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Prof. Dr. Dres. h. c. Werner F. Ebke
Prof. Dr. Dirk Olzen
Prof. Dr. Otto Sandrock
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XII
Adjudication in International Arbitration

Ulrike Gantenberg and Wolfgang Kühn

Dispute Adjudication Boards ("DAB") are increasingly implemented to provide interim or final decisions on disputes on an on-going basis, in particular, during the span of a long-term project. This article focusses on the basic considerations in the DAB's formation, and then looks closely at what has become of an increasingly controversial topic, the interaction with the parties' right to arbitrate and litigate. Clause 20 of the 1999 FIDIC Conditions on Contract (FIDIC Red Book) will be addressed in particular.

I. Purpose of DAB

Disputes, while by no means inevitable, are nether-the-less a very likely reality that anyone embarking on a construction project should take into consideration. Without any precaution, parties may find themselves embroiled in litigation or other timely and costly proceedings. DAB are a method of solving a dispute without consuming an extensive use of time and costs. What makes dispute adjudication stand out from other methods is a DAB:

"...ability to actively operate throughout the whole period of contract, not only to resolve disputes but also, if possible, to prevent them from happening."

An individual expert ruling on construction disputes is not a new occurrence. Informal, quick and low cost negotiations involving architects or engineers are common. However, since the 1950s construction jobs have become steadily more complex and other non-technical demands such as environmental regulations, social requirements and public interest pressure groups have likewise seen an in-

1 The legal literature on this subject is immense. This article focusses on international voices and precedents. Extended German and relevant international literature is listed under "Further Authorities" within the Bibliography.
3 The Global Construction Dispute Report 2013 states that the average dispute time has increased from 10.6 months in 2011 to 12.8 in 2012, while in some areas such as the UK the value of disputes has increased from $10.2 million USD in 2011 to $27 million USD in 2012.
crease since the 1980s. While arbitration at first filled this space, the alternative
system of DAB has crept in. In taking on this role, DAB has in effect been
designed for its purpose. It exists to facilitate prompt dispute resolution with a par-
ticular focus on the work, rather than legal, aspect of the contract.

DAB are best summarised as a proactive mechanism aimed at preventing or
mitigating disputes at their primary inception. This is done not only through the
action of the DAB members ("the Board"), but also through their presence.
Through having a DAB, parties are often more likely to seek out cooperation
and the DAB decision, whether followed or not, is in itself a motivating factor in
seeking amicable settlement after the process has been followed.

However, there are draw backs to DAB. DAB are an additional administra-
tive and dispute resolution layer; have the ability to impose their own concept of
fairness upon the parties; are an adversarial process and do not give directly en-
forceable decisions. Despite this, use of DAB is growing. This is due to DAB
being perceived as a cheaper dispute resolution process than the other options.
Further, only a few types of dispute are not suitable for resolution by a DAB, as
for example a dispute that arises out of the termination of contract. Finally, even
when performance of the losing party cannot be guaranteed, the DAB can facili-
tate subsequent arbitration.

II. Structure of DAB

"A dispute review board is a creature of contract; the parties establish and empower a
dispute review board with jurisdiction to hear and advise on the resolution of dis-
putes."11

"FIDIC recognises that [the standard] arrangements may not be appropriate for every
project under any given book and makes provision in the Guidance for the Prepara-
tion of Particular Contracts for the adoption of a standing DAB arrangement."12

5 Dispute Boards; procedure and practice, 2008, by Gwyn Owen & Brian Trotterdill,
(“Owen & Trotterdill”), pg. 1.
6 [At] pg. 8.
7 [At] pg. 9.
8 A DAB process has been said to reduce dispute costs to as little as 0.05 % of what they
would have otherwise been in arbitration (Chern on Dispute Boards, Practice and Pro-
cedure, 2008, by Cyril Chern, ("Chern"), pg. 18
9 See Bunni, pg. 600.
10 Final Report on Construction Industry Arbitrations, Sep. 2001, ICC Commission on In-
ternational Arbitration, Forum on ‘Arbitration and New Fields’, Construction Arbitra-
tion Section.
11 See Chern, pg. 2.
12 FIDIC Contracts: Law and Practice, pg. 509, section 9.24

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With that said, DAB clauses generally confirm to the standard set out in recognised formats, most notably the FIDIC Conditions of Contract for Building and Engineering Works 1999 Edition (“FIDIC Red Book”), Deutsche Institution für Schiedsgerichtsbarkeit Clauses on Adjudication (“DIS Clauses”) or the International Chamber of Commerce Dispute Board Clauses (“ICC Clauses”). In which case, they are then interpreted in relation to the accompanying rules, which in the case of the DIS would be DIS Rules on Adjudication (“DIS Adjudication Rules”), and ICC Clauses would be the International Chamber of Commerce Dispute Board Rules (“ICC Dispute Board Rules”). This structure gives DABs consistency in practice, and this in turn allows for a wider reaching analysis.

