Is a DAB Member Appointment Enforceable if One/Both Parties Do(es) Not Sign a Dispute Adjudication Agreement in Connection with FIDIC Contracts?

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IS A DAB MEMBER APPOINTMENT ENFORCEABLE IF ONE/BOTH PARTIES DO(ES) NOT SIGN A DISPUTE ADJUDICATION AGREEMENT IN CONNECTION WITH FIDIC CONTRACTS?

Introduction

1.1. Who should read this?

This piece of work is intended for (but not limited to) construction practitioners advising on/involved in international construction and engineering disputes, particularly those whose focus of interest is on the issues linked with adjudication, the dispute adjudication agreement ('DAA') within the dispute resolution mechanism set out in the Federation Internationale des Ingenieurs-Conseils ('FIDIC') forms of contracts and the gap created by Clause 20 (set out in full below in section 5). This topic is highly relevant to the dispute resolution structure and tactic in relation to the FIDIC construction contracts.

1.2. What is the issue?

This piece of work contains general advice on the type of situations where a dispute adjudication board member appointment attempt takes place although one or both parties to the dispute do(es) not sign a DAA in the context of FIDIC Red, Pink and Silver Books and whether such appointment is valid.

2. Adjudication

2.1. What is adjudication?

The adjudication process is an alternative to more conventional methods of dispute resolution, such as arbitration or litigation. The Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) introduced a statutory right for parties to a construction contract to refer their disputes to adjudication.[1] The adjudication process provides a quicker and more cost-effective way in which to solve construction disputes.

The purpose of the adjudication process is to[2]:

- produce a cash-flow remedy during the progress of a construction project;
- avoid the time/cost constraints of arbitration or litigation; and

[1] 'Adjudication: an introduction to adjudication' available at http://uk.practicallaw.com/cs/Satellite/resource/0-204-4021?q=adjudication#a1064872

[2] Supra:-

- allow sub-contractors and small construction companies, unable to afford arbitration/litigation to enforce payment or contractual entitlements.

It is a statutory right to adjudicate and this right cannot be excluded from the construction contract. It provides a way how to resolve disputes in construction contracts on an interim basis. A decision issued by an adjudicator can be ultimately determined through arbitration, litigation or agreement of the parties.

Adjudication is a quick and cost effective way in which to resolve disputes. There are only 28 days between the referral to the adjudicator and the adjudicator's decision. This period can be extended by agreement but the time frame provided by Section 108 of the Construction Act 1996 gives an indication as to the time usually spent in an adjudication, which is appropriate for resolving financial disputes, for example, in relation to delay and disruption claims, extension of time claims and final account disputes, but lately, also, breach of contract and termination issues.

2.2. Dispute Adjudication Boards

Dispute Adjudication Boards ('DABs') are common in international construction and engineering projects and feature in many standard forms of contract, including FIDIC Red, Pink and Silver Books, which require the parties to establish a DAB from the outset of the project. Under the Silver and Yellow Books, the parties appoint the dispute board on an *ad hoc* basis when a dispute arises.

