the basis of him having no relevant interest in the Contractor’s business), his nomination would stand. What we may conclude from such an interpretation is that the mere fact that the other party does not approve of a nominated DAB member does not of itself invalidate that nomination. Put another way, the parties do not need to

24 Cf Ellis Baker et al, *FIDIC Contracts: Law and Practice* (London, Informa, 2009) para 9.65. There is, however, a countervailing view that the process under FIDIC for appointing a DAB is one based upon either (a) party agreement of *all* DAB members; or, failing that, (b) appointment by an independent third party (an appointing entity or official). The attraction of such an approach is that it ensures that any DAB will not be constituted by a person (or persons) who could be perceived as partial, which may be the case where a party has nominated a person to whom the other party objects or does not agree.

25 Para 4(a) of the General Conditions of Dispute Adjudication Agreement requires that a DAB member ‘have no interest financial or otherwise in the Employer or the Contractor, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement’.

agree upon each other's nominated DAB member in order for that nomination to be effective. It is the fact of nomination which is the critical matter, not the reaching of agreement on nomination.

(iv) Failure of a party to sign the Dispute Adjudication Agreement

Even if the identities of the DAB members (or sole member) are secured, whether as a result of agreement or by way of appointment by an appointing entity or official, further problems may lie ahead so far as the constitution of the DAB is concerned. This is because Sub-Clause 20.2 contemplates the DAB being 'jointly appointed' by the parties, on terms which incorporate by reference the General Conditions of Dispute Adjudication Agreement (the 'General Conditions') contained in the Appendix to the FIDIC forms. The General Conditions represent the essential legal terms of the tripartite agreement between the Employer, the Contractor and each DAB member, and they identify (among other things) the obligations of the parties and the DAB member in relation to the DAB, including as to payment for the member's services.

What, therefore, the FIDIC forms contemplate is there being a *further agreement* – that is, over and above the agreement represented by the contract itself – which both confers rights and imposes obligations upon each DAB member. It is contemplated that this Dispute Adjudication Agreement will be legally executed by all three parties. Given this, it is not difficult to foresee that a party wishing to avoid (or obstruct) the DAB process under the contract may refuse to sign the Dispute Adjudication Agreement, with little or no justification for doing so.

What happens in such a situation? Again, the FIDIC forms provide no specific solution so as to allow the DAB process to continue. However, as a matter of practicality if there is nothing to prevent the DAB from proceeding to decide a particular dispute, and if the party wishing to refer the dispute undertakes to pay the DAB's fees and expenses (or to provide security for them), the DAB should be able to proceed and to render a binding decision for the purposes of Sub-Clause 20.4. Assuming the DAB rendered a decision, the party who wrongfully refused to sign the Dispute Adjudication Agreement would not, certainly as a matter of English law, be entitled to rely upon its failure to sign as a basis for contending that the DAB's decision was invalid. A party is not entitled to rely upon its own unlawful conduct as a basis for denying the other party its contractual rights (in this case, its right to have a dispute decided by a DAB).²⁶ Furthermore, the obligation of a recalcitrant party to sign a Dispute Adjudication Agreement (in circumstances where it otherwise has no valid basis for refusing to do so) is one which is specifically enforceable as a matter of English law, meaning (potentially) that that party

26 See eg *Roberts v Bury Improvement Commissioners* (1870) LR 5 CP 310, page 326. An alternative yet equivalent approach could be to invoke the principle of equity (that is, of the former Court of Chancery) that 'equity looks on as done that which ought to be done': see JD Heydon, MJ Leeming and PG Turner (eds), *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths Lexis Nexis, 4th ed 2002) paras [3-205]-[3-210].

may be in contempt of court if ordered by a court to sign the agreement, and it refuses to do so.²⁷

Taking such action, that is to compel the DAB process to take place, or to proceed with the DAB in the face of an obstructive party, may be a wearisome and expensive exercise for the party seeking to have its dispute decided by the DAB (and, indeed, for the DAB itself). In such cases, the more attractive approach may be for the party who wishes to have its dispute decided to refer it straight to arbitration under Sub-Clause 20.6 – a course of action which it would be entitled to adopt by virtue of Sub-Clause 20.8.²⁸

D Problems with the referral: ‘no dispute’

Once a DAB has been constituted, a ‘dispute’ may be referred to it for decision. More specifically, Sub-Clause 20.4 provides relevantly as follows:

‘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 valuation of the Engineer [or Employer in the Silver Book]...either party may refer the dispute in writing to the DAB for its decision...’

Thus, only a ‘dispute’ may be referred to the DAB, and if there is no ‘dispute’ then there is nothing which is capable of being referred to the DAB. What this may mean in practice is that if a party seeks to refer a putative dispute to a DAB before it has fully crystallized, the referral of the ‘dispute’ will be premature, with the consequence that the DAB will not be empowered to decide the ‘dispute’ in any binding way.