Both the creation of a DAB and the nomination of the Board itself are often done at the onset of a contract by the parties. If greater assurance of independence of the Board is sought, independent bodies can be appointed to complete the nomination. When hearing a dispute the Board will consist of either 1 or 3 members sitting at a time, however:

"where the project consists of multiple disciplines and several identifiable unrelated skills are required then the number of members may be greater [than 3] to provide the spread of expertise and experience required."

In relation to the members, the parties are free to nominate whomever they wish as long as the nominee is independent and impartial. However, the DAB must be comprised of members who have the ability and experience to properly and acceptably conclude a dispute. This often comes in the form of experienced engineers. The reason for this is to ensure that the adjudication process of the DAB is combined with an intimate knowledge of the construction process.

To ensure this knowledge is relevant, DAB members often conduct visits to the work sites. During their visits, the Boards’ time is spent not only in resolv-
ing any disputes, but also in giving advice and obtaining knowledge of what is actually happening. As per the ICC Dispute Board Rules:23

“The frequency of scheduled meetings and site visits shall be sufficient to keep the [Board] informed of the performance of the Contract and of any disagreements.”

It is not unusual for the Board to meet the parties separately to hear relevant background information or individual perspectives and for the Board to act quite informally as between the parties.24 It is only when a specific dispute is referred to the DAB that procedures become formal and the jurisdiction to make determinations takes effect. In which case, the DAB is not bound by any statement made previously under its informal operation.25 When there is a hearing it will almost invariably be without lawyers, and be presented by engineers or those who are actually involved in the disputed work. As stated in the ICC Dispute Board Rules:26

“The Parties shall appear in person or through duly authorized representatives who are in charge of the performance of the Contract.”

DAB can therefore be seen as a highly informal and personalised decision making body. The benefit of informality, however, can lead to issues when enforcement of its decisions is requested without an evaluation of the underlying merits.

III. DAB Decision vs Arbitration

There are, however, questions in regards to how a DAB clause affects the parties’ right to arbitration or litigation pre and post the DAB process. In regards to pre-DAB, an example of the questions involved can be seen through the differing interpretation between ad-hoc and standing DAB from the English and Swiss Courts.

In a French-language decision dated 7 July 2014,27 the Swiss Federal Supreme Court considered Article 20 of the FIDIC Conditions of Contract and the jurisdiction of an arbitral tribunal to hear a dispute that aimed to by-pass an ad-hoc DAB procedure. The Court found that while the DAB procedure is, in principle, mandatory and therefore a condition precedent to arbitration, the parties do not have to go through the process if doing so would amount to an abuse of rights because it appears futile to an efficient resolution of the dispute. In doing so, the Court confirmed that alleged failures to comply with pre-arbitration dispute resolution provisions may be challenged on the basis of lack of jurisdiction.

23 ICC Dispute Board Rules, article 12.1 and DIS Adjudication Rules article 6.2.
24 ICC Dispute Board Rules, article 16.1 and DIS Adjudication Rules article 6.
25 ICC Dispute Board Rules, article 16.3.
26 ICC Dispute Board Rules, article 19.7 and DIS Adjudication Rules article 14.2.
27 Case no. 4A_124/2014, (“Swiss Case”).

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Adjudication in International Arbitration

On the other hand, in a recent UK case dated 10 October 201428 the Court found that, upon a proper interpretation of the FIDIC contract, article 20.8 would only apply to give a party a unilateral right: to opt out of DAB adjudication if the parties had agreed to appoint a standing DAB at the outset. Accordingly, if the implementation of article 20.2 provided for ad hoc DAB appointments, the judge accepted that the contract required the determination of the dispute through DAB adjudication prior to any litigation.29 This stands in contrast to the Swiss Case, where there the Court held:30

“according to the very text of the ad hoc commentary (The FIDIC Contracts Guide), the fact that there is no DAB at hand may result from the intransigence of the parties, which clearly indicates that there is no general obligation to set up such a body.”
[emphasis added]

On the contrary, the UK Court argues that the ad hoc nature of a DAB in fact makes it mandatory. The UK Court took the view that, upon agreement of an ad-hoc DAB, there was a contractual requirement on the parties to, before making use of clause 20.6, “put in place” a DAB. In the courts words:31

“It seems to me that sub-clause 20.8, which is in the same form in all three of the FIDIC Books, probably applies only in cases where the contract provides for a standing DAB, rather than the procedure of appointing an ad hoc DAB after a dispute has arisen.” [emphasis original] ... followed by:32 “I reject the [...] submissions that sub-clause 20.8 gives [the Claimant] a [sic] unilateral right to opt out of the adjudication process, save in a case where at the outset the parties have agreed to appoint a standing DAB and that, by the time when the dispute arose, that DAB had ceased to be in place, for whatever reason.”

