



Forum

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Dispute Adjudication in Civil Law Countries: Phantom or Effective Dispute Resolution Method?

Author's Note: There is a lot of promotion for Dispute Review Boards and Dispute Adjudication Boards. This article focuses on how to deal with this excellent type of dispute resolution feature in a civil law environment. Part One will focus on an introduction to the subject matter. Part Two, which will be published in the November issue of the Forum, will discuss the legal nature of dispute adjudication, aspects of private international law and the enforceability issue. Members can access the full article in the Library on the DRBF website.

By Dr. Götz-Sebastian Hök

Worldwide we find complaints about lengthy, expensive and ineffective construction disputes. Germany is a typical example for this. However, in the words of an eminent former judge of the German Federal Supreme Court the bad reputation of court proceedings stands in a remarkable disproportion of the daily practise of courts. There are as many construction disputes as always irrespective that they are expensive and that they take long.¹

By contrast a great variety of alternative dispute resolution methods including dispute adjudication is available. However, in fact on the German domestic level alternative dispute resolution methods are rarely used. The reasons for this are not very clear. To some extent baseless fears and irrational anxieties and actual lack of persuasive arguments in favour of alternative dispute resolution methods are certainly contributing factors. Also there is insufficient and inadequate information about dispute adjudication. Moreover the term alternative dis-

pute resolution and its subtitles such as dispute review and dispute adjudication are more or less vague and missing sharp definitions. Probably more important Civil law practitioners frequently do not have encouraging experiences with alternative dispute resolution methods except for arbitration.

Last but not least the great variety of suggested methods causes perplexity. There is statutory adjudication and contractual adjudication.² The ICC suggests Combined Dispute Boards and local institutions have published adjudication rules.³ Fast track arbitration⁴ and dispute adjudication are similar features. Besides there is the Italian *arbitrato irrituale* (contractual arbitration)⁵. In some areas of the world the Engineer still has adjudication powers⁶. Multiparty dispute adjudication and back-to-back adjudication are upcoming features⁷. Expert determination, expert arbitration or binding advice features are complementary means of dispute resolution. Hence, a purposeful discussion presupposes a definition or description of dispute adjudication in a legal context.

(continued on page 20)

¹ Quack [2010] ZfBR 211

² Sub-Clause 20.4 FIDIC 1999; see Option W1 and Option W2 NEC3

³ The German Institution of Arbitration has published Adjudication Rules

⁴ Patil, *The Law of Arbitration and Conciliation*, 5th Edition, Pune 2008, 28

⁵ As to the recognition and enforcement of an Italian *lodo irrituale* in Germany under the 1958 New York Convention see German Federal Supreme Court, judgment from

08.10.1981 - III ZR 42/80, [1982] NJW 1224; BayObLG, ruling from 22.11.2002 - 4 Z Sch 13/02; [2003] Internationales Handelsrecht (IHR), 140=[2003] NJW-RR 502 = RKS A 4 a Nr. 60. In both cases the court have dismissed the respective applications under New York Convention.

⁶ Frequently based on Sub-Clause 67.1 FIDIC 1987 (1992), for example in India or Oman

⁷ See the new FIDIC Red Book Subcontract form

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President's Page



Dear DRBF Members,

For those of you who didn't get to Sao Paulo, Brazil for the DRBF International Conference in May you missed a great time. Sao Paulo is a city of over 22 million people, and after riding in from the airport every one of them owns and drives a car, motorcycle, motorbike or scooter. I wouldn't begin to try and drive there. Miami traffic looks tame when compared to Sao Paulo.

I would like to thank Gilberto Vaz and his colleagues Pedro Nicoli and Roberto Novais, who between them did an excellent job of putting on an interesting and informative conference. It was my first time where the individuals that did not speak the language were supplied with earphone and had simultaneous translation into English, or in the case of an English speaker into Portuguese. All the speakers had great English language skills, but some of the individuals attending the conference were not fluent in English or Portuguese, hence the need for simultaneous translation.

I did notice on the way into the city that every construction person, from laborer to superintendent, working anywhere near the roadway was dressed in an orange suite with fluorescent bands to make them even more visible. I don't know what that must cost the contractor, but it was impressive. I also noticed that the equipment appeared to be well kept, like the operators took pride in their machinery.

The Gala Dinner was held in a restaurant built around a huge 130 year old fig tree and was about 10 blocks downhill from the hotel. It was a nice walk to the restaurant, but a long climb back up the hill to the hotel. Did I tell you that the area of town where we were is located in a very hilly section of town, and we seemed to be at the top of the hill? Looking out my hotel window on the 13th floor it was high rise apartment buildings and office buildings as far as I could see in any direction, and I understand that it was the same on the other side of the hotel too.

I'm sorry that I didn't take some additional time to visit other areas of Brazil. I understand it is a beautiful country with many interesting places to visit. I may take the time in the next year or so to go back.

Speaking of places to visit the Annual Meeting of the DRBF will be in Seattle on September 23 and 24, and if you haven't been to Seattle there are many things to see and do. There are tours being arranged to various construction projects, and other tours will be available to some popular tourist destinations for both delegates and accompanying persons. A tour of the Boeing Aircraft complex will be available the day before the conference, and includes a view of the production line for some impressive aircraft. If you miss Seattle, the International Conference will be held in Sydney, Australia the first weekend in May of 2012. This should be another exceptional location to spend some additional time to tour the country and visit places like the Great Barrier Reef or the neighboring country of New Zealand.

The DRBF's Australian Chapter, DRBA, will be our host in Sydney and from what I have heard concerning the plans for this conference you won't want to miss it.

A handwritten signature in black ink that reads "John C. Norton". The signature is written in a cursive, flowing style.

John C. Norton
President, DRBF Executive Board of Directors

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The Executive Committee meets monthly. Recent topics have included:

- Joint conferences with King’s College and the Milan Chamber of Commerce.
- Creation of a DRBF Operating Procedures document for internal policies.
- Expansion opportunities into new regions and strategic partnerships with other industry organizations.

Summaries of the Executive Board meetings are available to all DRBF members on the DRBF web site. To access the **Board of Directors Meeting Minutes Summary**, go to www.drb.org. Click on the **Member Login** button, and then click on **DRBF Board of Directors**.

Executive Board of Directors Meeting Schedule:

August 19, 2011 by conference call
September 22, 2011 in Seattle, Washington
October 21, 2011 by conference call

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The Board of Regions 1 and 2 also meet on a monthly basis. Questions for the Executive or Regional Boards should be addressed to the Board President, care of:

Dispute Resolution Board Foundation
19550 International Blvd. So., Suite 314, Seattle, WA 98188
Phone: 206-878-3336 Fax: 206-878-3338 Toll free (US only) 888-523-5208

Executive and Region 1 Board of Directors Election Underway

The DRBF is holding elections for open positions on the Executive Board of Directors and the Region 1 Board of Directors. Ballots are available online and are distributed to all members via email or hardcopy.