How might this issue arise in practice? It is not difficult to conceive of examples. Take the Red and Yellow Books, where the Engineer acts as the contract administrator. Suppose that:

- The Contractor submits a claim (for Sub-Clause 20.1 purposes) for an extension of time of six weeks and delay costs in the amount of US\$2m consequent upon the Employer’s alleged breach of contract;
- The Engineer then proceeds to determine that the Employer did commit a breach of contract as alleged, but the effects of the breach were not as serious as claimed by the Contractor. The Engineer awards the Contractor a one-week extension of time and compensation for the Employer’s breach of contract in the amount of US\$200,000; and

27 Akenhead J in *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC), para [25]; Edwards-Stuart J in *Peterborough City Council v Enterprise Managed Services Ltd*, note 13, paras [26]-[27] and [31] (considering an amended FIDIC Silver Book, 1st ed 1999, form).

28 See Baker et al, note 24, paras 9.69-9.71.

- The Contractor is dissatisfied with the Engineer's determination, and wishes to put its claim to a DAB in the hope of obtaining a more favourable outcome.

Can the Contractor, based on the circumstances described above, take its claim straight to a DAB? Or does something *extra* need to occur before this is permissible? We know that the Contractor (and indeed the Employer) may refer a 'dispute' to the DAB. Is there a 'dispute' to be referred?

Perhaps surprisingly, it is not possible to give a clear or definitive answer to this question. The reason it may seem surprising is that the hypothetical factual scenario set out above could well be described as 'typical' or at least unremarkable. One of the reasons the question posed cannot be answered in any unqualified way is that the FIDIC Red, Yellow and Silver Books do not proffer any definition or even a *description* of what is (and is not) a 'dispute'.²⁹ One of the consequences of this is that working out whether there is a 'dispute' will be an exercise to be performed by considering the law applicable to the DAB process, which is likely to be the law governing the contract itself. The answer to the question 'is there a dispute?' may vary from jurisdiction to jurisdiction.

Looked at from an English law perspective, in the above factual scenario the answer to the 'is there a dispute?' question could well be 'no'. The reason is that, at least for the purposes of English arbitration law, a 'dispute' is taken to arise when A has (a) made a claim against B, where the claim is made neither as a sham nor on a specious pretext; and either (b) B has either distinctly rejected or not admitted the claim; or (c) B has not, after the lapse of a period of time, responded to the claim in any positive way.³⁰ The reason it may be difficult to say that a dispute has arisen in our example is that A (the Contractor) has not submitted a claim to B (the Employer) which the Employer has either rejected or not accepted. What has happened is that the Contractor has submitted its extension of time and compensation claim to *the Engineer*, who has assessed the claim by rendering a binding determination. The Employer *itself* has not expressed any opinion as to the merits of the Contractor's claim.³¹

And although Sub-Clause 3.1 of the Red and Yellow Books generally deems the Engineer, whenever carrying out his contractual duties, to act as the agent of the Employer, this may not quite be the same as saying that the Engineer's disagreement with the Contractor's claim is to be equated with the Employer's disagreement with the claim. For if the Engineer were the Employer's 'voice'

29 One may contrast, in this regard, the FIDIC Gold Book, where 'Dispute' is a defined term. However, the definition of 'Dispute' used in the Gold Book is of no import for the purposes of determining the meaning of 'dispute' under the Red, Yellow and Silver Books.

30 Kerr J in *Tradax Internacional SA v Cerrahogullari TAS ('The M Eregli')* [1981] 3 All ER 344, QBD, page 350; *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 WLR 726, CA, page 753 (Henry LJ) and 761 (Swinton Thomas LJ).

31 Although it *would* be possible to say that a 'dispute' has arisen under the Silver Book, because it is the Employer itself who administers the contract. Thus, the partial acceptance by the Employer of a Contractor's claim under the Silver Book could be said to give rise to a 'dispute'.

for the purposes of assessing the Contractor's claim, the Employer would surely be bound by the Engineer's determination and not be able to dispute it. However, under Clause 20 both the Contractor *and the Employer* may refer a contested Engineer's determination to be determined by a DAB.

As may be evident from the above, there is considerable latitude for dispute over (a) what constitutes a 'dispute'; and (b) whether a 'dispute' has arisen, which is capable of being referred to a DAB. The solution to the issue presented may therefore be for the party (usually the Contractor) who wishes to refer a disputed Engineer's determination to a DAB to (i) articulate the 'dispute' concerning the Engineer's determination to the other party; and (ii) give that party a short but sufficient period in which to articulate whether it agrees or disagrees with the particular matter. In our hypothetical example, the Contractor could seek to crystallize a dispute by writing to the Employer to this effect:

'Dear Employer

I refer to the Engineer's determination of date X in which he determined that I was entitled only to a one-week extension of time and compensation in the amount of US\$200,000 due to your breach of contract. Please be advised that I disagree with the Engineer's determination [for reasons A, B and C], and continue to assert my entitlement to a six-week extension of time and compensation in the amount of US\$2m. Please let me know within 14 days whether you accept or do not accept my claim (and if not, why not). If you do not accept it in full I will refer our dispute to the DAB.

Yours truly

The Contractor.'

E Problems with the DAB's decision

Let us assume that a DAB has been validly constituted, that a 'dispute' has been referred to it for its decision, and that it has rendered a decision. What is the legal status of the decision? Under Sub-Clause 20.4, the starting point (and usually the end point) is as follows:

'The [DAB's] 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 as described below.'