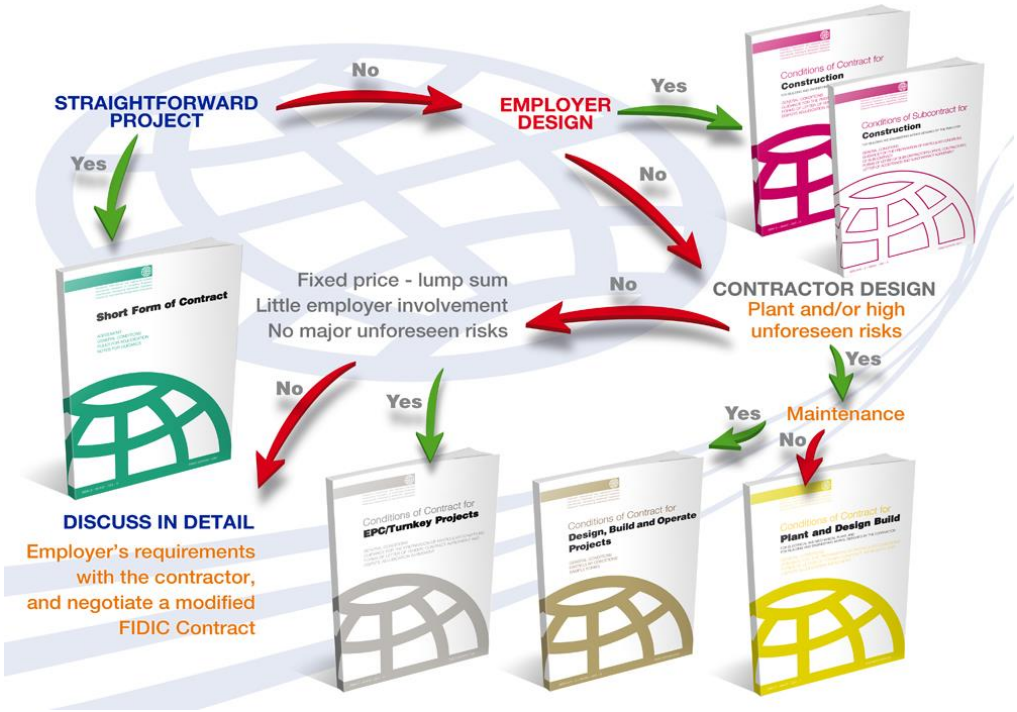
3. FIDIC

FIDIC was founded in 1913 and in August 1957, FIDIC published its first standard form contract: Conditions of Contract (international) for Works of Civil Engineering. The form of the early FIDIC contracts followed closely the fourth edition of the ICE Conditions of contract. Ian Duncan Wallace commented on this resemblance: "*as a general comment, it is difficult to escape the conclusion that at least one primary object in preparing the present international contract was to depart as little as humanly possible from the English conditions. (I.N. Duncan Wallace QC, The International Civil Engineering Contract, 1974)*".[3]

[3] Jeremy Glover 'FIDIC: an overview – The Latest Developments, Comparisons, Claims and Force Majeure' (2007) Construction Law Summer School 2007, p.2

3.1. The origins of the FIDIC suite of construction contracts[4]

The FIDIC suite of construction contracts is written and published by the International Federation of Consulting Engineers. The best known of the FIDIC contracts are:



Source: [5]

- **The Red Book**

  This was revised in July 1969 (2nd edition), March 1977 (3rd edition), September 1987 with an amendment in 1992 (4th edition) and a supplement in November 1996 introducing the concept of a Dispute Adjudication Board (DAB). The Red Book was for use in civil engineering works.

- The Yellow Book

  This is another contract for electro-mechanical works and was introduced in 1963, revised in 1980 (2nd edition) and 1987 (3rd edition). Up until the 3rd edition of the Yellow Book and 4th edition of the Red Book, therefore the forms were classified by different engineering disciplines.

[4] Taner Dedezade 'Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract' (2012) International Arbitration Law Review No. 4, pp.145-146

[5] 'FIDIC for Practitioners – Training Courses' available at https://www.fidic-for-practitioners.com/

- The Orange Book

  This was brought out by FIDIC in 1995. It was FIDIC's first design and build form: Conditions of Contract for Design Build and Turnkey.

3.2. FIDIC contracts today

In 1999, FIDIC brought out a new rainbow of contracts. The 1999 forms have been categorised in accordance with the allocation of design responsibility and the existence of an engineer. Below is the complete set of FIDIC contracts (also called the rainbow suite) as listed today on the FIDIC website[6]:

- The Conditions of Contract for Construction for building and engineering works designed by the Employer (the new Red Book).
- The Conditions of Contract for Construction for Building and Engineering works designed by the Employer – MDB Edition 2005 (*Red Book (MDB edition)*)
- The Conditions of Contract for Plant and design-build for electrical and mechanical plant and for building and engineering works, designed by the Contractor (the new Yellow Book).
- Conditions of Contract for Design-Build and Turnkey – First Edition 1995 (Orange Book)
- The Conditions of Contract for EPC turnkey projects (the Silver Book).
- The short form of Contract (the Green Book).
- The Conditions of Contract for Design Build and Operate Projects (the Gold Book) was published in 2008 and addressed a number of issues that had been identified by users of the 1999 forms.

4. Evolution of the alternative dispute resolution

The concept of alternative dispute resolution has been adopted by FIDIC at a very early stage of the evolution of their contracts. Since the Orange Book has been introduced in 1995, it provided adjudication as regular feature of dispute resolution. This was maintained by FIDIC when it published the 1999 Rainbow Edition. Today, one of the most sophisticated versions of the set of

[6] 'The FIDIC Suite of Contracts' available at http://fidic.org/sites/default/files/FIDIC_Suite_of_Contracts_0.pdf

these rules is contained in the Gold Book.[7]

Under the Gold Book conditions, the Sub-Clause dealing with the enforcement of DAB decisions is dealt with in subcl.20.9:

> "*20.9 Failure to comply with the Dispute Adjudication Board's Decision. 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 20.8 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.7 [Amicable Settlement] shall not apply to this reference.*" (emphasis added)

This clause is particularly relevant to the current conundrum surrounding the difference between interim binding; and final binding DAB decisions in connection with arbitrations[8] where in the former case the parties can presumably go to arbitration under Clause 20.6 (a relevant but different topic to that further analysed in this piece of work).