All DRBF members are invited to vote for the President Elect, Secretary, and Treasurer positions on the Executive Board. Region 1 members are invited to vote for the position of President Elect and a Director position open on that Board.

Summary statements of each candidate's experience and approach to the position are distributed to all members with their ballot. Ballots must be submitted by September 9, 2011.

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**Ballots are due by
September 9,
2011**

DRBF EVENT CALENDAR

September 13, 2011
4th UK Member's Meeting
London, UK

November 17-18, 2011
DRBF European Conference
Marriott Hotel, Brussels, Belgium

September 22, 2011
Training Workshops
Hyatt at Olive 8 Hotel, Seattle, WA

December 1, 2011
**2nd Annual Conference
International Construction Disputes:
Dispute Boards and Arbitration**
Milan, Italy

September 23-24, 2011
**15th Annual Meeting & Region 1
Conference**
Hyatt at Olive 8 Hotel, Seattle, WA

May 3-5, 2012
**12th Annual DRBF International
Conference**
Dockside Conference Center,
Darling Harbour
Sydney, Australia

October 6-7, 2011
**3rd DRBF Bucharest Regional
Conference**
Bucharest, Romania

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The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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Can Parties to a FIDIC Contract Safely Decline Giving Effect to a Dispute Board's Decision?

Editor's note: This article is based on the content of a dissertation by the author submitted in part fulfillment of an MSc degree in Construction Law & Dispute Resolution at the King's College of London in September 2010.



By Marcello Viglino

1. Introduction

FIDIC Conditions of Contract make provisions for the Dispute Board (the "DB"), or the Engineer, to give a decision on any dispute arising between the parties, as a mandatory precondition for any subsequent reference of the same dispute to arbitration.

Under these forms the DB/Engineer's decision (the "Decision") is binding on both parties who should promptly give effect to it, "unless and until" the Decision is revised by an amicable settlement or an arbitral award. However, there are no sanctions in these contracts against the failure to give effect to the Decision and it is fairly unclear what course of action is available to a party when the other has not complied with it.

This article considers the recent developments regarding the enforceability of DB's decisions by reference to three ICC arbitration cases and answers the question "*Can parties to a FIDIC contract safely decline giving effect to a Dispute Board's decision?*"

2. The dispute resolution clause in the FIDIC contracts

Before considering the ICC cases, it is useful to review the salient aspects of the dispute clauses in those FIDIC forms upon which the cases hinge.

2.1 The 1987 Red Book

The 1987 Red Book is still being used in many international projects and it pro-

vides for the Engineer to decide any dispute arising between the parties. Its dispute resolution clause is Clause 67, which significant sub-clauses are commented below.

Sub-Clause 67.1 - Engineer's Decision

Under this sub-clause any dispute in connection with the contract is to be referred to the Engineer who has to issue his decision within 84 days from such reference.

The parties are then required to "... give effect forthwith to every such decision of the Engineer unless and until the same shall be revised ... in an amicable settlement or an arbitral award".

A party dissatisfied with the decision of the Engineer may give notice to the other party of his intention to commence arbitration within a prescribed time, failing which the Decision becomes "final and binding" upon the parties.

Sub-Clause - 67.3 Arbitration

This sub-clause states that any dispute in respect of which the Engineer's decision has not become "final and binding" and that has not been settled amicably shall be finally settled in ICC arbitration.

Sub-Clause 67.4 - Failure to Comply with Engineer's Decision

Under this sub-clause, a party may refer directly to arbitration the failure by the other party to comply with an Engineer's decision, where no notice of intention to commence arbitration has been given and the decision has therefore become "final and binding", with-

out the need for a further Engineer's decision or any attempt at amicable settlement.

Sub-Clause 67.4 does not say what happens where a timely notice of intention to commence arbitration has been served (i.e. the Decision is binding but not final) and a party does not comply with the Decision as required by Sub-Clause 67.1.

2.2 The 1999 Red Book

The 1999 Red Book has largely replaced its 1987 edition and it provides for a Dispute Adjudication Board (the "DAB") to decide any dispute arising between the parties. The significant sub-clauses of its dispute resolution clause (Clause 20) are commented below.¹

Sub-Clause 20.4 - Obtaining DAB's Decision

The most important paragraph of Sub-Clause 20.4 with which we are concerned is the fourth:

Within 84 days after receiving such reference ... the DAB shall give its decision... The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award ...

This paragraph requires the DAB's decision to be given effect to, "until" it is revised, if at all, as suggested by the word "unless". The fifth paragraph then goes on to state:

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction.

This paragraph gives either party the opportunity to express dissatisfaction with the Decision and opens to the possibility

that its merits be discussed further. It is noteworthy that there is no reference to the effect of the Decision being suspended by service of a notice of dissatisfaction.

In my view, it makes perfect commercial sense that, in the interim, the Decision is given effect to irrespective of any notice of dissatisfaction being issued. It would make no sense if the parties were left where they were when the dispute arose after having gone through the pain and costs of a DAB referral, with the likelihood that also the construction activities on site are left in a stalemate situation pending the Decision becoming effective.

Regrettably, the wording of the fourth paragraph of Sub-Clause 20.4 is often ignored by the losing party who, having given notice of its dissatisfaction with the Decision, assumes to be no longer bound by it.

Sub-Clause 20.6 - Arbitration

This sub-clause states that unless settled amicably, any dispute in respect of which the DAB's decision has not become final and binding shall be finally settled by international arbitration.

Therefore, only in relation to those disputes that have been challenged and have not been settled amicably is there jurisdiction for an international arbitral tribunal to finally settle them.

Sub-Clause 20.7 - Failure to Comply with DAB's Decision

In the event that:

- a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 ...,*
- b) the DAB's related decision (if any) has become final and binding, and*

¹ Please note that the same comments would apply to the 1999 FIDIC Yellow and Silver Books, which dispute resolution clauses have broadly the same wording as in the Red Book

c) a Party fails to comply with this decision, then the other Party may ... refer the failure itself to arbitration under Sub-Clause 20.6 ...

Thus, a party can refer directly to arbitration the other party's failure to comply with a decision that has become "final and binding". What about the case when one party gives a timely notice of dissatisfaction and then refuses to comply with the Decision?²

What are the options open to the winning party when the losing party fails to comply with a binding but non-final Decision?³

To a large extent, the cases discussed in section 3 will answer these questions.

2.3 The 2008 Gold Book

Although not directly linked to the cases discussed below, this new FIDIC form deserves proper consideration because it introduced significant changes regarding the enforceability of DAB's decisions in its dispute resolution clause.

The most significant change is in the fourth paragraph of Sub-Clause 20.6 [Obtaining DAB's Decision] where it is stated that the DAB's decision "... *shall be binding on both Parties and the Employer's Representative, who shall promptly comply with it notwithstanding that a Party gives a Notice of dissatisfaction with such decision...*" (author's emphasis).