If a DAB's decision is given *in accordance with the contractual requirements* for such decision, there is no doubt that the decision is to be treated as 'binding on both Parties'. If, however, there is some deviation from the requirements of the FIDIC contract, the legal characteristics of a DAB's decision may be less clear. Three types of deviation (or possible deviation) are considered below.

(i) Late decision

The time limits for the DAB giving its decision are laid down in Sub-Clause 20.4, and vary as between the Red Book (which has a standing DAB) and the Yellow and Silver Books (which contemplate there being an *ad hoc* DAB, unless the Parties elect to have a standing DAB). Under the Red Book, the DAB is to give its decision ‘within 84 days after receiving [the] reference, or within such other period as may be proposed by the DAB and approved by both Parties’.

What is the effect of a DAB issuing its decision outside of the prescribed period for doing so, even if its decision is only *slightly* late (say, one or two days)? The FIDIC forms provide little indication as what consequences flow. A failure to issue a decision in time entitles either Party to serve a notice of dissatisfaction (pursuant to Sub-Clause 20.4) within 28 days of the expiration of the period for the DAB giving its decision. Giving such a notice entitles a Party to commence an arbitration (pursuant to Sub-Clause 20.6) in respect of the particular dispute. However, Sub-Clause 20.4 does not state whether a DAB’s decision, whether given before or after any such notice of dissatisfaction, has legal effect. Accordingly, the question of whether the DAB’s decision is legally effective is to be determined according to the relevant law governing the DAB process.

It may, however, be noted that a cognate issue has been the subject of a reported ICC award, in *ICC Case 10619*.³² The contract under consideration was a FIDIC Red Book (4th ed, 1987), which provided for the Engineer making a binding decision within 84 days of the Contractor’s request for a decision. The Tribunal in that case accepted the argument that a decision of the Engineer made after the 84-day period had expired rendered the putative decision invalid:

‘... in the absence of any evidence at this stage that both parties had, whether in express terms or impliedly, agreed for the Engineer not to stick to the time condition in [Sub-Clause] 67.1, it is the Tribunal’s opinion that the Engineer has no authority to depart from a rule which remained binding on the parties.’

We should not, however, look upon this award as being ‘the final word’ on the enforceability of a late-issued DAB decision. The FIDIC forms of contract are essentially neutral on this issue. Ultimately, the question of whether a late-issued DAB decision is enforceable is to be determined as a matter of contractual interpretation, albeit in the context of a contract which does not explicitly address this issue.

We may also take cognisance of alternative approaches from other sources. For example, in the analogous South African case of *Freeman NO v Eskom Holdings Ltd*, Kathree-Setiloane AJ held that a late-issued adjudicator’s decision under the NEC form of contract would not (in a purely contractual context) be invalid simply because it was issued late:

³² Extracts from the Award were published in the ICC International Court of Arbitration *Bulletin*, Vol 19(2), 2008.

‘It is clear from Core Clause 92.1 of the contract that the adjudicator settles the dispute as independent adjudicator and not as arbitrator. His decision is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. So, in the absence of a clause, which makes ‘*time of the essence*’ failure by an adjudicator, to deliver his or her award in the time stipulated in the contract, cannot be rendered as binding on the parties or of any force and effect. Unlike in arbitrations, there is no statutory or common law contractual basis for declaring the delivery of a late adjudication award invalid, particularly where there is no agreement between the parties that unless the decision is made within a certain time it shall not be binding or of any effect. There is accordingly no basis in law for treating a delayed adjudicator’s award as invalid.’³³

Similarly, in the FIDIC forms there is no wording which makes ‘time of the essence’ in relation to the giving of a DAB’s decision. Nor do the FIDIC forms stipulate that unless the DAB’s decision is given within the time for doing so, any late-issued decision shall not be binding and will be of no legal effect. Accordingly, there is seemingly scope for the reasoning in *Freeman* to be applied by analogy in a FIDIC context.

(ii) Errors and procedural shortcomings

If a dispute is referred to a DAB, and the DAB gives a reasoned, written decision within the time for doing so addressing the matters in dispute, will any qualitative shortcomings in the decision, or in the process by which the DAB reached its decision, affect the decision’s status? Let us consider this question by breaking it down into the qualitative elements of ‘error’ and ‘procedural shortcomings’.

Whether an *error* – of fact, law or both – has an invalidating effect on a DAB’s decision is to be considered primarily as a matter of contractual interpretation. A DAB is a creature of contract, and the status of a DAB’s decision, including the grounds (if any) on which it may be impugned, must usually be set out in the contract itself. From an English law perspective, if a contract does not identify the grounds upon which a decision made pursuant to it will not have contractual effect, the decision will be upheld provided that it otherwise meets the criteria for being a ‘decision’ under the relevant contract. This is why, in the case of contractual expert determinations (which are analogous to the DAB process) it is common to find provisions to the effect that the expert’s determination will be binding upon the parties unless it is affected by, among other things, ‘manifest error’. As a matter of common law, absent such a stipulation an expert’s determination will be binding *even if* it contains a ‘manifest error’.³⁴

33 *Freeman NO v Eskom Holdings Ltd* [2010] ZAGPJHC 137 (South Gauteng High Court, Johannesburg), para [23].