5. Clause 20 of the FIDIC 1999 Red Book and adjudication

Clause 20 of the FIDIC 1999 Red Book sets out the multi-tier dispute resolution mechanism adopted under the contract to deal with claims, disputes and arbitration. Below is a brief summary highlighting the main points that are relevant in relation to the gap that gave rise to conflicting views as to whether a DAB member appointment is enforceable if one or both parties do not sign a DAB agreement:[9]

- **Sub-Clause 20.1** (Contractor's Claims) defines the notification process that a Contractor must follow if it wishes to progress a claim. If the notification period is not adhered to, there are severe barring consequences. The engineer has to respond in the first instance to such a claim indicating whether the claim is met with approval/disapproval. If no agreement is reached, a formal Sub-Clause 3.5 determination follows.

[7] 'FIDIC Dispute Adjudication' available at http://www.dr-hoek.de/EN/beitrag.asp?t=Dispute-Adjudication-FIDIC
[8] 'Interim Enforcement of DAB Decisions in International Arbitration, Part I' available at http://www.kennedyslaw.com/files/Uploads/Documents/Construction/Enforcement%20of%20DAB%20decisions%20in%20arbitration.pdf
[9] Taner Dedezade 'Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract' (2012) International Arbitration Law Review No. 4, p.146

- **Sub-Clauses 20.2-20.3** are the provisions dealing with the appointment of the DAB.
- **Sub-Clause 20.4** provides the mechanism by which the parties can refer a dispute to the DAB; defines the time-scales in which the DAB must make a decision; explains how the parties are to give notice if they are dissatisfied with the DAB's decision (or failure to give a decision) and explains the effect of the DAB's decision, which depends on whether a notice of dissatisfaction has been issued. If neither of the parties have issued a notice of dissatisfaction, then the DAB's decision becomes final and binding. If both or either of the parties issues a notice of dissatisfaction, the DAB's decision is binding but not final. In either of the scenarios, the parties must swiftly give effect to the DAB's decision.
- **Sub-Clause 20.5** gives a 56 day mandatory period allowing time for the parties to reach an amicable settlement.
- **Sub-Clause 20.6-20.8** provide the three routes permissible under the contract for a dispute to be referred to arbitration.
    - Sub-Clause 20.6 – The dispute can be referred to arbitration if:
        - it has been referred to the first DAB; and
        - where the DAB has issued/failed to issue a decision; and
        - either/both parties issue(s) a notice of dissatisfaction within 28 days of receipt of the decision; and
        - the 56 day period for amicable settlement discussions has expired.
    - Sub-Clause.20.7 – The DAB's decision can be referred to arbitration (in order to be enforced) if the DAB decision becomes final and binding (i.e. neither of the parties gives a valid notice of dissatisfaction within 28 days of receipt of the DAB's decision or if applicable within 28 days of the expiry of the 84 day period in the event that a DAB fails to make a decision). There is no requirement for the arbitrator to consider the merits of the dispute. The purpose of such arbitration is purely enforcement of the final and binding DAB decision.
    - Sub-Clause – 20.8 – The interpretation of this particular provision is a conflicted one. One view is that if there is a dispute between the parties and no DAB is in existence, the dispute can be referred directly to arbitration. The opposing view is that the adjudication step should not be avoided and should be adhered to. Analysis of this conflict follows below.

6. Analysis of the lacuna

6.1. The usual DAB procedure

Either of the parties to the contracts dealt with in this piece of work may refer a dispute to

the DAB under Sub-Clause 20.4. The summarised skeleton of the usual procedure for the DAB is set out in Sub-Clause 20.4:[10]

- A party to the contract refers a dispute to the DAB.
- The referral must include all relevant in formation in relation to the dispute.
- The DAB can investigate the facts of the dispute.
- Both parties will submit to the DAB any further relevant information which the DAB may require.
- The DAB has a choice as to whether to conduct a hearing for evidentiary purposes and/or to consider the submissions.
- DAB has 84 days within which to issue its decision. (A different period of time is possible if agreed from the date of the referral received by the DAB chairman).
- If the DAB fails to issue its decision or either of the parties is dissatisfied with the DAB's decision, either party can issue a notice of dissatisfaction within 28 days.
- If no notice of dissatisfaction is issued by either of the parties, the DAB decision becomes final and binding.