Furthermore, Sub-Clause 20.9 [Failure to Comply with DAB's Decision] states that the failure itself to comply with a DAB's decision, whether binding or final and

binding (i.e. irrespective of any notice of dissatisfaction), may be referred to arbitration for summary or other expedited relief, and reference to a further dispute board decision or amicable settlement is expressly excluded.

These provisions clearly constitute a major improvement on the subject of enforceability of DAB decisions.

3 Giving effect to a binding but not final decision

An arbitral award giving effect to an Engineer/DAB's decision should be one enforcing the Decision as it is, right or wrong, without considering its merits. This currently appears to be possible only for *final and binding* decisions under the 1987/1999 FIDIC Books, and for any decision *whether binding or final and binding* only under the Gold Book.

The arbitration cases discussed below consider the situation where the arbitrators were faced with one party's application to give effect to an Engineer/DAB's decision that had not become final and binding.

3.1 ICC Case No 10619⁴

In November 1994, an Italian contractor entered into two construction contracts (based upon the 1987 FIDIC Red Book) with the Roads Authority of an African State for the construction of two roads in the state of the Employer.

During the course of the works, the Contractor submitted two claims for time extension and additional payment for which it formally requested decisions from the Engineer pursuant to Sub-Clause 67.1.

² For comments on this sub-clause see N.G. Bunni, *The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works*, ICLR [2005] 272, April 2005

³ For comments on this point see F. Gillion, *How easily can a DAB decision be enforced?*, Shadbolt/Law FIDIC Briefing Paper, June 2009

⁴ For further comments on this case see Seppälä C.R., *An Engineer's/Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award*, White & Case, December 2009

In November 1998, the Engineer gave his decisions and granted the Contractor a sum of money under each of the two contracts.

The Contractor filed a timely and compliant notice of dissatisfaction, whereas the Employer did not do so. Neither of these decisions were complied with by the Employer.

In August 1999, the Contractor filed a Request for Arbitration with the ICC in which it raised a number of complaints, amongst which the *“Respondent’s failure to give effect to Engineer’s decision pursuant to sub-clause 67.1 of the contracts”*⁵

In February 2000 the Contractor declared its intention to request the Tribunal to render an Interim Award to the effect of *“...(i) declaring that the Respondent must give effect to the Engineer’s Decisions pursuant to Sub Clause 67.1 [...] regardless of the pending arbitration, and (ii) ordering the Respondent to immediately pay the amounts determined by the Engineer...”*⁶

The Contractor argued that decisions given by the Engineer under Sub-Clause 67.1 *“... are binding ... on both parties and shall have effect as soon as they are made notwithstanding any notice of dissatisfaction and/or application or Request for Arbitration, and they must remain effective for as long as that they are not reviewed or cancelled by an out of court settlement or by an arbitral award.”*⁷

The Employer argued that the Contractor’s claim for interim relief was unjustified as there was *“no evidence of urgency or of a risk of irreparable harm for the Claimant, which should be a necessary condition for an interim or conservatory*

*measure”*⁸ and that, if the Tribunal were finally to adjudicate in favour of the Claimant, interest would be an adequate compensation. Furthermore, where a party had expressed disagreement with the decisions, these would be deprived of their binding character.

On 1 March 2001 the Tribunal rendered its Interim Award where it first noted that if either party had given a timely notice of dissatisfaction, while a decision of the Engineer was not “final”, it was nevertheless “binding” on both parties who were to comply with it forthwith, as required by the second paragraph of Sub-Clause 67.1.⁹ The Tribunal then stated:

*... If the above Engineer’s decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the Arbitral Tribunal should refrain from an immediate judgment giving the Engineer’s decisions their full force and effect. This simply is the law of the contract.*¹⁰

The merits of the case being reserved until the Final Award, the Tribunal provisionally ordered the Employer to pay the Contractor the sums awarded by the Engineer.

3.2 Unpublished ICC Case 1¹¹

The Parties entered into a contract (based upon the 1999 FIDIC Red Book) for the

⁵ Para. 4 of Interim Award

⁶ Para. 6 of Interim Award

⁷ Para. 14 of Interim Award

⁸ Para. 17 of Interim Award

⁹ Para. 18 of Interim Award

¹⁰ Para. 22 of Interim Award

¹¹ See G. Di Folco & M. Tiggeman, Enforcement of a DAB Decision through an ICC Final Partial Award, The Dispute Board Federation Newsletter, September 2010

construction of new infrastructure in the state of the Employer.

During the course of the works dispute arose between the parties culminating in the Employer serving a notice of termination on the Contractor.

No DAB had been appointed within the period stated in the contract and, in the absence of agreement with the Employer, the Contractor applied to the President of FIDIC that appointed the DAB.

The Contractor then started DAB proceedings to which the Employer refused to participate arguing that the DAB had been improperly appointed. Nevertheless, the DAB rendered two decisions (first on liability and second on quantum) in favour of the Contractor on an “*ex parte*” basis.

The DAB found that the Employer was liable to the Contractor in damages for wrongful termination and ordered the Employer to pay the Contractor a substantial sum of money. The Employer issued Notices of Dissatisfaction against both decisions, whereas the Contractor only challenged the second decision for insufficiency of the damages awarded.

The Employer filed a Request for Arbitration with the ICC seeking damages from the Contractor. In its answer the Contractor, among other things, applied for bifurcation of the arbitral proceedings seeking a Partial Award enforcing the DAB’s decisions.

In arguing its case the Contractor relied upon the binding nature of the DAB’s decisions pursuant to Sub-Clause 20.4 and on the ICC Case N° 10619.

In mid-2010 the Tribunal enforced the DAB’s decisions by way of a “Final Partial Award”, subject to the Arbitrators retaining the full power to open up, review and revise such decisions later in the arbitration.

3.3 Unpublished ICC Case 2¹²

In late 2003, the Parties entered into a construction contract based upon the 1999 FIDIC Red Book.

During the progress of the works the Contractor raised a number of claims against the Employer, requesting extensions of the time for completion and additional payments.

When the time for completion was about to expire, the Contractor had not been granted an extension of time and the majority of the problems it had notified had not been solved by the Employer.

Thus the Contractor terminated the contract under the provisions of Sub-Clause 16.2 and later initiated two sets of DAB proceedings to establish liability and quantum.

The DAB rendered two decisions in favour of the Contractor and ordered the Employer to pay the Contractor a considerable sum of money. Both parties noted their dissatisfaction against the Decisions.

The Decisions were not complied with by the Employer and the Contractor initiated a third set of DAB’s proceedings seeking damages for breach of Sub-Clause 20.4 for the Employer’s failure to give effect to the Decisions. The DAB awarded such damages to the Contractor and the Employer, having served a notice of dissatisfaction, did not honour this decision either.

¹² This is a case in which I am currently involved and at the time of writing this article the arbitration proceedings are still ongoing and I had to be careful to preserve confidentiality when providing the information.