34 See, in this regard, McHugh JA in *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, NSWCA, pages 335–336; Vickery J in *500 Burwood Highway Pty Ltd v Australian Unity Ltd* [2012] VSC 596, paras [172] and [267]-[275].

The FIDIC contracts are silent as to the effect of any error in a DAB's decision upon its validity. From a common law perspective, therefore, the characterisation of the contractual scheme is one pursuant to which error in the DAB's decision does not represent a vitiating factor. Thus, by entering into a FIDIC contract which contains a DAB process, the parties are taken to have accepted the binding effect of a DAB's decision 'for better or worse with the attendant risks of error which are inherent in the ordinary human weaknesses of any tribunal'.³⁵

We may also say that the remedy for a party who is aggrieved by the contents of a DAB's decision, on the basis that it contains significant errors (and that the DAB 'got it wrong') is to issue a Notice of Dissatisfaction pursuant to Sub-Clause 20.4, and then (following amicable settlement discussions, if unsuccessful) seek to have the result of the DAB's decision reversed in a subsequent arbitration pursuant to Sub-Clause 20.6.

Turning now to 'procedural unfairness': if the DAB conducts the adjudication before it in a manner which could be described as procedurally unfair, does this affect the validity of the DAB's decision? In the context of a FIDIC DAB, 'procedural fairness' requires a DAB to 'act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case'.³⁶

Let us assume that a DAB fails to afford procedural fairness, for example by refusing to allow the Employer to make a submission on a key issue before the DAB. Does such conduct render the DAB's decision void? Once again, the FIDIC forms give no clear indication of what status the DAB's decision has, and whether it is binding upon the parties notwithstanding the Board's mishandling of the dispute. Nor may we readily conclude, as perhaps we can in the case of errors of fact or law, that the parties have agreed to accept the DAB's decision as binding notwithstanding the procedural unfairness of the DAB. Parties may be taken to accept ('for better or worse') that a DAB, acting in good faith and with the best of intentions, may come to an erroneous conclusion on key issues of fact or law. The risk of error at the DAB level may be acceptable to a party, knowing that the effect of any error can be undone in a later arbitration. But it may be rather different to say that each party has accepted the risk of the DAB acting partially, or failing to give a party an opportunity to present its case, *even if* that party may later seek a corrective decision from an arbitration tribunal. It may, therefore, be hazardous to express any firm conclusion on the character of a DAB decision resulting from or manifesting any 'procedural unfairness'.

(iii) 'Interim' or 'provisional' decisions

One of the more curious issues that has emerged in relation to DABs' decisions is whether a DAB is entitled to issue an 'interim' or 'provisional'

35 Roskill J in *Frank H Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 WLR 506, QBD, page 524; Sir Donald Nicholls V-C in *Jordan v Norfolk County Council* [1994] 1 WLR 1353, ChD, page 1358.

36 Procedural Rules (Annexed to the General Conditions of Dispute Adjudication Agreement), para 2(a).

decision. To explain how and why such a decision might be issued (or, at least, why giving such a decision may be regarded as desirable), let us consider the following scenario:

- A Contractor claims that it is entitled to a three-month extension of time and damages for prolongation in the amount of US\$3m on the basis of the Employer having committed various breaches of contract.
- The Contractor submits its claim to the Engineer, who rejects it on grounds including that the claim is unsupported by factual or analytical material.
- Undeterred, the Contractor refers the dispute over its claim to the DAB for its decision.

If the DAB is satisfied that the Contractor has grounds for its claim (ie that the Employer committed breaches of contract which caused the Contractor to be delayed and incur additional cost), but the DAB is not satisfied on the material presented by the Contractor that it is entitled to a three-month time extension and damages in the amount of US\$3m, the DAB may see some merit in deciding that the Contractor is entitled to *some* extension of time and *some* damages, without wishing to close off the issue, should the Contractor subsequently be able to adduce new or more detailed material substantiating its claim. In such a case, a DAB may regard it as both fair and expedient for it to decide, say, that the Contractor is entitled to an ‘interim’ or ‘provisional’ extension of time of one month, and to be paid damages in the amount of US\$1m.

The logic of taking such an approach is that, although the DAB’s decision is immediately binding, unless and until superseded by an amicable settlement or arbitral award, it permits the Contractor to supplement or improve upon its claim without being required to prosecute an arbitration. For example, the Contractor could submit more detailed substantiation for the remainder of its claim (ie the additional two months of time extension and the additional US\$2m claimed as damages) to the Engineer, and then to the DAB (assuming that the Engineer did not accept the further substantiation).

Although such an approach may, in certain cases, be a commendable one insofar as it avoids the need for the Contractor to commence an arbitration in order to obtain the balance of the relief it seeks, the legal question for us to consider is whether a DAB is entitled to render an ‘interim’ or ‘provisional’ decision on the referred claim.