One of the areas causing potential problems is the appointment of the DAB itself, which is the focus of Sub-Clause 20.2 of the standard Red Book, Yellow Book and Sub-Clause 20.3 of the Gold Book[11].

6.2. What poses the problem?

Following on from the dispute resolution procedure mechanism above, it is likely that the intention of the drafters of all 1999 FIDIC books was, that a dispute, once crystallised, should be referred first to the DAB prior to amicable settlement/arbitration[12].

There are and will be situations where referring a dispute to the DAB will not be an option due to a:

- party refusing to sign the DAA; and/or

[10] FIDIC Dispute Adjudication' available at http://www.dr-hoek.de/EN/beitrag.asp?t=Dispute-Adjudication-FIDIC
[11] 'FIDIC Dispute Adjudication Boards' available at http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/fidic-dispute-adjudication-boards)
[12] 'Can a Party Ignore FIDIC's DAB Process and Refer its Dispute Directly to Arbitration?' available at http://corbett.co.uk/can-a-party-ignore-fidics-dab-process-and-refer-its-dispute-directly-to-arbitration/

- DAB not being in existence.

Clause 2 of the General Conditions of the DAA stipulates that:

> "*The Dispute Adjudication Agreement shall take effect when the Employer, the Contractor and each of the Members (or Member) have respectively each signed a dispute adjudication agreement.*
> *When the Dispute Adjudication Agreement has taken effect, (i.e. after signing), the Employer and Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective"*.[13]

A party may refuse to sign a DAA if there is a disagreement between the parties as to the existence of the dispute. A signed DAA is necessary in order for the DAB to be empowered to decide upon its own jurisdiction and on the dispute referred to it.

If a party refuses to sign a DAA then the DAB has to proceed with great care. If the DAB concludes that a dispute has indeed crystallized under the contract, which is capable of being submitted to the DAB and that the party who refused to sign the DAA is in material breach of its contractual obligations, it necessary to make sure that the referring party is informed that:[14]

- "*they would be responsible for seeking a declaration from the appropriate local Court that any DAB decision would be valid even though one party has not signed the DAA; and*
- *that they would also have to agree to pay all the DAB's fees and expenses, reasonably incurred, by regular stage payments suitably invoiced periodically; and*
- *the referring party would then be responsible for Court or Arbitration enforcement of the DAB's decision(s) should this become necessary."*

According to the view of David Loosemore above, subject to the provisions overhead, the DAB could technically be then able to proceed with the referral.

[13] 'The use of Dispute Boards – recent experience' available at http://www.constructionarbitrators.org/sites/default/files/local/browser/documents/Loosemore_paper_May_2009.pdf
[14] 'The use of Dispute Boards – recent experience' available at http://www.constructionarbitrators.org/sites/default/files/local/browser/documents/Loosemore_paper_May_2009.pdf

The problem is that there is a conflict between:

- Sub-Clause 20.3 of the General Conditions of Contract enabling referral to the DAB after it has been appointed by the appointing authority; and
- Clause 2 of the General Conditions of the DAA a requirement of which is that both parties to the contract sign it in order for it to become effective[15].

This conflict creates uncertainty as to the DAB's jurisdiction and authority.[16]

One view as that in these situations Sub-Clause 20.8 allows for the parties a 'way out' of the dispute resolution mechanism procedure above by allowing for a 'shortcut' directly to arbitration under Sub-Clause 20.6.

In practice[17]:

- Red Book – it is not uncommon for parties that entered into a 1999 Red Book contract to subsequently fail to constitute a DAB in the time set out in the appendix to tender when dispute(s) emerge(s).
- Yellow or Silver Book contracts – it is not uncommon in projects based on these contracts for one party refusing to refer the matter to a DAB. Even if the relevant appointing body does make an appointment under Sub-Clause 20.3, the uncooperative party often then refuses to sign the DAA.

Circumventing the DAB by going straight to arbitration was however criticised by case law further discussed below.