Arbitration proceedings were started by the Contractor to deal with the merits of the case. In the course of these proceedings the Contractor sought a Partial Award to recover damages for the Employer's failure to honour the DAB's decisions, pending final resolution of the substantive dispute. The Contractor relied upon the provisions of the fourth paragraph of Sub-Clause 20.4 and sought damages in the amounts awarded by the DAB.

The Employer argued that the Contractor should not be allowed to enforce a DAB's decision in circumstances in which there had been a notice of dissatisfaction, because Sub-Clause 20.7 only provided wording to enable enforcement of a decision in which there had not been a notice of dissatisfaction, in contrast with the FIDIC Gold Book that enabled enforcement in both scenarios.

In mid-2011 the Tribunal rendered a Partial Award where it held that, irrespective of any notice of dissatisfaction, there was an enforceable contractual obligation on the Parties to observe the DAB's decision until revised in an arbitral award. It noted that the Contractor was not seeking to enforce the Decisions but to recover damages for the Employer's failure to honour them and that interests on the sums awarded in the Decisions was unlikely to be an adequate compensation for breach of the obligation.

The Tribunal therefore ordered the Employer to pay the Contractor the sums awarded in the DAB's decisions and interest from the date when payment was due, not by way of enforcement of the decisions but by way of damages for breach of Sub-Clause 20.4.

Conclusions

FIDIC contracts provide for any decision of the Dispute Board (or the Engineer in the 1987 Red Book) to be binding upon the parties who should promptly give effect to it. As we have seen however no sanctions are given in these contracts for a party's failure to give effect to that decision and the dissat-

isfied party commonly seeks to frustrate the dispute resolution process by challenging the decision and not complying with it; thus forcing the winning party to endure lengthy and costly arbitration proceedings.

These proceedings could be shorter and the dispute resolution mechanism made more effective if, despite disagreement, the DB's decision was immediately given effect to by an arbitral award without considering its merits. However, with the exception of the Gold Book, the other FIDIC forms expressly allow for this possibility only where the decision has not been challenged.

The cases presented in this article suggest that even where DB's decisions have been challenged, arbitrators are indeed inclined to give effect to these decisions, irrespective of their merits, by way of a partial or interim award, albeit in circumstances where the tribunal can open up, review and revise the Decisions later in the arbitration.

In my view this approach would encourage faster resolution of disputes and final settlements probably being reached before a full arbitration dealing with the substantive disputes is completed, with obvious benefits for the parties in terms of time, efforts and costs.

The arbitrators' approach in enforcing DB's decisions without considering their merits gives some much needed "teeth" to Dispute Boards and I consider it to be the proper way forward in the swift resolution of international construction disputes.

If, as it seems and I believe it should, this approach was to become the norm, then the short answer to the question "*Can parties to a FIDIC contract safely decline giving effect to a Dispute Board's decision?*" would simply be "*No*".

Marcello Viglino can be reached by email at marviglio@yahoo.co.uk.

11th Annual DRBF International Conference & Training Workshops São Paulo, Brazil May 2011

By Gilberto José Vaz, DRBF Country Representative for Brazil

The Annual International Conference of the Dispute Resolution Board Foundation made its way to South America and was held for the first time in this part of the globe, in the city of São Paulo, Brazil. The Conference took place on 14 and 15 of May, 2011, preceded by Training Workshops on 12 and 13 of May, 2011, at the Renaissance Hotel.

The conference had as the main theme “*Real Time Dispute Resolution in Infrastructure Contracts: Latest Developments and the Advantages of Dispute Boards*”, and the agenda was conceived to cover the fundamentals of the DB method, the use of it in Brazil and South America, latest developments around the world, besides model clauses and the use of DB in different legal systems. Several speakers from different backgrounds and parts of the world contributed with a broad and deep discussion, which will contribute for setting the grounds for the development of the method in this region. There were also two workshop programmes: a 2-day introductory, discussing the FIDIC contracts and the main aspects of the DB method; and a 1-day advanced workshop, for initiated practitioners.

Taking the conference to Latin America was seen by the Foundation as an investment, as the region was not very familiar with the method. The initiative was taken as a way to divulge the format in an almost “virgin” territory, spreading the word to people who could act as propagators.

The numbers of the conference and workshop show that this goal was fully achieved! The outcome of the event was extremely positive, with feedback from many delegates and organizations, all of them with compliments and good impressions.

Overall, the event had over 130 attendees of 18 different nationalities, with a massive participation of local audience (more than 80 Brazilians attended), among contractors, consulting engineers, employers, public entities’ representatives, legal professionals and others. The conference and workshop had also more than ten sponsors and several affiliating organizations from Brazil, amongst the most prestigious contractors, arbitration chambers and ADR organizations of the country, besides international organizations.

The traditional gala dinner was definitely a highlight, with a special Brazilian taste this year, to the sound of live Brazilian music, with good “caipirinhas” and local food.

Special thanks should be directed to the organizing teams of the conference and workshop, which gave their best in order to make the event come to reality, in a fantastic team work.

The Foundation wishes to see everyone in Sydney, 2012, for the 12th International Conference!

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Ethics in Today's World of DRBs:

Contractor and Owner Advise the DRB Chair That They Wish for a Board Member to Resign



By Jim Phillips Ph. D.

This is the last issue of the *Forum* prior to the Foundation's Annual Meeting and Conference in Seattle, Washington in September. As some of you may know, the Annual Meeting and Conference is an excellent opportunity to see old friends, make some new ones and network with Foundation members and attendees who are active in the dispute resolution board practice around the world. Every year we also try to have at least a short session devoted to ethical issues and practices and this year the conference organizers have graciously given us a substantial block of time on Friday afternoon, September 23, 2011.

I am very thrilled to announce that I will be hosting a panel this year of distinguished practitioners, including Dan Meyer, of Meyer Construction Consulting, Inc, Bill Edgerton of Jacobs Associates, and Dan McMillan of Jones Day, who will be discussing complex ethical dilemmas and decision making in Dispute Board practices. We will also have time for the audience to join in the discussion which should make for a high level learning experience! Please join us in Seattle.

In the last column, I discussed the question of how a DRB should respond if the contractor advises the DRB Chair that she/he would like a Board member to resign because she/he had lost confidence in that member's neutrality. The question for this column is how the Board should respond to a request from both parties for a member to resign because they do not like the Recom-

mendations being issued by the DRB.

First of all, I am certain we all agree that there is a huge difference between these scenarios. It's one thing for a Board member to be challenged based on their neutrality, it is something else entirely for the parties to claim that a member should resign because of a disagreement or dissatisfaction on the merits with the DRB's Recommendations.

Canon 5 of the Foundation's Canon of Ethics may be the only Canon remotely related to this issue. This Canon provides in part that "...[r]eports shall be based solely on the provisions of the contract documents and the facts of the disputes". If the parties are concerned about the DRB member's performance because he/she has "gone off the reservation" beyond the four corners of the contract documents and the testimony at the hearing, then there may be an ethical implication.