In arguing so, the English Court does not recognise the same “intransigence of the parties” that was the basis of the Swiss Court’s ruling. Rather, it holds the requirement to “put in place” a DAB as paramount, arguing that:33

“there is a presumption in favour of leaving the parties to resolve their dispute in the manner provided for by their contract” ... and that:34 “the various factors are too finally balanced for me to conclude that, overall, the [Claimant] has made out a sufficiently compelling case to displace the presumption in favour of adopting the method of dispute resolution chosen by the parties in their contract.”

As such, whether or not a DAB needs to be put in place before proceeding to arbitration or litigation appears to be unsettled. In regards to post-DAB, the question is more complex and requires a deeper examination of the DAB mechanism.

28 Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 (TCC), (“English Case”).
29 As opposed to the standard term providing for arbitration in the event of no agreement being found, the contract in question provided for litigation.
30 Swiss Case, page 9.
31 English Case, para 33.
32 English Case, para 35.
33 English Case, para 41.
34 English Case, para 43.
IV. Pay Now, Argue Later

The “pay now, argue later” rubric is often invoked in construction contract disputes as a means of avoiding stagnation in construction projects and a lack of liquidity in the construction supply chain. While immediate enforcement of an outstanding payment is often explicitly provided for in domestic construction legislation,\(^{36}\) the availability of such an outcome is not entirely clear for international construction contracts that incorporate the FIDIC Red Book.

Although under the FIDIC Red Book a contractor is entitled to pursue a claim before a DAB and a Sole Arbitrator or Arbitral Tribunal, this process could take months or years, and offers no solution to the problems that can arise from delays in the construction process.\(^{37}\) As a result, some claimants have attempted to obtain arbitral awards as an “interim”\(^{38}\) measure, seeking an order for payment of the outstanding amount before the merits of the dispute are even considered.

This regards post-DAB disputes, and specifically how arbitrators have addressed claims for immediate enforcement by partial or interim arbitral award. In contention with this is the legal issue of whether an arbitrator, applying the FIDIC Red Book, can render an award that enforces a DAB decision while reserving final resolution of the substantive underlying dispute.

V. Clause 20 of the FIDIC Red Book

Construction contract disputes are dealt with in accordance with Clause 20 the FIDIC Red Book. The first stage of any dispute regarding payment is reference to a DAB, which as previously stated can be comprised of either one or three members, depending on the parties’ agreement. This of course has a potential impact on the fairness and independence of the DAB decision. The DAB has 84

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\(^{35}\) Words used by Lord Ackner in the House of Lords in relation to the adjudication process during the debate on what is now the Housing Grants Construction and Regeneration Act 1996 (HGCR Act).

\(^{36}\) A “pay now, argue later” dispute resolution regime is part of construction law in the United Kingdom, Ireland, Australia, New Zealand and Singapore. The Housing Grants, Construction and Regeneration Act 1996 (England and Wales); Construction Contracts Act 2002 (New Zealand), ss 58 and 59; Construction Contracts Act 2013 (Ireland); Building and Construction Industry (Security of Payment) Act 2002 (Victoria, Australia), ss 17 and 27; Building and Construction Industry Security of Payments Act 2004 (Singapore).

\(^{37}\) See footnote 8 and the works on Chern.

\(^{38}\) See the joint work of Giovanni Di Folco and Mark Tiggeman, Enforcement of a DAB Decision Through An ICC Final Partial Award, Chartered Institute of Loss Adjusters, Oct 2010.
days from the date of receiving the reference to give its decision. After the DAB decision is issued, the situation becomes more complicated.

Sub-Clause 20.4 makes a deliberate distinction between final and binding DAB decisions and those that are simply binding. The dividing line is whether a notice of dissatisfaction has been filed by one of the Parties in respect of the decision. If no notice of dissatisfaction is filed within 28 days of receiving the DAB decision, then the decision becomes both final and binding and it can be enforced swiftly through an arbitral award under Sub-Clause 20.7.

"20.7 Failure to Comply with Dispute Adjudication Board's Decision
In the event that:
(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],
(b) the DAB's related decision (if any) has become final and binding, and
(c) a Party fails to comply with this decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration], Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference."

Under Sub-Clause 20.7, a party can refer the non-compliance of the other party to arbitration, as a distinct dispute which is independent of the underlying substantive merits of the main dispute. Sub-Clauses 20.4 and 20.5 do not apply to such disputes, meaning that neither a separate DAB decision nor a 56 day amicable settlement period is a necessary prerequisite to arbitration. An arbitral award made under Sub-Clause 20.7 simply confirms the requirement of compliance with a DAB decision, and is akin to a summary judgment. It is uncontroversial that where no notice of dissatisfaction is filed, an arbitral tribunal can make such an award, and there is no jurisdiction for an arbitral tribunal to reopen the merits of the dispute. However, Clause 20 is silent as to a decision that is binding but not final, namely where a party has served a notice of dissatisfaction and refuses to comply with the DAB decision.