6.3. Does a DAB appointment render the signature of a DAA unnecessary?[18]

As to whether an appointment under Sub-Clause 20.3 makes the signature of a DAA unnecessary is met with conflicting views. It would appear that only when the DAA is actually signed can a DAB be said to be in existence. Following this stream of thought, then

[15] W. Totterdill 2006 FIDIC User's Guide: A Practical Guide to the 1999 Red and Yellow Books, (published by Thomas Telford Publishing), p. 311
[16] 'The use of Dispute Boards – recent experience' available at http://www.constructionarbitrators.org/sites/default/files/local/browser/documents/Loosemore_paper_May_2009.pdf
[17] 'Can a Party Ignore FIDIC's DAB Process and Refer its Dispute Directly to Arbitration?' available at http://corbett.co.uk/can-a-party-ignore-fidics-dab-process-and-refer-its-dispute-directly-to-arbitration/
[18] Supra:-

(absent any ability by a court to rectify a refusal to sign) it follows that the dispute is referred directly to arbitration under Sub-Clause 20.8[19]**.**

This view is supported by the FIDIC Contracts Guide Commentary on Sub-Clause 20.8:

> *"There may be "no DAB in place" because of a Party's intransigence (e.g., in respect of the first paragraph of P&DB/EPCT 20.2), or because the DAB's appointment had expired in accordance with the last paragraph of Sub-Clause 20.2. If a dispute arises thereafter, either Party can initiate arbitration immediately (subject to the first paragraph of P&DB/EPCT 20.2), without having to reconvene a DAB for a decision and without attempting amicable settlement. However, the claimant should not disregard the possibility of settling the dispute amicably.*
>
> *Under P&DB or EPCT, the first paragraph of Sub-Clause 20.2 requires a DAB to be appointed within 28 days after a Party gives notice of intention to refer a dispute to a DAB, and Sub-Clause 20.3 should resolve any failure to agree the membership of the DAB. The Parties should thus comply with Sub-Clauses 20.2 and 20.3 before invoking Sub-Clause 20.8. If one Party prevents a DAB becoming 'in place', it would be in breach of contract. Sub-Clause 20.8 then provides a solution for the other Party, which is entitled to submit all disputes (and this breach) directly to arbitration."*

Since a situation, where no DAB is in place and/or no DAA has been signed is not unrealistic, the provisional solution in practice would be simply to apply Sub-Clause 20.8 in a way where the dispute process would not be frustrated.

6.4. Solution to the lacuna: How should DAB/parties proceed if a DAA is not signed by all concerned?

The questions that arise are:[20]

- Should DAB proceed with referral?
- Can a party refer the dispute directly to arbitration under Sub-Clause 20.8, since there is no DAB in place, whether by reason of the DAB's appointment or otherwise?

When it comes to DAB's jurisdiction, the lacuna raises serious doubts. The main concerns

[19] Supra:-

[20] 'How risky are 'ex parte' DABs?' available at http://www.drbfconferences.org/documents/brussels2011/31BrownPPT.pdf

are that:

- the parties may have lost substantial amounts of time and money in relation to the DAB disputes' stage; and
- uncertainty in a situation when a party seeks enforcement of a DAB decision.

It is not advisable for one party to proceed with a referral to a DAB under a DAA signed by one party with the members without the agreement of the other party. Should a DAB in such a situation issue a decision, this would be very likely rendered to be ineffective and unenforceable[21].

The general consensus seems to be that the FIDIC forms should be amended and thereby include an express and clear provision that a DAB is considered to be in place anyway (whether a DAA has been signed or not) and to provide for a clear option for a direct referral of the dispute to arbitration – meaning – that there is a potential and even an option to circumvent the DAB stage.

7. Case law

If one party refuses to sign a DAA and thus refuses to co-operate in relation to the DAB process, then, at first glance, it makes sense to proceed under Sub-Clause 20.8.

Recently, English and Swiss courts had to consider these issues and both courts came to the conclusion that there is a tension between: [22]

- "*the opening wording of sub-clause 20.2 which uses mandatory language for the parties to refer their dispute to the DAB; and*
- *the wording in sub-clause 20.8 which provides that if a DAB is not 'in place whether by expiry … or otherwise' the parties can bypass the DAB.*"

As under the Yellow and Silver Books the parties are to constitute an *ad hoc* DAB when a dispute has crystallized, the tension is particularly apparent.