For example, if the Board member in question insists on taking into account information not properly before the Board, or insists on applying a "fairness" standard beyond the contract documents, then the DRB has a dilemma to address. However, if the parties are complaining about the member because they do not like his/her analysis or disagree with his/her reasoning regarding the content of DRB Recommendations, then ethical considerations may not apply.

However, as I wrote in the last column, the effectiveness of any DRB is predicated on the confidence and the trust the parties have in the process and in the members of the Board. If that trust or confidence is lost,

then the Board's effectiveness will be compromised and this very well could lead to an ethical dilemma.

Another possibility is that if this DRB's Recommendations are not unanimous, and there are dissenting or separate Recommendations being issued, then a Board member's personal views on project disputes are on greater display. As many of you have said to me over the years, the DRB should make every effort to issue unanimous Recommendations. A split Recommendation can alleviate dissension among the Board, but it does not help the parties resolve disputes in a timely fashion.

Moreover, Section 3.7.3 of the Foundation's Practices and Procedures Manual cautions the DRB from disclosing the name of the dissenting Board member if there is a minority Recommendation issued. The concern is that if the dissenting Board member is identified, the party nominating him/her to the Board may be tempted to reject the Recommendation. This raises the process of Board selection which is beyond the scope of this discussion, but one I will return to in a future column.

The issue of the parties asking a Board member to resign is a complicated one. If both parties do not like the member's approach or analysis of the disputes being heard by the DRB, this type of request may not rise to the level of an ethical issue. However, if the parties have lost their overall confidence in the Board member's ability to serve, this is more serious. In either case, the Chair, in my opinion, should convene the Board and lead a discussion of what is in the best interests of the parties and the project. If the Board member recognizes that he/she is hurting the DRB process, he/she may consider offering his/her resignation.

At the very least, the Chair should treat the request seriously, and send the parties the message that their concerns are being heard, evaluated and considered. Often parties will complain and vent about individual Board Recommendations or opinions, and then move on to the next issue or project challenge. However, if they insist on a member's resignation, it deserves the DRB's full and immediate attention.

NEXT ETHICS CHALLENGE

Assume you are sitting on a DRB that has heard several disputes and issued several Formal Recommendations. Assume that before one of the regular project DRB meetings, one of the Board members discloses to other members that recently she/he has received a job offer of full time employment from the contractor to begin in 30 days.

What should the DRB do?

Ethics Commentary or Question?

Please contact:

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Committee Chair
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National Construction Dispute Resolution Committee

By Kerry Lawrence and Blase Reardon

The DRBF is one of 33 construction industry and dispute resolution organizations that are members of the National Construction Dispute Resolution Committee (NCDRC). The NCDRC serves two purposes: 1) to advise the American Arbitration Association on Construction Industry Dispute Resolution, and 2) for the member organizations to exchange information between themselves on dispute resolution in the construction industry while developing mutually supportive relationships that foster more cooperation among the various organizations, including outreach, education and training opportunities. The NCDRC meets twice each year in the Washington, D.C. area, rotating among the offices of member organizations, with the June 2 meeting being held at the ASCE headquarters in Reston, Virginia.

Because the member organizations are about equally split between construction industry organizations (AGC, ASCE, AIA, ASA, Design-Build Industry Association and others) and legally-oriented construction industry and ADR organizations (ABA Forum Committee on the Construction Industry, ABA Public Contract Law Section, College of Commercial Arbitrators and others), most organizations send one industry representative and one legal representative to gain the most benefit from the meetings. Blase Reardon and Kerry Lawrence attended the June 2 meeting on behalf of the DRBF. The head of AAA's Construction Division, John Emmert represented the AAA, along with Michael Marra and our DRBF liai-

son, Cathy Shanks, who is also VP of the AAA Boston office.

The meeting kicked off with the AAA providing statistics on arbitration filings and mediation filings (both down about 20% over the past year and 33% over the past two years), and discussions about the trends the AAA sees, with the AAA then soliciting the observations of the member organizations on those trends. Others in the room reported similar observations due to the severe decline in construction overall, and the fact that many construction stakeholders are resolving disputes otherwise without litigation or arbitration, or even mediation.

The group then extensively discussed the NCDRC mission, and whether to expand the mission to include dispute avoidance. The consensus was that this group should stay focused on dispute resolution VS dispute prevention.

At each NCDRC meeting, one or two of the member organizations are invited to provide a 15-20 minute presentation on their organization and its support of dispute resolution in the construction industry. At this meeting the ASCE presentation was introduced by DRBF member Patricia Galloway, a past president of ASCE, with ASCE staff then providing information on ASCE membership (160,000 members), what they do for their members and the construction community, and what support/assistance they see the NCDRC members might provide. The ASCE publishes 26 journals for various segments of its membership, including a "Journal of Legal Affairs and Dispute Resolution

in Engineering and Construction”. Recent articles in that Journal included “Analytical Framework for the Choice of Dispute Resolution Methods in International Construction Projects Based on Risk Factors” and “Effective Management of Construction Dispute Resolution.”

Serena Lee who is the VP of the AAA Seattle office is the AAA liaison with the publishers of that Journal. It is expected there will be calls for papers for future editions of this Journal. On the subject of calls for papers, Cathy Shanks handed out a sheet soliciting articles for the AAA’s “Construction Resolver” newsletter and the AAA’s “ADR Journal.” This solicitation is being sent to all DRBF members.

The College of Commercial Arbitrators provided a presentation on their 75 page “Protocols for Expedious, Cost-Effective Commercial Arbitration, an excellent guide to steps arbitrators, the parties and counsel can take to reduce the time and cost of arbitration. Free copies were handed out to the attendees. There was also discussion about the excellent materials available through the International Institute for Conflict Prevention and Resolution (previously known as the “Center for Public Resources”), including a “white paper” on DRB’s authored in part by DRBF members Bob Smith, Bob Rubin and Jim Groton. As an aside, Region 1 Board Member Deborah Mastin represented the DRBF at the IICPR annual conference in New York City this past January.

The Design Build Institute of America representative at the NCDRC turned out to be a friend of Kerry’s. The DBIA announced they would very much like to have speakers for their chapter meetings, which is a topic Kerry will be pursuing with them on behalf of the DRBF.

The members agreed they would like to have more owner associations participating, and suggestions were provided on which owner associations seemed to be most consistent with the mission of the NCDRC.

Blase described the ongoing effort by the North American division of the DRBF on promoting the use of DRB’s to public agencies, general contractors, specific projects, and selected owners through the efforts of eight DRBF Region 1 members in the US and Canada. He also made reference to the recent DRBF training programs in West Virginia, Wisconsin, and Colorado and the upcoming training in Nevada.

The NCDRC is not itself a potential user of DRBs, but it is the central meeting point for the many organizations that represent potential users of the DRB process and the people who have input into the choice to use the DRB process. Through the NCDRC the DRBF has developed relationships that continue to provide us with avenues to broadcast the DRBF message among wide swaths of the construction, engineering and legal communities.

