

THE LAWYER
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LAW FIRM OF THE YEAR

Applicable law, DABs and arbitration under FIDIC

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Pinsent Masons

Overview

- Dispute resolution procedure under FIDIC
- Role of DAB/DAABs
- Applicable law and DAB/DAAB
- Enforcing DAB decisions



Dispute resolution procedure under FIDIC

- Claim (Employer or Contractor)
- Engineer's determination – including amicable settlement period
- DAB (/DAAB)
- Amicable Settlement
- Arbitration



Why are DABs important in construction

- DAB intermediate step to arbitration
- Can issue binding decisions, which can become final and binding
- Cash flow is the lifeblood of the construction industry
- Cannot wait 2 years for arbitration process to run its course
- DAB provides mechanism for a quick decision
- Pay now argue later



Applicable law

ICC Case 20149

- Law of the seat of arbitration applied not only to the arbitral clause but to the whole of Clause 20
- A dispute cannot be referred to arbitration unless the provisions of Sub-Clauses 20.1 – 20.5 have been satisfied

ICC Case 20118

- Since appointment process was part of a contract relating to a project in a given country then it was subject to the law of that country

Contrast: statutory adjudication

- Also operates within the framework of local legislation (e.g. in the UK (Housing Grants, Construction and Regeneration Act 1996)).
- Legislation establishes mandatory requirements applicable to statutory adjudication.
- Legislation confers particular status on decisions of statutory adjudicators – they can be enforced in local courts.
- But (like DAB decisions) the decisions of statutory adjudicators are not enforceable internationally via New York Convention.

Enforcement of final and binding decisions

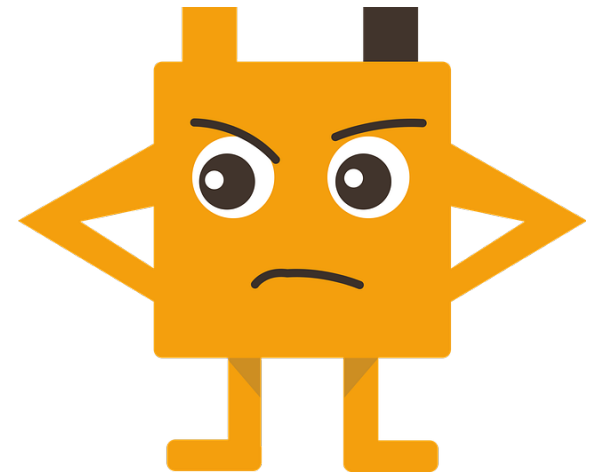
- DAB decision in Contractor's favour
- No notice of dissatisfaction issued by either party within 28 days
- S-C 20.4, 7th para ('99 edition) [**S-C 21.4.4 '17 ed.** essentially the same]
 - *“If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction 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”*
- Simply refer the failure to give effect to final and binding decision to arbitration (S-C 20.7 / **S-C 21.7**), with the arbitrator able to issue a final award without opening up the merits of the claim

Enforcement of binding but not final decisions

- What if notice of dissatisfaction is issued?

- S-C 20.4

“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”



Enforcement of binding but not final decisions

- Creates contractual obligation to pay?
 - There used to be (and still are) disputes that there is no obligation since notice of dissatisfaction has been issued

- **S-C 21.4.3**

“The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause.”

If the decision of the DAAB requires a payment of an amount by one Party to the other Party

(i) Subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any certification or Notice...”

- **S-C 21.7**

“In the event that Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may...refer the failure itself directly to arbitration under S-C 21.6.”

Enforcement of binding but not final decisions

- What happens if paying party does not give effect?
 - Refer failure to pay amount pursuant to S-C 20.4 / **S-C 21.4.3** to arbitration?
 - Bifurcate proceedings – partial award on failure to give effect to DAB decision?
 - Will such a partial award be enforceable by local courts?
 - Not a “final” award
 - Depends on how word relief – damages for breach of S-C 20.4 / **S-C 21.4.3**

What do you think?

- Do you agree that binding, but not final, DAB decisions should be capable of being enforced in your jurisdiction?
- Does the applicable law in your jurisdiction go far enough in enabling this?
- For countries within EU and particularly for projects financed by EU money, is this something which can and should be dealt with at an EU wide level?

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