Since it is an embedded feature of the FIDIC form of contract that the parties need to obtain a

[21] Ellis Baker, Ben Mellors, Scott Chalmers, Anthony Lavers 2009 FIDIC Contracts: Law and Practice (Fifth edition published by Informa Law from Rouledge), p.520

[22] 'Can a Party Ignore FIDIC's DAB Process and Refer its Dispute Directly to Arbitration?' available at http://corbett.co.uk/can-a-party-ignore-fidics-dab-process-and-refer-its-dispute-directly-to-arbitration/

DAB decision first as a pre-condition to them being able to start arbitration proceedings, two conflicting questions arise: [23]

- "*What can I do if the other party to the contract refuses to assist in the appointment of the DAB? How do I resolve my dispute if there is no DAB and no DAB decision? Can I go straight to arbitration?*
- *Do I have to go through the DAB process? The contract is at an end. Obtaining a decision of the DAB is just an unnecessary duplication of costs.*"

The recent case law below addresses these issues and provides a consistent view that the courts have adopted under both Common and Civil Law.

7.1. Common Law position

Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC) [1]

In this case, the parties entered into a FIDIC Silver Book 1999 contract with amendments to Sub-Clause 20.6 which provided that the English courts would be substituted for arbitration.

Peterborough City Council ('Peterborough') engaged Enterprise Managed Services ('EMS') for the purpose of designing and installing a 1.5 MW solar energy plant. The contract provided that if the plant did not generate 55 kW of power by 31 July 2011, then EMS would be liable to pay liquidated damages equalling £1,300,000 to the Council.

After practical completion, Peterborough alleged that the agreed power generation has not been met and issued a letter of claim as to £1,300,000 on 6 January 2014 relying on Sub-Clause 20.8.

EMS stated that the dispute should have been referred to a DAB and applied for the DAB adjudicator appointment. Peterborough issued court proceedings on 11 August 2014 and on 27 August 2014, EMS issued an application to stay such court proceedings.

Mr Justice Edwards-Stuart granted the stay of the proceedings so that the parties would resolve their dispute in accordance with the dispute resolution procedure set out in the contract, i.e. the dispute to be referred to the DAB.

[23] 'FIDIC Dispute Adjudication Boards' available at http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/fidic-dispute-adjudication-boards

Counsel for EMS relied on the opening words of Sub-Clause 20.2 and argued that if Sub-Clause 20.8 was interpreted in a way that DAB could be circumvented, it would render Sub-Clauses 20.2 to 20.5 redundant.

Counsel for Peterborough relied on the words *"or otherwise"* in Sub-Clause 20.8 and argued that it could refer the matter to court in any circumstances where no DAB was constituted.

Counsel argued that:

- The source of the DAB's authority was the DAA (judge agreed).
- Without a signed DAA the DAB could not be formed.
- As the parties did not sign the DAA, Sub-Clause 20.8 allowed for DAB to be circumvented.
- Sub-Clauses 20.2 to 20.4 were unenforceable for lack of certainty as a result of the 'gap' identified in the FIDIC General Conditions by commentators.[24]
- Even if reference of a dispute to a DAB was mandatory, the court-proceedings should be allowed to continue as:
    - "*what was a complex dispute was unsuitable for a 'rough and ready' DAB adjudication procedure; and*
    - *any DAB adjudication would be an expensive waste of time as it was inevitable that the losing party would go to court.*"[25]

Both parties referred to a judgment of Hildyard J in *Tang v Grant Thornton* [2013] 1 All ER (Comm) 1226. In *Tang*, Hildyard J had to consider the enforceability of a dispute resolution clause and he identified the conflict as being that of the desire to give effect to what the parties agreed and the necessity to give such a decision a legal enough substance.

The judge addressed the situation where one party refused to sign the DAA by ruling that the court could exercise its power of specific performance to compel the refusing party to sign, particularly if all DAA terms were clear and accepted and/or the court felt able to imply reasonable fees in the absence of agreement. However, if the DAB wanted to suggest any

[24] 'Can a Party Ignore FIDIC's DAB Process and Refer its Dispute Directly to Arbitration?' available at http://corbett.co.uk/can-a-party-ignore-fidics-dab-process-and-refer-its-dispute-directly-to-arbitration/
[25] 'FIDIC Dispute Adjudication Boards' available at http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/fidic-dispute-adjudication-boards

additional terms to its DAA and there was a disagreement between the parties as to such terms, it is not clear as to whether a court could compel the parties to sign in the face of such disagreement.[26]

The over-riding principle demonstrated by English legal authorities shows a presumption in favour of leaving parties to resolve their disputes in the way in which they had agreed to in their contract. In such a situation, the court has an inherent jurisdiction to stay proceedings brought in breach of the parties' agreement.[27]

In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, the contract provided for the initial reference of disputes to a panel of experts with remaining disputes to be subject to arbitration in Brussels. Nevertheless, court proceedings had been commenced. The House of Lords held that the court has a discretionary power to stay proceedings brought before it in breach of an agreement between the parties to resolve disputes through an alternative method.[28] Lord Mustill said:

> "*… I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reason for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose is to my way of thinking quite beside the point.*"[29]

In Peterborough Edwards-Stuart J decided that:

- Sub-Clause 20.8 would only apply for Peterborough to circumvent DAB if the parties had agreed to appoint a standing DAB at the outset.