The next meeting will be in December 1, 2011 somewhere in the DC area.

Kerry Lawrence can be reached by email at kerryclaw@aol.com, and Blase Reardon can be reached at Reardon@bostonsolv.com.

Florida Court Bars Multiple Litigation of Multiple Claims

By Robert J. Roberatory

Without expressing any opinion, on May 10, 2011, the Florida Supreme Court declined to accept an appeal from an April 20, 2010, intermediate appellate court decision that limited the right of contractors to litigate construction disputes. The lower court Decision is *AMEC Civil LLC. v. Florida Department of Transportation*, 41 So.3d 235 (Fla. App., 2010), which was decided by a 2-1 vote. As a result of the Supreme Court action, the lower appellate court decision is now precedent in Florida.

AMEC contracted with FDOT to construct a major highway interchange. Shortly after work commenced in November, 2001, AMEC filed a claim with FDOT alleging, according to the Court, that FDOT breached the contract by failing to obtain noise permits from the city of Jacksonville for necessary night work. (The Court used the term “breach” with regard to all claims by AMEC, including those covered by contract clauses and not ordinarily deemed to be breach.)

The claim was submitted to the DRB, which in a 2-1 vote ruled against AMEC. AMEC filed suit for breach of contract in August, 2003. Work continued on the project but the litigation was still pending upon final acceptance in May, 2006. In December, 2006, FDOT began contending in the trial court litigation that all claimed breaches of the contract should be adjudicated in a single lawsuit and moved the pending litigation

should be stayed. In April, FDOT again moved for a stay pending submission of all claims to the DRB. AMEC opposed these Motions and the litigation proceeded. In October, 2007, a jury found for AMEC on its noise permit claim, in the amount of \$8.5 million.

Meanwhile, the DRB had been disbanded and a second DRB was established in March, 2004. AMEC submitted over 60 claims to the second DRB. The second DRB issued many recommendations on entitlement, some favoring the FDOT and some favoring AMEC. It had not yet held hearings on all of the claims submitted when DRB proceedings were suspended for several months due to the illness of a DRB member. When the DRB was ready to resume in the late spring of 2007, FDOT declined to participate further on the grounds that there could be one only one litigation and that once AMEC commenced litigation and carried it through to judgment, no further claims could be filed under the Contract.

In February, 2008, AMEC commenced litigation on this issue, seeking a declaratory judgment that it had a right to a hearing under the DRB process. FDOT filed a motion for summary judgment claiming that, having filed one action and prosecuting it to judgment precluded AMEC from pursuing further claims because “the doctrine of splitting a cause of action requires that all damages sustained or accruing to one as a result of a single wrongful act must be

claimed and recovered in one action.” The trial court found in FDOT’s favor and AMEC appealed to the District Court of Appeal, the intermediate appellate court.

The Contract contained a provision that no court proceedings on any claim could be filed until after the later of final acceptance or claim denial. However, this clause was not the basis for the Court’s decision since the trial court had knowingly disregarded it and allowed the noise permit litigation to proceed.

Rather, the appellate Court applied the principle of *res judicata*, ruling that the judgment on the merits of the noise permit claim was conclusive not only as to every matter which was litigated, but also every other matter which might properly have been litigated in that action. The court held that both the permit litigation and the subsequent claims were based on a single contract between the parties, a single indivisible agreement for construction of the interchange; by its nature the contract was not divisible.

According to the Court, the noise permit dispute litigation was premature, AMEC was not required to file the legal action in 2001 and in fact filing before final acceptance could itself have been deemed to be a breach. The numerous breaches of the indivisible contract that AMEC alleged could properly have been litigated and determined in a single action.

The dissenting judge held that the case involved separate unrelated breaches of a contract between AMEC and FDOT over the course of a four-and-a-half year highway project, each new breach constituting a new and

separate cause of action, *i.e.*, the contract was in fact divisible.

As a result of this decision, contractors and attorneys in Florida should be very wary of taking a case to court or to arbitration when work is still progressing so that there is a possibility of additional claims or if that case as filed does not include all existing claims. It is impossible to predict the extent to which courts in other states will follow this precedent.

The decision may well pose a serious problem on long-term construction contracts. Holding off commencing litigation of a large-dollar dispute may deprive a contractor of needed working capital for an extended period. If a state statute of limitations on a dispute arising early in performance will expire prior to completion and acceptance, what can a contractor do to preserve its rights to obtain compensation? One possibility, commencing a court action and then asking the court to stay proceedings, may not be possible in all jurisdictions.

Robert J. Robertory can be reached by email at robert@robertory.com.

Editor’s Note: A copy of the Florida intermediate appellate court decision has been posted in the DRBF library in the member’s only section of the DRBF website. To receive a copy by email, contact the Forum editor, Ann McGough, at amcgough@drb.org.

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS APRIL THROUGH JUNE 2011

Garry Ash
ACS Pty Ltd
Sydney, NSW AUSTRALIA

Hartmut Bruehl
Unna, GERMANY

David Erik Chase, AIA, Leed GA
West Palm Beach, FL USA

Chris Elliott
Roswell, GA USA

Paula Gerber
Monash University Law School
Clayton, VIC AUSTRALIA

Alexandre Magno de Mendona Grandese
Sao Paulo, SP BRAZIL

William Bourke Harris
Orinda, CA USA

Naoki Iguchi
Anderson Mori & Tomotsune
Tokyo, JAPAN

Takaharu Kaburaki
CTI Eng. Co., Ltd.
Tokyo, JAPAN

Brian J. Larkin
Larkin & Associates
San Francisco, CA USA

Lavcorp Enterprises Inc.
Yves Bruno Lavallee
Edmonton, Alberta CANADA

Tsepo T. Letsunyane
Ministry of Works & Transport, Dept. of Bldg &
Eng. Services

Gaborone, BOTSWANA
Ryuji Manai
Oriental Consultants Co., Ltd.
Ho Chi Minh City, VIETNAM

Kunihisa Oba
Taisei Corporation
Tokyo, JAPAN

Takashi Okamoto
Saitama, JAPAN

Garry Nunes
Parsons Brinckerhoff
New York, NY USA

LPM Canada Inc.
Michael J. Primiani
Montreal West, Quebec CANADA

James D. Smith, PE
Macedon, NY USA

Matthew M. Stamp
Kiewit Infrastructure Co.
Omaha, NE USA

Charles (Buck) Sweeney
Axley Bryaelson, LLP
Madison, WI USA

Dan Thomas
Garberville, CA USA

Bernardo Ramos Trindade
Belo Horizonte, MG BRAZIL

Maria Laura Velazco
Marval O'Farrell & Mairal
Buenos Aires, CABA ARGENTINA

Forum Newsletter Editorial Deadline

Our readers love to hear DRB success stories, new ideas, and the latest industry news and events. If you have information about DRBs, DRBF members, or an article to share, please tell us!