We find no answer to this question in the words of Sub-Clause 20.4.³⁷ All that says with regards to the issuing of the DAB’s decision is that the DAB, within

37 It may be noted, however, that para 5(g) of the Procedural Rules (Annexed to the General Conditions of Dispute Adjudication Agreement) entitles a DAB to ‘decide upon any provisional relief such as interim or conservatory measures’. Such language could be seen as supportive of a DAB being entitled to issue an ‘interim’ or ‘provisional’ decision. However, if one were to draw an analogy with ‘interim measures’ ordered in arbitrations, where we now encounter so-called ‘emergency arbitrators’ being deployed to secure urgent interim relief (see, in this regard, Christian Johansen, ‘The Emergency

the applicable timeframe for doing so, ‘shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause’. The DAB must therefore ‘decide’ the issue referred to it. If, however, a DAB gives a ‘provisional’ or ‘interim’ decision, is it ‘deciding’ the matter in dispute, or is it doing something less than that, so that it cannot be said to have given a ‘decision’ for Sub-Clause 20.4 purposes? Is a ‘decision’ made if it is only a partial decision, and not ‘the full answer’ to the question posed?

As with the other issues considered above, reaching a firm conclusion on this issue is problematic. There is nothing in Sub-Clause 20.4 which expressly delimits the characteristics of a DAB’s decision, so as to prevent a ‘provisional’ or ‘interim’ decision from being made. If, therefore, a DAB renders a reasoned decision on the dispute referred to it, the decision should (on this view) be treated as binding even if the DAB’s decision leaves open the possibility of further claims or evidence regarding the particular dispute. If a DAB’s decision provides a definite outcome (albeit one which may later be improved upon), it decides the dispute and gives to the parties a clear result.³⁸ On the other hand, it could be said that a DAB’s ‘decision’ which does not purport to address *fully* the legal and factual issues referred to it is not a ‘decision’ for the purposes of Sub-Clause 20.4, because it does not decide all of the matters in dispute.

The scope for parties (or, specifically, a party who wishes to avoid complying with a DAB’s decision) to press such arguments should not be underestimated. Whether a valid DAB decision exists is important not only as between the parties, when considering the immediate consequences of any such decision, but also when it comes to the enforcement of the DAB’s decision and indeed the prosecution of the underlying claim in any arbitration which is subsequently brought. If there is a DAB but it has not issued a ‘decision’ in respect of a referred dispute, there is no right to proceed to arbitration: the DAB process must be undertaken again.

F Problems with enforcement in arbitration

(i) Introduction

As we have seen, a DAB’s decision (if valid) takes immediate legal effect as between the parties and is ‘binding upon both Parties’, unless subsequently superseded by an amicable settlement or an arbitral award. The DAB’s decision will become ‘final and binding’ upon both parties if a notice of

Arbitrator in Construction Disputes’ [2013] ICLR 266), it may be thought that the ‘provisional relief’ which DABs are empowered to issue should be confined to matters of urgency, which need to be decided upon before the DAB is able to render its eventual ‘decision’ on the merits of the particular dispute. Paragraph 5(g) therefore does not, it is suggested, resolve conclusively the issue of whether a DAB may issue an ‘interim’ or ‘provisional’ decision on the merits of the underlying dispute.

38 Which, it may be added, is different from a tribunal expressing its views in ‘draft’ form and inviting comment, where it is not intended that the ‘draft’ decision will take effect: see Judge Richard Seymour QC in *Simons Construction Ltd v Aardvark Developments Ltd* [2003] EWHC 2474 (TCC), [2004] BLR 117, para [24] (considering a statutory adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996 (UK)).

dissatisfaction is not given by either Party within 28 days of the DAB giving its decision. Assuming, however, that such a notice *is* given, the DAB's decision will be 'binding' (pending amicable settlement or arbitration) but not 'final and binding'. The dispute the subject of the DAB's decision may be re-heard (*de novo*) in arbitration under Sub-Clause 20.6.³⁹

In the case of a 'final and binding' DAB decision (that is, where a notice of dissatisfaction has not been given within 28 days of the decision being given) which the unsuccessful Party has failed to comply with, there is an express right under Sub-Clause 20.7 for the successful party to 'refer the failure itself' to arbitration. In the case of a 'binding' DAB decision (where a notice of dissatisfaction *has* been given within 28 days), Sub-Clause 20.6 provides that (in the absence of an amicable settlement) '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'. Although Sub-Clause 20.6 provides for the *final* settlement of a dispute by way of international arbitration, no provision is made as to how a 'binding' decision of a DAB is to be enforced in the meantime, that is pending the final determination of the dispute in arbitration. This omission from Clause 20 of the FIDIC form has, as we shall see, given rise to significant controversy and litigation.

(ii) Enforcement: the 'wrong' dispute

How is a 'binding' (but not a 'final and binding') DAB's decision enforced? The short answer to this question is 'through international arbitration', because this is what Sub-Clause 20.6 provides. But what is the 'matter' which a party, who has obtained a DAB's decision in its favour, must refer to arbitration? Asking such a question may seem a little abstruse. If a Contractor has a DAB's decision which states it is entitled to be paid US\$10m by the Employer, and the Employer issues a notice of dissatisfaction in respect of the decision (and refuses to pay the US\$10m), is it not sufficient for the Contractor to file a Request for Arbitration with the ICC, rehearsing the background to the dispute and the DAB's decision, and to seek an award from an arbitral tribunal which orders the Employer to pay US\$10m to the Contractor? Such a form of Request for Arbitration may indeed be unobjectionable.