- By including the DAA in the appendix, the parties had agreed to the terms of that agreement, save for agreement over the adjudicator's fees. There was an implied term that the adjudicator would be entitled to his reasonable fees and expenses. This was something the court could readily assess. Here the adjudicator had

[26] 'Can a Party Ignore FIDIC's DAB Process and Refer its Dispute Directly to Arbitration?' available at http://corbett.co.uk/can-a-party-ignore-fidics-dab-process-and-refer-its-dispute-directly-to-arbitration/
[27] DGT Steel & Cladding v Cubitt Building [2007] EWHC 1584 (TCC)
[28] 'FIDIC Dispute Adjudication Boards' available at http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/fidic-dispute-adjudication-boards
[29] Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 at p.353

provided details of his fees and neither party had challenged them. On that basis, a court would not have much difficulty in holding those fees were reasonable.[30]

- As Sub-Clause 20.2 provided for *ad hoc* DAB appointments, the dispute under the contract had to be referred to a DAB adjudication before proceeding to court (in accordance with Sub-Clause 20.4 as soon as a DAB has been appointed either under Sub-Clause 20.2 or 20.3.). Sub-Clause 20.8 only applied where the contract provided for a standing DAB and that DAB had ceased to be in place when a dispute arises.

- The complexity of a potential dispute was foreseeable by the parties from the outset and is not a reason for circumventing DAB as the parties chose to incorporate the DAB adjudication procedure in the contract and thus agreed to follow it.

- However, where the parties had not yet spent time/money on the DAB adjudication, he expressed sympathy towards Peterborough's case that the court proceedings should not be displaced by adjudication.[31]

- It was ordered by the court that the court proceedings be stayed.

It is apparent from the decision above that the court's policy is to uphold the dispute process agreed between the parties, which is a contractual provision and needs to be respected by both the court and the parties.

7.2. Civil Law Position

Swiss Federal Supreme Court Case – 7 July 2014 (4A_124/2014) [2]

The decision of the Swiss Supreme Court relates to an appeal from a decision of an arbitration tribunal. The Parties entered into a contract based on the Red Book on 6 June 2006. Following a dispute the parties spent about 15 months unsuccessfully trying to form a DAB despite the intervention of the FIDIC President. On 2 May 2011, both parties appointed their respective adjudicators and the DAB chairman was agreed in October 2011. The chairman was however not formally appointed as the DAA was not agreed. In March 2012, the chairman disclosed a conflict of interest. On 14 June 2012 another chairman was agreed, who invited the parties to produce a draft DAA by 2 July 2012. Instead, the Contractor filed a

[30] Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC) [1], (paragraphs 28 to 31, judgment)
[31] 'FIDIC Dispute Adjudication Boards' available at http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/fidic-dispute-adjudication-boards

request for arbitration on 27 July 2012 with the ICC. Subsequently a Tribunal of three members has been appointed with a seat of the arbitration in Geneva. Subsequently, the potential DAB chairman issued a draft DAA. The Owner suggested changes to the DAA on 18 October 2012 and invited the Contractor to sign the DAA. On 19 October 2012, the Contractor's response was that the DAB was not formed (18 months after the Contractor attempted to start proceedings it had initiated the arbitration to protect its rights). The Owner then challenged the jurisdiction of the arbitration tribunal with the argument that the Contractor failed to follow the DAB procedure agreed in by the parties in the contract.[32]

The arbitration tribunal issued a partial award on 21 January 2014:

- Upholding jurisdiction; and
- Ruling that the DAB procedure enshrined in Clause 20 of the Red Book was not mandatory meaning that it is not a pre-condition to the right to commence arbitration and that a not adhering to it will not cause inadmissibility. The reasons are:[33]
    - the word 'shall' in Sub-Clause 20.2 should be interpreted in the broader context of the dispute resolution mechanism instituted by clause 20;
    - the word 'may' in Sub-Clause 20.4 suggests that the DAB procedure is only a choice available to each party to submit the case to the DAB;
    - Sub-Clause 20.8 allows for circumventing the DAB procedure by going straight to arbitration;[34] and
    - FIDIC General Conditions do not set a time limit to constitute a DAB, which supports the view that the FIDIC procedure of dispute resolution settlement is not mandatory.