In these situations, the dispute settlement procedures set forth in Sub-Clauses 20.4–20.6 apply:

"20.4 Obtaining Dispute Adjudication Board's Decision
If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to

39 FIDIC Red Book, Sub-Clause 20.4. It should be noted that other governing institutes grant different time. The ICC grants a total of 90 days as well as specific division of the tasks required in that time. However, the issue of time is not engaged in this article.
40 Such a notice can be either filed after a DAB has given its decision or after the 84 day time period has come to an end without the DAB giving a decision.
41 The FIDIC Guidance Memorandum, dealt with later in this article, attempts to give the same right to binding but non-final decisions.
42 FIDIC Red Book, Sub-Clause 20.6 says that only disputes in respect of which the DAB's decision has not become final and binding can be referred to arbitration on the merits.
any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. 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 as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

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.

If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board’s Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board’s Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB’s decision, then the decision shall become final and binding upon both Parties.

20.5 Amicable Settlement
Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration.

However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration
Unless settled amicably, any dispute in respect of which the DAB’s decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language]. The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation
of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute. Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works."

The process can be summarised into three distinct stages:

a. Stage One: DAB decision is received and a notice of dissatisfaction filed within 28 days;
b. Stage two: Parties attempt amicable settlement;
c. Stage three: Arbitral proceedings can be commenced 56 days after the notice of dissatisfaction is filed.

Throughout these stages, the DAB decision retains its “binding character”, and Parties remain obligated to “promptly give effect to” the decision, unless and until reviewed by amicable settlement or arbitral award. Indeed, the wording of Sub-Clause 20.4 anticipates a period of time after the DAB decision is issued and before settlement or final arbitral award, where the parties are contractually obliged to “give effect” to the DAB decision. However, ensuring that the Parties “give effect” to the decision in this interim period does pose some difficulties. Contractually, a party is obliged to immediately make payment of any amount determined by the DAB. Despite this, Sub-Clauses 20.4–20.6 do not explicitly provide a means of enforcing this obligation. Claimants are left with a binding decision without any teeth and therefore turn to Sub-Clause 20.6, the general arbitration provision, to seek an award for immediate enforcement of their DAB decision.

These enforcement discrepancies make up what has been described as the “gap” in Clause 20.43 In commentator Nael Bunni’s view, the only solution to the “gap” issue is to treat the non-compliant party as in breach of contract, which is of little practical value in the immediate term because there is no decisive mechanism to remedy the breach by enforcing compliance with the DAB decision.44 Bunni suggests that amendment to Sub-Clause 20.7 is needed in order to remove the words “final and binding” and definitively allow interim enforcement of all DAB decisions.45

44 [At] pg. 12
45 A similar solution was discussed and adopted during the deliberations of ICC’s drafting Committee for its recently published Dispute Board Rules, in force as from 1st September 2004. It is embodied in Article 5.4 of these Rules which provides “If any Party fails to comply with a Decision when required to do so pursuant to this Article 5, the other
Without clarification, Sub-Clause 20.6 is subject to varying interpretation.46 There have been two different approaches to the interpretation of Sub-Clause 20.6 by arbitrators. The first holds that failure to comply with a binding DAB decision is a distinct dispute in and of itself akin to breach of contract that can be referred to arbitration under Sub-Clause 20.6 and be enforced through a partial arbitral award. The second interpretation is that a binding DAB decision cannot be enforced through a partial arbitral award since Sub-Clause 20.7 provides for this possibility only in respect of decisions that are both final and binding.

VI. Partial award or interim award?

It is appropriate at this juncture to describe the distinction between a partial and an interim arbitral award. A partial award is dispositive of the issues it decides, removing those issues from the purview of the arbitrator for the remainder of the proceedings, carrying with it the power of res judicata. Partial awards are generally rendered in respect of jurisdiction, preliminary points of law, or distinct substantive claims — essentially, issues that are more appropriately dealt with before the final award and that are unnecessary to revisit later in the proceedings. As described by Robert Merkin:47

"a partial award... finally disposes of a particular issue which has arisen between the parties and is wholly independent from later awards which may be issue by the arbitrators."

For this reason, the idea of immediate enforcement of a DAB decisions does not square off with an orthodox understanding of a partial award. Although non-compliance (breach of Sub-Clause 20.4) can be seen as a separate claim decision leading to a partial award would be res judicata of that issue. This is problematic where the underlying claim or merits ask the arbitrator to review the sufficiency and validity of the DAB decision itself. Here, one risks revisiting an issue twice. For although breach is a separate legal claim and legal theory, decision on a claim concerning the validity of the DAB decision itself leads the parties to the same place in the end, namely, enforcement or non-enforcement of the DAB decision. If an arbitrator were to issue a partial award for payment under a claim for breach, technically, that decision should not be subject to review, meaning payment pursuant to the DAB decision could not be revoked. Respondent’s failure to comply with the DAB decisions is not part of the underlying substantive dispute. Therefore, a declaration that the Respondent is in breach of Sub-Clause 20.4 could theoretically be the subject of a final partial award.