There is, however, case law from Singapore that highlights how the form of expression of a Request for Arbitration may indeed be critical to the enforceability of a DAB's decision, and that great care must therefore be exercised in framing a Request. The case which has prompted this re-thinking of the DAB enforcement process is *PT Perusahaan Gas Negara (Persero) v CRW Joint Operation (Indonesia)*,⁴⁰ usually referred to as 'the *Persero* case'. In the briefest of terms:

39 An arbitration under Sub-Clause 20.6 is not an appeal from the DAB's decision, as the terms of Sub-Clause 20.6 make abundantly clear.

40 The *Persero* case has resulted in three judgments to date: at first instance in the Singapore High Court [2010] SGHC 202, and then on appeal to the Singapore Court of Appeal (Singapore's highest court) [2011] SGCA 33, before new proceedings were commenced and a decision of the High Court delivered in July 2014: [2014] SGHC 146.

- The Contractor submitted to a DAB a dispute over whether it was entitled to additional payment for work performed (for variations and the like);
- The DAB decided that the Contractor was entitled to additional payment in the sum of approximately US\$17m;
- The Employer gave a notice of dissatisfaction in respect of the DAB's decision (thus making it 'binding', but not 'final and binding'), and refused to pay the amount decided by the DAB to be owing;
- The Contractor then commenced an arbitration, seeking to enforce the DAB's decision. In its Request for Arbitration, the Contractor stated: 'This request for arbitration shall be limited to giving prompt effect to the [DAB's] [d]ecision dated 25 November 2008 in which instance shall be the fulfillment of [the Employer's] obligation to perform payment of the US\$17,298,834.57...to [the Contractor]';⁴¹ and
- An arbitral tribunal was duly appointed, and by a majority the tribunal gave a 'final award' which upheld the DAB's decision, awarding the Contractor the US\$17m that the DAB decided was owing. The tribunal did not, however, consider the merits of the underlying dispute between the parties, and whether the Contractor was in fact due the amount which it had claimed. It simply enforced the DAB's decision.

The Employer sought to resist the enforcement of the award against it. It said that Sub-Clause 20.6 empowered (and required) an arbitral tribunal to 'settle' by international arbitration the 'dispute in respect of which the DAB's decision... has not become final and binding'. In other words, it is only 'the dispute' as referred to the DAB which the arbitral tribunal must consider, and upon which it must rule. In the *Persero* case, the Contractor did not refer to the arbitral tribunal the underlying 'dispute' (concerning its claimed entitlement to payment). It only sought to refer to arbitration the enforcement of the DAB's decision, and not the underlying 'dispute'. Accordingly, so the argument went, as the Contractor had not referred the underlying dispute to arbitration, and the tribunal's 'final award' only considered the enforcement of the DAB's decision, the 'dispute' which the Contractor had referred to arbitration was not the correct 'dispute' for Sub-Clause 20.6 purposes. The tribunal's award was therefore made without jurisdiction.

The Singapore courts accepted the Contractor's argument, and held that the tribunal's award was made without jurisdiction under Sub-Clause 20.6. In order for Sub-Clause 20.6 to be engaged, the very dispute which was referred to the DAB also needed to be referred to arbitration.⁴² Sub-Clause 20.6 did not permit only the issue of the non-compliance with the DAB's decision to be

The 2014 judgment indicates that it is the subject of an appeal to the Singapore Court of Appeal. The author understands that the appeal has not (at the time of writing) been heard.

41 [2011] SGCA 33, para [41].

42 See also Christopher Seppälä, note 5, page 972.

referred, or simply the enforcement of the DAB's decision. The Singapore Court of Appeal held that if a party wished to enforce a DAB's decision, the process to be followed was for the same dispute which was referred to the DAB to be referred to arbitration, and pending the arbitral tribunal's (final) ruling on the merits of that dispute, the tribunal could enforce the DAB's decision 'by way of either an interim or partial award'.⁴³

The correctness of the Singapore Court of Appeal's decision has been questioned, but in this paper I will not seek to examine the legal merits (or not) of the approach taken by the court.⁴⁴ The practical point which emerges from the *Persero* case is that if a court takes a somewhat formalistic approach (as the Singapore courts arguably did)⁴⁵ in their characterisation of 'the dispute' referred to arbitration, it has the potential to de-rail the enforcement of a DAB's decision through arbitration. Following the Court of Appeal's decision, the Contractor commenced a fresh arbitration (in the manner suggested by the Court of Appeal); it obtained an award (by a majority) enforcing the DAB's decision on an interim basis, and in July 2014 the Singapore High Court upheld the enforcement of the tribunal's award.