Contact Forum Editor Ann McGough by email at amcgough@drb.org.



**Deadline for the November issue is
October 1, 2011**

(continued from page 1)

I. Contractual Freedom

Dispute adjudication is the product of an agreement between parties⁸. It is aimed at the resolution of disputes by an adjudicator. That agreement is merely based on the principle of contractual freedom. Nevertheless agreements that are intended to have a legal operation create legal rights and duties which do not exist in a vacuum. Hence, in order to know whether that agreement is not only there but is an enforceable one, the test is whether there are limits or constraints with regard to dispute adjudication agreements making them invalid or unenforceable. Also the question arises whether dispute adjudication must comply with particular rules at law in order to become an effective feature.

II. State court adjudication v. Dispute adjudication

At first we shall look whether the courts have exclusive jurisdiction, because dispute adjudication agreements do not only have a positive effect. They obviously also have a negative effect since they may prevent the parties to a contract referring their respective disputes to the courts at least until the DAB or DB has given its decision on the dispute.

Article 33 UN Charter provides:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other

peaceful means of their own choice. Hence, public international law recognises various forms of alternative dispute resolution methods. However, throughout the world only state courts have the uncontested authority to enforce contracts and obligations arising out of or in connection with contracts⁹, though in parallel most states and jurisdictions recognise arbitral tribunals having similar or complementary authorities¹⁰. The strength of state court decisions and arbitral awards lies with the fact that both, court decisions and arbitral awards may become enforced by the states without reviewing the merits of the case. In principle the parties are free to agree to refer their respective disputes to an alternative dispute resolution process. At least they are free to do so, if such agreement does not limit the access to either state courts or arbitration because throughout the world it is a recognised principle of law that parties cannot by contract oust the jurisdiction of the courts¹¹.

However, since *Scott v. Avery*¹² it is the law in England and Wales and Ireland that any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant. The English and Irish Arbitration Acts, confer on the courts a certain jurisdiction over arbitrations¹³. The purpose of this role is supervisory and is designed to ensure that the arbitration procedure is conducted fairly. Further, court supervision gives parties confidence in the process by assuring the participants that if there is breach of fair procedures, or if an injustice is caused, they can invoke this jurisdiction

⁸ Also arbitration legislation does not confer the right to agree on arbitration or the duty to abide by it. Hence, legislation does not create the arbitral process, but it may regulate it within the appropriate jurisdiction. Usually this type of legislation shall ensure the enforceability of arbitral awards.

⁹ See Lembcke IBR 2007, 1189 who however confuses complementary and exclusive dispute adjudication. Article 101 para. 1 of the German Constitution reads: "Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge."

¹⁰ See Spanish Constitutional Court decision No 288/1993, 4.10.1993; German Federal Supreme Court NJW 1986, 3027. Though arbitration is recognized to be a complementary dispute resolution method whilst state courts have priority over arbitration there is a tendency to accept arbitration as an equal means of dispute resolution, see Capri in: Cadiet/Clay/Jeuland, *Médiation et arbitrage*, 205

¹¹ *Scott v. Avery* (1859) 25 L.J. Ex. 308 (England and Wales); Zöller/Vollkommer, ZPO, 28. Auflage, Köln 2010, § 38 note 2 (Germany); Spanish Constitutional Court decision No. 288/1993, 4.10.1993; see also the South African case *Lufano Mphaphuli & Associates (Pty) Ltd. v. Andrews and Another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (20 March 2009) as to the proper interpretation of an arbitration agreement whereunder the parties intended the arbitrator to follow an informal, investigative process and one in which no oral evidence would be led.

¹² *Scott v. Avery* (1859) 25 L.J. Ex. 308

¹³ See *Carillion Irishenco v. Dublin City Council & Anor* [2009] IEHC 225 (20 February 2009); *Bernhard's Rugby Landscapes Ltd v. Stockley Park Consortium Ltd* [1998] EWHC Technology 326 (22nd April, 1998); noteworthy that in Ireland a new Arbitration Act was enacted in 2010.

to remedy any misconduct. Without this safeguard, every arbitration clause which, by its nature “supplants” the jurisdiction of the court, would be void, including every Scott v. Avery clause. Despite this in England and Wales the Arbitration Act 1996 has given English arbitration law an entirely new face, a new policy, and new foundations¹⁴. The English judicial authorities . . . have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Arbitration Act 1996 embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve the policy proclaimed by Parliament and outside, but may also have changed their juristic nature.

In Belgium, France, Italy, Luxemburg and the Netherlands arbitration and binding advice are available dispute resolution alternatives¹⁵. The Dutch Complaints Boards give decisions which are binding on both parties. The courts will enforce it subject to the test under section 904, book 7 of the Dutch Civil Code. Enforcement will be declined if the decision, according to reasonable and fair standards, is unacceptable regarding its content or the way in which it was reached with regard to the given circumstances, e.g. if the Complaints Board has ignored the fundamental principles of procedural law, such as the right of both parties to be heard. The Spanish Constitution reserves the adjudication of disputes to the judiciary; however, arbitration is a valid dispute resolution method which does not depart from the spirit of the Spanish Constitution¹⁶. The right of access of every citizen to the ordinary courts in no way affects the constitutional validity of arbitration¹⁷. The right to justice can be exercised before ordinary courts and through arbitra-

tion as it was confirmed by the Spanish Supreme Court¹⁸. In Germany parties may agree on arbitration (see Sections 1025 et seq. Civil Procedure Code) and the giving of binding advice (see Sections 317 Civil Code) as a dispute resolution method.

Interestingly the South African Constitutional Court¹⁹ has held that international and comparative law (as considered in the judgment) suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. It then accepted and approved the validity of an agreement whereunder (1) the parties intended the arbitrator to follow an informal, investigative process and (2) one in which no oral evidence would be led and (3) whereunder the procedure was, by and large, aimed at the determination of facts and in particular the amount owed by one party to another (if anything). In fact the terms of the arbitration agreement itself contemplated that the purpose of the arbitration was to determine –“whether payment is due in terms of the contract concluded between the parties, and if it is . . . due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the Defendant or . . .; the value of the work that has been done”. Thus, in the view of the South African Court an informal, investigative process was envisioned. That process was one where the arbitrator received evidence, prepared a schedule of quantities based on the evidence he received, gave both parties a copy of the schedule or a letter setting out his concerns and gave each an opportunity to comment.