46 Refer to footnote 77.
47 Robert Merkin, Arbitration Law, para. 18.7.
However, a declaration is not what claimants seek, rather an order for payment of the amount ordered by the DAB, backed by the enforcement mechanisms that attach to arbitral awards. An order requiring immediate payment in a partial award is not dispositive in the traditional sense; rather it intends to provide an interim solution for payment which may be revised by a final award. Therefore, any Partial Award would need to contain an explicit or implicit reservation that the merits of the dispute concerning the claimant’s entitlement to payment, will be revised and determined in the final award. See for example, In ICC Case No. 17988:48

"the rights of the Parties in respect of the merits of the claims underlying the DAB's decision are reserved until the final resolution of these claims under a future Award, and the Arbitral Tribunal reserves its rights to open up, review and revise the DAB's decisions”

Commentators and arbitrators are divided as to whether a partial award containing this kind of reservation is an acceptable means of enforcing a DAB decision since it is not wholly dispositive.

1. Arguments against the availability of a Partial Award

Those that take the position that a partial award is not possible, adhere to the view that a partial award must be distinct and independent of the issues that will remain open for review in the proceedings, and will be definitively determined by final award. Although a partial award in this context has a different legal basis, i.e. breach of contract (breach of Sub-Clause 20.4), an arbitral order for payment will inevitably be revisited in the Final Award when deciding the substantive merits of the dispute because the Final Award will determine whether the amount ordered in the DAB decisions, or any further payment, is due and owing under the construction contracts. So, although a request for partial award may have a different legal basis, it essentially addresses the same entitlement to payment pursuant to the same construction contract. The Arbitrator rejected a requested for a partial award for this reason in ICC Case No. 16119, reasoning that “the payments awarded under the DAB's decision will be revisited by the Sole Arbitrator and cannot be the subject of a final partial award and again the subject of a final award”. Because the subject matter of the two awards could not be meaningfully distinguished, “it [went] against the essence of a final award to make an order that could be revisited and reversed in a further award.”

The Singapore Court of Appeal’s decision in CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK also supports this view, however, not because the Claimant was seeking a partial award, but a final one.49 The Claimant’s request for arbitration was limited to whether non-compliance with the DAB de-

48 At para 236.
cision constituted breach of contract and thus Respondent should be made to compensate Claimant for the amounts decided by the DAB. The distinguishing feature of this case being that Claimant requested a final award ordering immediate compliance with a DAB decision. Although the arbitrator ordered immediate payment, the Singapore Court of Appeals essentially reversed on jurisdictional grounds, reasoning that an Arbitrator can only issue an award regarding non-compliance with a DAB decision if the merits of the DAB decision are also to be considered within the same arbitration, holding:52

"...[Sub-clause] 20.6 the 1999 FIDIC Conditions of Contract requires the parties to finally settle their differences in the same arbitration, both in respect of the non-compliance with the DAB decision and in respect of the merits of that decision. In other words, [Sub-clause] 20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved."

The Court of Appeal rejected the notion that a final award can be made solely on the issue of non-compliance with a DAB decision.

It is important to note that some commentators argue for a restrictive interpretation of the Singapore decision and claim that there is nothing about the decision that would prevent a Sole Arbitrator or Arbitral Tribunal from issuing a partial award ordering immediate compliance if the merits of the dispute are also before the Arbitrator.51 While the 2011 Singapore decision lends credence to the notion that an award of a final nature only addressing breach of Sub-Clause 20.4 and not the merits, is improper, the 2014 High Court ruling of the same case does raise some issues.52 While the Court does reinforce the right of the Tribunal to open up the case on its merits by confirming the decision reached in 2011, it also attempts to give expediency to the "pay now" aspect of claim by allowing bifurcation of proceeding between merit and breach. As stated by Dr Collin Ong:53

"[T]he conclusion of the judgment now suggests that it is possible for the Tribunal to issue two different Final Awards dealing with a single claim for losses and damages provided by the DAB."

Taneer Dedzeade does not support partial awards of this nature, proposing a "provisional order" as the more appropriate measure to give effect to a DAB decision.54 Echoing the reasoning of the arbitrator in ICC Case No. 16119, in which he was Counsel for the successful Respondent, Dedzeade states that:55 "it is inap-

50 [At] 67.
51 Indeed the High Court of Singapore expressly saw an interim award enforcing the DAB decision as an available option for a claimant, although "the amount paid out is liable to be returned to the payer," in the final award PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2010] SGHC 202 at [38].
52 Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation (Indonesia) [2014] SGHC 146.
55 [At] 18.
Appropriate for an arbitral tribunal to issue a partial (final) award concerning sums owed as the effect of such an award would be finally to resolve an issue that is yet to be resolved. In his view issuing a partial and a final award on a party's entitlement to payment would create a risk of two conflicting awards, which is unacceptable in the same arbitration proceedings.