The Owner sought annulment of the partial award in the Swiss courts on 26 February 2014, under ss. 190-192 Federal Private International Law Act 1987 ('PILA'), the Swiss law on international arbitration. The Swiss Federal Supreme Court published its judgment on 20 August 2014 deciding that the application to have the award set aside was rejected and the award upheld noting, amongst other, that:

[32] Supra:-
[33] Supra:-
[34] Doosan Babcock Ltd v. Comercializadora de Equipos y Materiales Mabe Limitada [2013] EWHC 3010/TCC (paragraph 12, judgment)

- The DAB was never appointed as agreeing on a DAB chairman by itself was insufficient in the absence of a signed DAA.

- Reference to the DAB was mandatory (subject to exceptions) making reference to the definitions' section of the Gold Book and that at its Sub-Clauses 1.2(e) and (f) 'shall' is to be interpreted as imposing an obligation.[35]

- Sub-Clause 20.8 does not provide for a choice of circumventing the DAB process and should be viewed as the exception rather than the rule. The strict interpretation of Sub-Clause 20.8 would turn the FIDIC alternate dispute resolution procedure into an empty shell (the same point made by counsel for EMS in the English case above).[36] The Swiss court held however, that in this case a refusal to sign the DAA meant there was no DAB and so Sub-Clause 20.8 could be relied on. (The court did not give any indication as to how long such a refusal should last.)

- Although the DAB procedure was mandatory, the court also took into account the reasons why no DAB was formed. It would be a breach of good faith for the Owner to insist on the mandatory nature of the DAB procedure, considering the severe delay in constituting the DAB for which it was primarily responsible.[37]

- The arbitration tribunal was correct in finding that the DAB was not in place when the arbitration request was filed and the appeal was dismissed.

The court's highlighted circumstances in which a DAB's decision is not a pre-condition to arbitration in FDIC Contracts.

8. Conclusion

The decisions that the nature of the DAB procedures are mandatory, are similar in both the English (Peterborough*)* and Swiss cases above although with a reverse outcome. In the Swiss case, the failure to constitute a DAB was caused by one of the parties by not signing the DAA and not co-operating in general. In Peterborough, the DAB had already been appointed at/immediately after the issue of court proceedings and there was no issue of lack of cooperation of the parties to the contract.

[35] FIDIC Dispute Adjudication Boards' available at http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/fidic-dispute-adjudication-boards
[36] 'Can a Party Ignore FIDIC's DAB Process and Refer its Dispute Directly to Arbitration?' available at http://corbett.co.uk/can-a-party-ignore-fidics-dab-process-and-refer-its-dispute-directly-to-arbitration/
[37] FIDIC Dispute Adjudication Boards' available at http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/fidic-dispute-adjudication-boards

Both the English and the Swiss judgements above support the existence of the DAB as the centre-piece for dispute resolution in the FIDIC contract[38] In Peterborough, the DAB procedure was viewed as a mandatory pre-condition to arbitration. However, according to the court ruling in the Swiss case, if a party is uncooperative and the other party to the contract is prevented from referring the dispute to DAB, it may go directly to arbitration by relying on Sub-Clause 20.8 (which provides for an exception to the mandatory DAB process rule). In any case, the party wishing to go straight to arbitration must at least attempt to set up a DAB.

FIDIC should clarify the position on the DAB procedure in its next editions of the 1999 forms by making it clear that if a party to the contract fails to sign the DAA with a DAB member agreed by the parties or appointed by FIDIC, this will not stand in the way of the DAB being able to issue valid decisions. This way the DAB procedure would be clearly kept as a mandatory part of the dispute resolution process not giving room for easy circumvention. The DAB procedure was devised as a means of quick, straightforward, cost-effective and enforceable dispute resolution, which needs to be maintained in order to meet such expectations.

[38] 'Can a Party Ignore FIDIC's DAB Process and Refer its Dispute Directly to Arbitration?' available at http://corbett.co.uk/can-a-party-ignore-fidics-dab-process-and-refer-its-dispute-directly-to-arbitration/