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A FIDIC CONTRACT AND LEGAL DILEMMA

Termination of the appointment of a DAB in Civil Law Jurisdictions

The interpretation and unfortunate operation of the last paragraph of Sub-Clause 20.2 in conjunction with Sub-Clause 20.3 (d) and Civil law

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Prior to and in 1999, FIDIC decided that the Engineer's further role as adjudicator had to be handled by the DAB and published accordingly until the Red, Yellow & Silver Books were introduced and used by containing agreement on adjudication.

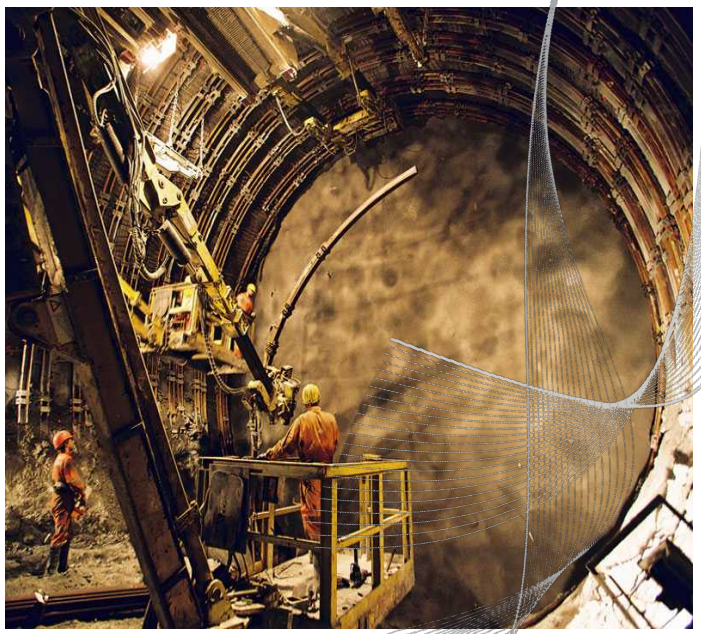
The basic principle, recognized in both Civil and Common law jurisdictions, which allows agreement on dispute adjudication, is the principle of contractual freedom.

Under Common law systems, it is of paramount importance to set out all the terms governing the relationship between the parties within the contract. On the contrary, under Civil law systems, despite the fact that the Parties agreed on certain terms within the Contract, the ambiguities of some Clauses may be resolved under the applicable law to the Contract.

The consent of the Parties in appointing the DAB represents the **"will of the Parties"** – seen as a technical juridical instrument. The contractual and legal acts of appointment of the DAB comprise the correspondence exchanged between the Parties and the résumés of the members proposed to be on the dispute adjudication board and indeed the DAB's acceptance of the appointment.

The appointment's instrument symbolises the materialization of the **Will of the Parties**, known in the Civil law doctrine as being a psychological element that denotes the Parties' trust in the DAB members' impartiality, professional qualities, experience and personal career achievements.

From a Civil law jurisdiction viewpoint, the inclusion of a clause or clauses in the FIDIC contract, by which the Parties convene to subsequently sign with the appointed DAB a tripartite agreement, does not only imply an obligation of the Parties, but it may be considered as rather being a bilateral promise to contract or as an agreement in principle.



Although it may be included in the bilateral promise to contract or in the agreement in principle, yet the appointment of the DAB *per se*, produces legal effect (i.e. exists) without the need of the **Dispute Adjudication Agreement**.

The general terms of the DAA refer to the mutual agreement between the Employer and the Contractor regarding, *inter alia* the revocation of the DAB members, consequent to the termination of the DAA. Yet, to what extent this type of contract may be terminated, should the Parties have differing opinions with regard to the DAB member(s) impartiality and actions? This is the purpose of these discussions.

I have adopted for this purpose Romania, as a typical Civil law jurisdiction, because they use the FIDIC and the DAB over there extensively.

Article 1321 of the Romanian Civil Code, stipulates the rules that govern the termination of contracts. The legislator has set forth that when these rules are insufficient, the rules of the most similar contract shall apply.

One such similar contract is the contract of mandate.

Thus, the provisions comprised therein in respect of the unilateral termination (revocation), might apply to the termination of the DAA.

This is so due to the "*Intuitu personae*" nature of the DAA, whereby the formation of such contract took into consideration the trust of the Parties in the DAB members and precisely for this reason, the formation of the DAA took place with the DAB member(s) previously appointed by the parties.

Yet if the DAA is construed to be similar to the contract agreement, then the matter is different.

In such interpretation, one Party cannot give unilateral notice of termination for default to a DAB member as its perceived result of the DAB's failure to fulfil any of its undertaken obligations. Consequently, unilateral rescission / termination for default cannot operate in the case of a DAA. Should the unilateral termination be perceived as abusive, then the party terminating it might be held liable for damages thereof.

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Thank you!

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