Jeremy Glover and Simon Hughes also support this view, whereby swift enforcement through Sub-Clause 20.7 only applies in situations where neither party has served a notice of dissatisfaction. If a notice of dissatisfaction has been filed, there is no immediate recourse for the aggrieved party to ensure the DAB decision can be enforced. The most a winning party can do is bring a second claim before the DAB, and obtain a decision on the parties' failure to honour the first DAB decision.

2. Arguments in favour of a Partial Award

Those who take the view that partial award is possible characterise the issue as limited to the legal effect of Sub-Clause 20.4, which requires immediate payment in accordance with a DAB decision regardless of the overall merits. According to this view, an arbitrator need only decide whether the respondent is obliged by Sub-Clause 20.4 to pay immediately the amount adjudicated by the DAB. Thus, the partial award would operate res judicata in respect of the breach of contract issue, and would leave open the merits to be determined by a final award.

A number of arbitral decisions support this view. In ICC Case No. 10619, the arbitral tribunal held in favour of the Claimant, finding that the decisions should be given their "full force and effect" notwithstanding that those decisions may be revised or set aside by arbitration or agreement between the parties. Similarly, in ICC Case No. 15751, the arbitrator concluded that the Respondent should pay the amounts ordered by the DAB decisions as damages for breach of contract, without pre-judging the merits of the substantive dispute. ICC Case No. 17988 also characterised the partial award as "different and separate from the dispute (claims) underlying the DAB decisions".

One of the most vocal and prominent supporters of this approach is Christopher Seppälä, one of the drafters of the FIDIC Red Book 1999. He has described the drafters' intention that DAB decisions.

56 Jeremy Glover and Simon Hughes, Understanding the New FIDIC Red Book: A Clause by Clause Commentary (Sweet & Maxwell, 2006) at 408.
57 [At] 401.
58 ICC Case No. 10619, ICC Case No. 16948, ICC Case No. 15751, ICC Case No. 17988, and ICC Case No. 15956 in support this position.
60 Referring to Engineers' decisions in the 1987 rules, replaced largely by DAB decisions in the 1999 Rules. Christopher Seppälä, Enforcement by an Arbitral Award of a Binding Receipt.
... were to be respected, even if they have been the subject of a timely notice of dissatisfaction from a party and might later be proved to have been wrong. If they specify that an amount is to be paid to the contractor, then the amount is to be paid even though the decision could later be reversed and the amount paid be required to be returned.”

Seppälä notes that sub-clause 20.7, although explicitly referring to final and binding decisions, was not intended to exclude the possibility of a binding decision also being enforced by arbitral award under 20.6. His view was that the drafters saw it as “obvious” that a binding decision that had been subject to a notice of dissatisfaction, together with the dispute underlying it, could be referred to arbitration under sub-clause 20.6.61

Seppälä was one of the strongest critics of the Singapore Court of Appeal’s decision in Persero. His view is that the Court of Appeal misinterpreted sub-clause 20.7 as implying a limitation which the drafters did not intend. He also contends that the Court misinterpreted sub-clause 20.6 as requiring the merits of the dispute to be referred to arbitration, as the wording allows any dispute to be referred to arbitration, including the enforcement of a DAB decision. He also disagrees that sub-clause 20.6 requires all disputes to be referred to the same Tribunal and decided in the same ICC arbitration, as 20.6 does not restrict the number of arbitrations that can be brought in respect of one dispute.

Jane Jenkins also supports the arbitrator’s ability to enforce a binding but not final DAB decision, by rendering a partial award pending determination of the overall dispute.62 Her view is that the substantive merits of the dispute must be submitted to arbitration in the ordinary way under clause 20.6, and as a component of those arbitral proceedings the claimant can request a partial or interim award. Jenkins suggests the only grounds in which such an award would not be made in favour of the claimant is where the DAB has made a fundamental error, for instance:

- if it decided matters beyond the scope of the referral,
- if it asked itself the wrong question,
- if the nature of the decision is one which the board is not contractually permitted to make,

or

- if the process by which the decision was made was not procedurally fair to the parties (ie breach of natural justice, the right to be heard).63

but not Final Engineer’s or DAB’s decision under the FIDIC Conditions ICLR 2009 at 421.

61 Christopher Seppälä, How not to interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in Persero 29 ICLR 4 at 12.


63 [At] 115.
Additionally, in the opinion of Oana Soimulescu and David Brown, there is no "gap" in clause 20.7, as the broad wording of clause 20.6 allows for any dispute to be referred to arbitration, and is not limited to a dispute on the underlying merits. They characterise sub-clause 20.7 as an exception to the general rule under sub clauses 20.4 and 20.5 that all disputes must first be referred to the DAB for decision, and secondly be subject to a 56-day amicable settlement period before arbitral proceedings can be commenced. Sub-clause 20.7 allows the party seeking enforcement to bypass these two steps and directly obtain an arbitral award enforcing compliance with the DAB decision. In the opinion of the authors, decisions that are binding but not final can also be enforced by an arbitral award, however only after the usual prerequisites for arbitration have been fulfilled, namely a DAB decision has been issued on the breach of clause 20.4, and the 56 day settlement period has passed.