The effect of agreements whose subject matter it is to limit or exclude the jurisdiction of courts depends on the wording of the agreement and the applicable laws. To

¹⁴ approved by Lord Steyn in *Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others* (Appellants) [2005] UKHL 43

¹⁵ See Nauta/Meijer, de Boer and Snijders in Snijders, *Access to Civil Procedure Abroad*, 168, 190, 235, 239, 274, 349

¹⁶ Cremades in Berger, *Zivil- und Wirtschaftsrecht im europäischen und globalen Kontext* [Festschrift Horn], Berlin 2006, 909

¹⁷ Spanish Constitutional Court decision No 288/1993, 4.10.1993

¹⁸ Supreme Court decision, 9.10.1989, [R] 1989, 6899

¹⁹ *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) (20 March 2009)

the extent that the agreement provides in lieu of a court proceeding for a dispute resolution method which ensures a fair and equitable procedure in accordance with the essential requirements as set out by the relevant laws the courts may decline their jurisdiction conferred to them by the laws. To the extent that by virtue of the agreement the courts have no jurisdiction until a condition precedent to the right of action has been satisfied, the courts virtually having had jurisdiction may grant an order to stay.

An exclusive jurisdiction agreement is “one which imposes a contractual obligation on one or more parties to litigate in the stated jurisdiction”. This type of agreement has a positive aspect in that the parties are agreeing on trial in the chosen (e.g. arbitral) forum. Moreover, having done so, the parties implicitly agree not to object to the jurisdiction of that forum. However, equally important, such an agreement also has a negative aspect. In the situation where there is an agreement providing for the exclusive jurisdiction of an arbitral court or DAB, the parties promise not to invoke a state court. If one of the parties does so, this is a breach of their agreement.

The European Court of Justice has consistently held that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, but the Member States are nevertheless responsible for ensuring that those rights are effectively protected in each case²⁰. Accordingly the Court has held that neither the principles of equivalence and effectiveness nor the principle of effective judicial protection preclude national legislation which imposes, in respect of ... disputes, prior imple-

mentation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.

III. Dispute Avoidance

It is a very important insight that dispute adjudication does not only serve for dispute resolution but also for dispute avoidance. The issue with it is whether the parties are really open and inclined to avoid disputes. Under FIDIC both parties shall at least attempt to avoid arbitration (see Sub-Clause 20.5 Red Book 1999). The FIDIC Gold Book encourages the parties to avoid disputes (Sub-Clause 20.5).

Whilst there is no general rule in Common Law requiring the parties to negotiate in good faith, the obligation of good faith in negotiation is found practically in all Civil Law system countries. Under Common Law the principle is that it is generally left to parties themselves to make bargains. It is therefore left to them sometimes to fail to make bargains or to fail to agree on particular terms²¹. By contrast Civil Law generally provides a remedy for a wrongful conduct produced by an act of bad faith (see Sections 311, 242 German Civil Code). Although there is no general rule about pre-contractual liability in the Common Law system, the parties shall not engage in unfair conduct at the pre-contract stage if the parties have signed a letter of intent or a memorandum of understanding, requiring them expressly and clearly to “act in good faith” and/or “to use their best efforts to reach an agreement”.²² A

²⁰ ECJ in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, judgment of 18.3.2010

²¹ *Biotechnology Australia Pty Ltd v. Pace* (1988) 15 NSWLR 130, 133; see also *Candid Productions Inc v International Skating Union* 530 F Supp 1330 (1982) at 1337 (USDC NY)

²² *Little v. Courage Ltd* (1994) 70 P & C.R. 469, 476; *Queensland Electricity Generating Board v. Hope Collieries Pty Ltd* (1989) 1 Lloyd’s Report 205

contractual duty to use best endeavours to achieve a defined object is enforceable, whereas an obligation to use best endeavours to achieve an indefinite object is not.²³ However, provided there was consideration for the promise, in some circumstances a promise to negotiate in good faith will be enforceable...²⁴

For example German law has developed comprehensive rules regarding good faith negotiations. The doctrine of good faith plays a most important role in the emerging field of secondary or auxiliary contract obligations in Germany. (The primary obligation of the parties is to perform in terms of the contract. The secondary obligation specifies how the parties have to perform.) Within that category courts have recognised an obligation on contracting parties to bargain in good faith and to deal fairly with each other particularly where the parties have reached agreement on that question. Italian scholars have mostly looked for inspiration to German doctrines on good faith. In France principles of good faith extend to both the negotiation and performance of contracts despite the limited terms of the *Code Civil*. Although the French *Code Civil* has been influential in Belgium, Belgian courts have relied more extensively than their French counterparts on the principle of good faith in the performance of contracts.

The German Federal Supreme Court²⁵ has held that during the construction period the parties to a construction contract are obliged to cooperate provided that the contract includes such an express or implied duty. If disagreements or differences between the parties to the contract arise during contract performance on the need of or the way how adapting the contract or

its implementation to changed circumstances, the parties are in principle required to negotiate in the endeavour to reach a mutual settlement of such differences or disagreements if the contract so requires. It held, that provided there is such an express or implied duty the parties shall not refuse to negotiate and to cooperate. Otherwise this is a breach of their contract. On the other hand nothing prevents the courts from accepting jurisdiction and hearing the case if reliance on the ADR clause would result in enforcing bad faith.²⁶

Under South African Law an agreement to agree on something is enforceable provided that the parties had created a specific mechanism to ensure that an agreement was concluded. In the referred case this mechanism was the dispute resolution mechanism of arbitration providing that in the event of the parties not being in a position to agree on any of the terms and conditions, such dispute would be referred to an arbitrator.²⁷

Hence, dispute avoidance practises do not only depend on the free and deliberate intention to avoid a dispute. Rather the contract and the law require to act in good faith in the endeavour to reach agreement. Failure to comply with these duties may lead to breach of contract.

Editor's Note: Part Two of this article will be published in the November issue of the *Forum*. It will discuss the legal nature of dispute adjudication, aspects of private international law and the enforceability issue. Members can access the full article in the Library on the DRBF website.

²³ *Little v. Courage Ltd* (1994) 70 P & C.R. 469, 476

²⁴ *Coal Cliff Collieries (Pty) Ltd v. Sijehama (Pty) Ltd* (1991) 24 NSWLR 1

²⁵ BGH, Urteil vom 28.10.1999 - VII ZR 393/98, BauR 2000, 409; BauR 2000, 777; BGHZ 143, 89; DB 2000, 471; MDR 2000, 388; NJW 2000, 807; NZBau 2000, 130; OLG-Report Düsseldorf 1999, 217; WM 2000, 730; ZfBR 2000, 170

²⁶ See Court of Appeal Jena, decision from 21.12.2009 - 9 U 234/09, IBR 2011, 309 - Heiliger; Federal Supreme Court, ruling from 09.12.2010 - VII ZR 19/10 (certiorari denied); Federal Supreme Court, IBR 2000, 195 - Zerhusen. In fact the above German authorities assume that ADR proceedings presuppose significant reciprocal trust. However, if significant trust was the common basis for the ADR agreement and one of the parties behaves in a way that justifies to say that the relation of mutual trust has been manifestly abandoned the aggrieved party is no longer bound to the ADR clause.

²⁷ *Southernport Developments (Pty) Ltd v. Transnet Ltd* [2004] ZASCA 94; [2005] 2 All SA 16 (SCA) (29 September 2004)



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