The Contractor in *Persero* 'got there in the end'; however, given that the DAB's decision was given on 25 November 2008, it had to wait almost six years (to July 2014) before obtaining judgment in its favour, and as matters stand that judgment is under appeal. FIDIC's reaction to the *Persero* Court of Appeal decision was to suggest amendments to its forms, deleting Sub-Clause 20.7 and replacing it with:

'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 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.'⁴⁶

G The potential benefits of using DABs

The preceding sections of this paper may convey the impression that DABs under the FIDIC forms are inherently problematic, and perhaps are to be avoided if possible. Such an impression, however, needs to be balanced against the benefits that DABs – if used effectively – may bring.

43 [2011] SGCA 33, para [101].

44 See, for example, Christopher Seppälä, 'How Not to Interpret the FIDIC Dispute Clause' [2012] ICLR 4; Gerlando Butera, 'Untangling the enforcement of DAB decisions' [2014] ICLR 36.

45 Compare, in this regard, the more 'pro-enforcement' approach taken by the South African courts in *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* [2013] ZAGPJHC 155 (considering the enforcement of a DAB decision under a FIDIC form); and *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* [2013] ZAGPJHC 249 (considering the adjudication provisions of the JBCC Services 2000 Principal Building Agreement).

46 FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1st April 2013: <www.fidic.org>.

What are the potential benefits of using a DAB? The principal value of dispute boards, whether of the advisory or the adjudicative variety (such as a DAB), lies in their ability to ensure that disputes arising on construction and engineering projects are resolved promptly, without festering so as to lead to an (otherwise avoidable) arbitration or court proceedings.⁴⁷

As Akenhead J held in the Technology and Construction Court, London (with reference to Dispute Review Boards):

‘DRBs have become quite common on very substantial infrastructure type projects around the world, many of them involving hundreds of millions of dollars or more. They often comprise three members, one being chairman, who will keep a weather eye on the project as it goes along, with more or less regular meetings at the site. One of the main ideas of having DRBs is that they can look at disputes as they emerge and make recommendations to the parties with a view to ‘nipping in the bud’ such incipient disputes.’⁴⁸

Similar observations may be made in relation to DABs, and in particular standing DABs whose role it is to ‘keep a weather eye’ on the project and assist with the speedy resolution of issues which have crystallized into disputes.

But how, it may be asked, are we to determine in a measurable sense whether DABs are worthwhile? Two metrics are commonly used to expound the benefits of dispute boards (including DABs).

The first metric is what might loosely be described as ‘the settlement rate’. The vast majority of disputes which are referred to a dispute board for decision do not lead to subsequent arbitration or litigation.⁴⁹ This is the major selling point of dispute boards, and indeed DABs as used under the FIDIC forms. If it were the case that DAB decisions were regularly challenged (either directly or collaterally) through international arbitration, the DAB process would represent little more than a dress rehearsal for the main event

47 Furthermore, in the case of a standing DAB composed of experienced and skilful members, it may be possible for the DAB to make recommendations to the parties during the course of a project which have the *effect* of preventing disputes from arising.

48 *Mi-Space v Lend Lease*, note 27, para [16].

49 One of the few available sources of data on the use of dispute boards is the website of the Dispute Resolution Board Foundation: <www.drb.org>. The DRBF database identifies projects – mainly from the United States – where dispute boards have been used, the number of times the dispute board ‘heard’ a dispute, whether the dispute ‘settled’ as a result of the dispute board process, or alternatively whether the dispute went to ‘other resolution’ (presumably arbitration, litigation or even both). It has, however, been observed that ‘The use of Dispute Boards in the United States is different from that in most other parts of the world in that they are review boards giving nonbinding advisory opinions (DRBs) rather than adjudication boards (DABs) which produce contractually binding decisions’: Murray Armes, ‘Everybody has won and all must have prizes’: how the Dispute Board process could improve UK adjudication’ (2011) 27 *Construction Law Journal* 552, page 557. Given this, it may be important to understand whether there are qualitative distinctions between DRBs and DABs which lead to quantitative differences in their success at resolving disputes, without further steps (such as arbitration) being taken.

(that is, the Sub-Clause 20.6 arbitration). The cost and time expended by the parties upon the DAB process would therefore have been wasted, save to the extent that material prepared for the DAB could be recycled by the parties in the subsequent arbitration.

If, however, DABs' decisions are not disputed on any widespread basis, ie are accepted by the parties, it may be safe to conclude that the use of a DAB is indeed worthwhile.⁵⁰ The caveat to this is that a DAB process will only be worthwhile to the extent that it represents a less expensive and time-consuming means of resolving construction and engineering disputes than international arbitration. If the overall cost of using a DAB to resolve disputes approximates or even exceeds the cost of resolving the same disputes by way of arbitration, the justification for using a DAB disappears, given (among other things) the *risk* that the DAB's decisions will be contested in a subsequent arbitration, in which case the overall cost to the parties may be (say) double what it would have been had the DAB procedure been excised from the contract during its drafting and negotiation. However, it seems likely, given the relatively short period for the DAB to reach its decision (84 days, subject to extensions), and the well-known expense of ICC arbitration (as provided for in the Red, Yellow and Silver Books) that, for any given dispute, the cost of a DAB deciding the dispute will usually be less than the cost of having it decided in an ICC arbitration. Nevertheless, there would not appear to have been any study conducted to confirm whether or not this is the case.