VII. Approaches to overcome the uncertainty within FIDIC clause 20

1. Damages for breach of contract?

An important distinction between the decisions in favour and against partial awards is the legal characterisation of the claim as one for breach of contract. This allows a Claimant to couch the request for partial award as a distinct and separate dispute since the issue of whether sub-clause 20.4 has been breached is unlikely to arise at the substantive stage of proceedings. This position is consistent with the view expressed by commentator Frederic Gillion in a 2011 article that the correct measure of damages for breach of sub-clause 20.4 is for payment of the amount ordered by the DAB, not simply interest. The Sole Arbitrator in ICC Case No. 15751 agreed, holding that:

"[the breaching party] should be required to pay [the sum of money ordered by the DAB] and interest from the date payment was due by way of damages for breach of Sub-Clause 20.4."

Opposing that position is the view that the damages for breach of sub-clause 20.4 do not necessarily equate to the amount ordered by the DAB. Instead, the final

64 Oana Soimulescu and David Brown, Enforcement of binding DAB decisions: a fresh approach to clause 20 of the 1999 FIDIC conditions of contract 29 ICLR 19 (2012).
65 At. 25(a).
66 At. 25(c).
68 See also ICC Case No. 17988 where the Partial Award ordered payment of the amount determined in DAB decisions "as damages for the breach of Sub-Clause 20.4 of the Contract".
award will ultimately and definitively determine entitlement to further payment under the construction contracts. If the Claimant is successful on the merits, it will be restored to the position it would have been in had the DAB decisions been promptly complied with, i.e. the respondent will be ordered to make payment of amounts outstanding. Any loss the claimant suffers for breach of contract in the interim period, by the respondent’s failure to promptly give effect to the DAB decisions pending the final award can adequately be compensated by interest on the amounts owing. Therefore, it is not necessary to grant immediate enforcement of the DAB decisions to compensate Claimant for the Respondent’s present breach of contract. As was stated in ICC Case No. 16949:69 “though non-compliance with DAB decisions may amount to breach of contract, the consequences of such breach would hardly be a claim for damages of the same amount already awarded.” Judge Ean in the High Court of Singapore agreed, stating that:70 “suing in contract for breach may not be the best practical move for the winning party, especially when the decision on relates to payment of money. The winning party may need to prove damages, which may be no more than a claim for [interest] on the sum owing”.

Taner Dedezade also supports this view that “as a matter of principle” damages for breach of contract would not amount to the sum ordered by the DAB.71 Instead he recommends alternative claims for specific performance and damages as a means of enforcing a DAB decision.72

2. Interim awards & enforceability

Another solution to the current conundrum is for the arbitral tribunal to issue an interim order for payment. As noted above this is the solution favoured by commentator Taner Dedezade. Many institutional arbitral rules allow for such provisional measures, such as Article 28 of the ICC Rules which provides:

“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.”

However, an interim order is unlikely to provide a solution for the out-of-pocket claimant. The New York Convention and its associated enforcement mechanism

71 [At] 16.
72 [At] 16.
only applies to "arbitral awards",73 without clarification as to whether an award must be final. Jurisprudence and commentary is divided on whether interim orders are enforceable under the New York Convention. For instance, in the United States interim awards are seen as important to the arbitral process and are thus judicially enforceable as being final in the sense that they clarify the parties' rights in the interim period pending a final decision on the merits.74 However, Swiss, German, Austrian, and Australian Courts have all held interim awards to be unenforceable. The Supreme Court of Queensland rejected the notion that interim orders or awards can be treated as an "arbitral award" for the purposes of the New York Convention,75 reasoning that "an interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it, is not "final" and binding on the parties".76

Indeed, a Swiss Federal Tribunal decision refused to annul or enforce an interim arbitral decision that required one party to transfer inventory to the other because the arbitration was ongoing.77 The Austrian Oberster Gerichtshof held that due to the non-final character of interim awards, such awards may not be challenged in the absence of agreement to that effect.78 The Higher Regional Court ("Oberlandesgericht") Frankfurt also rejected an application to annul an award on liability, which left open the issue of damages, stating that:79

"An arbitral award for the purpose of this section [German ZPO, §1039] is a decision of the arbitral tribunal which disposes comprehensively and finally of a dispute or a separable portion of a dispute. So-called interim awards, which only deal with individual issues such as admissibility of the claim, preliminary substantive issues or the basis of a claim, at least in those cases where an arbitral tribunal still has to decide on the amount due, do not fall within this category."