The second metric we may apply to DABs is their cost. Cost is often a major consideration – and indeed a deterrent – to the use of DABs (and dispute boards generally). This concern is pronounced in relation to standing dispute boards, which may be involved from a project (at a cost) from the outset. The countervailing argument which is usually put forward when the delicate matter of 'cost' is raised is that the cost to the parties of establishing and using a dispute board usually represents a very small proportion of the total project cost. As one learned commentator has said:

'A rule of thumb base costs price for a DB is between 0.1% - 0.2% per year of the total project cost. For a \$100m project, the use of a DB would therefore cost between \$100,000 and \$200,000. By contrast, it would not be unusual for the total costs of a major arbitration in a large project to exceed \$500,000'.⁵¹

50 Indeed, it could even be suggested that, if DABs' decisions are generally regarded as 'acceptable' (as evidenced by the fact that they are usually not disputed), construction contracts should do away with the arbitration tier of the dispute resolution 'cake', and confer upon the DAB's decision an element of finality, thus making the DAB the 'final port of call' for dispute resolution: see, in this regard, Derek Griffiths, 'Do dispute review boards trump dispute adjudication boards in creating more successful construction projects?' (2010) 76 *Arbitration* 686, page 692. There would appear to be no legal objection to a contract providing that a DAB's decision is to take effect as an arbitral award, and to have final and binding effect upon the parties.

51 Professor Doug Jones, 'Dispute boards: preventing and resolving disputes', Paper delivered to the SCL Malaysia Construction Law international conference, Kuala Lumpur, 19 September 2014, page 10.

A marginal cost increase of 0.1% - 0.2%, flowing from the decision to use a DAB, may seem miniscule, and certainly not disproportionate. However, for many construction companies, whose margins are already wafer thin, taking a further margin cut may be commercially unacceptable, or at least it will require a material 'upside' (in terms of project outcome) before it becomes acceptable.⁵² If, for example, it could be demonstrated that using DABs will ultimately lead to savings, efficiencies or optimum relations between contracting parties than if no DAB were used at all, that would certainly add to the appeal of the DAB concept.⁵³ None of this is to cast any doubt on the notion that there may be a strong 'business case' for using DABs in construction and engineering projects, as the FIDIC contracts advocate. It is suggested, however, that more could be done to make the case for the use of DABs.

H Conclusion

We live in an age of great innovation – not only *technical* innovation, but also *legal* innovation. New ways of avoiding or resolving disputes have emerged only in the past few decades.⁵⁴ DABs are a relatively new device in the spectrum of modern dispute resolution. The consequences of this are that they have a limited track record, and (naturally) legal glitches have been exposed as parties have (in pursuing their own interests) sought to test the limits and weaknesses of the DAB procedure, as used under the FIDIC forms.

In time, no doubt, the creases in the DAB process will be ironed out, and contracting parties – or at least the more enlightened ones – will come to see DABs as a useful tool for resolving disputes in a short time period, as a project progresses. In this way, DABs may assist in promoting good relations between contracting parties, by dealing with issues as-and-when they arise, and then (if the parties accept 'the referee's decision') allowing them to get on with the project, rather than storing-up suspicion and resentment throughout the project, only for it to result in a contractual termination, or a protracted and expensive arbitration once relations have broken down. If part of the work

52 A recent report by KPMG in the UK found that on average contractors' profit margins were just above 1%. The report concluded that 'margins currently being generated are not sustainable in the long term': 'Construction Barometer: Recovery in Sight?' (September 2014): <www.kpmg.co.uk>. Of course, margins in other countries may well be different (and significantly greater than those in the UK). However, the point is still a valid one: no commercial party will willingly accept an increase in its cost (and decrease in its margin) for a product (in this case, a DAB's decision) which does not physically add to the performance of a project unless there is some perceived benefit to it.

53 A recent article from Australia identifies correlations between the use of dispute boards for Australian infrastructure projects and successful project outcomes, as compared with like projects where dispute boards were not used: Graham Peck, 'The Benefit/Cost Equation for Dispute Boards – Australian Experience' (2014) 18 DRBF Forum 1. However, what is absent is evidence of whether positive project outcomes result from the use of dispute boards, or whether they occur for other reasons. Given that information concerning construction and engineering projects and their contractual methods of dispute resolution is essentially private in nature, and not readily obtainable, this makes it difficult for the operation of dispute boards in practice to be studied with any precision. Nevertheless, the available information (both statistical and anecdotal) on the performance of dispute boards is generally positive as to their usefulness.

54 See Robert Gaitskell, 'Current trends in dispute resolution' (2005) 71 Arbitration 288.

that DABs do is to alleviate suspicion and mistrust, they should be embraced by contacting parties. To borrow the words sung by a man who lived and died in Memphis,⁵⁵ who was no Pharaoh, yet to many was ‘the King’:

‘We can’t go on together,
With suspicious minds (suspicious minds),
And we can’t build our dreams,
On suspicious minds.’

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⁵⁵ Memphis, Tennessee; as opposed to the capital of ancient Egypt after which it was named.

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