3. FIDIC Guidance Memorandum

In April 2013, FIDIC issued a Red Book Guidance Memorandum ("Memorandum").80 The stated purpose of the Memorandum was to "make explicit the inten-

73 Article II(1) of the New York Convention provides that the Convention applies to "the recognition and enforcement of arbitral awards," while Article III of the Convention also deals only with "arbitral awards".
76 [At 39].
77 Judgment of 13 April 2010, DFT 136 III 200, §23.3 (Swiss Federal Tribunal).
79 Judgment of 10 May 2007, 2007 OchelVZ 278, 278 (Oberlandesgericht Frankfurt);
Judgment of 23 January 2013, AZ 2 Sch 3/12 (Oberlandesgericht Koblenz) (Not published).
80 See http://fidic.org/node/1615.
tion of FIDIC in relation to the enforcement of the DAB decisions that are binding and not yet final", and clarify whether failure to comply with such a decision can be referred to arbitration. The Memorandum noted that international arbitral tribunals are divided on the issue. In order to overcome the present ambiguity, the Memorandum suggested amendment to Sub-Clause 20.4, which would allow the DAB to order the payee to provide security for payment ordered. It also suggested Sub-Clause 20.7 was to be "rewritten in its entirety" in order to make the subsection apply to situations where a party fails to comply with a DAB decision "whether binding or final and binding", thereby "the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 for summary or other expedited relief, as may be appropriate."

While the Memorandum clarifies where the FIDIC Red Book may be amended, it did not make current interpretation any easier. Instead, it left two possibilities:

1) that the Memorandum explained the intention behind the FIDIC conditions as they currently stand and therefore the amendments are not strictly necessary to allow a sole arbitrator or arbitral tribunal to render a partial award on non-compliance; or

2) as they currently stand, the FIDIC Red Book allows an arbitral award under Sub-Clause 20.7 only in respect of final and binding decisions. Therefore, a tribunal does not have jurisdiction to issue a partial award enforcing a decision which is binding but: not final unless the suggested amendments are implemented.

Thus due to the existence of the Memorandum, Arbitral Tribunals may be prevented from reading contracts that do not incorporate it in line with the stated intentions of FIDIC. As was stated by Andrew Tweeddale:

"If the [Memorandum] has not been expressly incorporated in the contract of the parties then an arbitral tribunal should be wary of interpreting the contract in the way that the [Memorandum] suggests. The reason for this is that the arbitral tribunal would in effect be rewriting the contract rather than simply interpreting the parties' intentions."

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82 In the penultimate paragraph, the Memorandum wanted “If the decision of the DAB requires a payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment” inserted. This was intended to refute attempts at bundling both the “merit” dispute and the “breach” dispute together, as was done in the CRW v PGN [2011] case.

83 FIDIC Guidance Memorandum to Users – a half-baked solution?, Construction Law International, Andrew Tweeddale, vol. 9, is. 2, June 2014, pg. 27, ("Andrew Tweeddale").
The FIDIC Gold Book,\textsuperscript{84} in comparison, has been amended to account for such ambiguities. FIDIC Gold Book 2008 Sub-Clause 23.6 was amended to clarify the obligation of party to comply with a DAB decision "notwithstanding that a Party gives a Notice of Dissatisfaction". Further, Gold Book Sub-Clause 20.9 now specifies that a party's failure to comply with any decision, whether binding or final and binding, can be referred to arbitration for summary or expedited relief.

4. Policy Considerations

The risk of a construction process stalling due to lack of liquidity caused by non-payment is a real concern. Similarly important is whether a party may be entitled to cease work in the event of a dispute. For these reasons, expeditious payment backed by legal sanctions is important in the construction industry. It is why the "pay now, argue later" rule has developed in many jurisdictions.\textsuperscript{85} The "pay now, argue later" rule ensures that contractors maintain cash flow, can continue with a project, and pay subcontractors for services rendered. This is especially important in circumstances where contractors would otherwise have to wait until resolution of the dispute settlement process to receive a final award or judgment directing payment, which can be a lengthy process. The absence of a clear "pay now, argue later" position in the FIDIC Red Book raises questions about efficacy and purpose of the DAB process. If DAB decisions are not backed by a sanction and are practically unenforceable, then what is the purpose of the DAB to begin with?\textsuperscript{86}

Nevertheless, there is the need to maintain a distinction between DAB decisions and arbitral awards. A DAB decision should not be akin to an arbitral award and should not have the same enforcement mechanisms and legislative support that attach to arbitral awards (such as the New York Convention provisions). In fact, Sub-Clause 20.4 of the FIDIC Red Book says explicitly that "[t]he DAB shall be deemed to be not acting as arbitrators". It is therefore against the policy of the DAB process to elevate DAB decisions to the status of arbitral awards, except in exceptional circumstances (for instance, as provided in 20.7 of the FIDIC Conditions).

\textsuperscript{85} Cross reference footnote 35.
\textsuperscript{86} The DIS Adjudication Rules try to resolve this problem by stating that the non-compliance with a DAB decision is a "severe breach of contract", see article 22.2, even if it is held that the breaching party had a right to refuse compliance with the incorporated decision. Further, article 24.1 provides for an interest rate of 10 % above the base interest rate per year on any "payment obligation" not fulfilled.
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