

IBA International Construction Projects Committee

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# FIDIC Guidance Memorandum of 1 April 2013

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LALIVE

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## DAB Decision – Scenario I

No Notice of dissatisfaction

DAB Decision final and binding

Enforcement through summary arbitration  
(Sub-Clause 20.7 FIDIC)

## DAB Decision – Scenario II

Notice of dissatisfaction

DAB Decision binding

- Parties must promptly give effect to decision (Sub-Clause 20.4)
- But not final: dispute may be referred to amicable settlement / arbitration for final determination (Sub-Clauses 20-5 and 20-6)

Enforcement if failure to comply?

# The Gap: Enforcement of 'binding' DAB decisions?

- 1999 FIDIC conditions: no equivalent rule to Sub-Clause 20.7 granting direct right to summary arbitration
- International arbitral tribunals divided (based on different interpretations of primary arbitration clause in Sub-Clause 20.6)
- *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*
  - ▶ Singapore High Court [2010] SGHC 202: set aside final ICC award directing enforcement of a binding, but not final, DAB decision without first hearing the merits of the dispute
  - ▶ Singapore Court of Appeal [2011] SGCA 33: dismissing appeal

# FIDIC Guidance Memorandum of 1 April 2013

FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1st April 2013

## Purpose:

This Guidance Memorandum is designed to make explicit the intentions of FIDIC in relation to the enforcement of the DAB decisions that are binding and not yet final, which is that in the case of failure to comply with these decisions, the failure itself should be capable of being referred to arbitration under Sub-Clause 20.6 [Arbitration], without Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] being applicable to the reference. This intention has been made manifest in the FIDIC Conditions of Contract for Design, Build and Operate Projects, 2008 ('Gold Book') by the equivalent Sub-Clause 20.9.

To make FIDIC's intention explicit this Guidance Memorandum provides changes to be made to the FIDIC dispute resolution Clause 20 and in particular to Sub-Clause 20.7 and, as a consequence, to 14.6 and 14.8 of the FIDIC Conditions of Contract for Construction, 1999 (the 'Red Book'), the FIDIC Conditions of Contract for Plant and Design-Build, 1999 ('Yellow Book'), and the EPC/Turnkey Projects, 1999 ('Silver Book'). Compliance with the guidance provided in this Memorandum is highly recommended when using the 1999 FIDIC Red, Yellow or Silver books.

## Background:

A substantial number of arbitral tribunals have found Clause 20 to be unclear on the issue of whether a party may refer the failure of the other Party to comply with a DAB decision that is 'binding' but not 'final' to arbitration as is explicitly the case of a 'final and binding' decision under Sub-Clause 20.7. A DAB decision is 'binding' and not 'final' when either Party, within 28 days after receiving the DAB decision, gives notice to the other party of its dissatisfaction with the DAB decision.

International arbitral tribunals have been divided over whether, in the event of a failure to comply with a DAB decision issued under Clause 20 of the Red Book, which is 'binding' but not 'final', the failure itself may be referred to arbitration, without Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] being applicable to the reference. This issue was also the subject of the judgment of the Singapore High Court in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 and the judgment of the Court of Appeal of Singapore dismissing an appeal from that judgment [2011] SGCA 33 ('Singapore Case'), which set aside an ICC award directing enforcement of a DAB decision.

The same concern applies to Clause 20 of the Yellow Book, and the Silver Book, as that Clause is worded in substantially identical terms in them.

## FIDIC's Recommendation:

### Clause 20:

- a. Sub-Clause 20.4 - Insert the following as a new penultimate paragraph:

*'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'*

- b. Replace Sub-Clause 20.7 in its entirety with:

*'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 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.'*

### Clause 14

- a. Sub-Clause 14.6 - Insert the following at the end of the last sentence of the first paragraph:

*',' and shall include any amounts due to or from the Contractor in accordance with a decision by the DAB made under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]*

- b. Sub-Clause 14.7, paragraph b - Insert the following before '; and':

*'including any amounts due in accordance with a decision by the DAB which have been included in the Interim Payment Certificate'*



# FIDIC's Recommendation # 1

- Replace Sub-Clause 20.7 to avoid uncertainty:

***“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 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.”***

## FIDIC's Recommendation # 2

- Insert new Sub-Clause 20.4 (as penultimate paragraph):

*“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.”*

- ▶ Give DAB the power to require “winning” party to provide security where it is to receive a payment as part of the DAB decision
- ▶ Arbitral tribunal can overturn DAB decision

# Gap closed?

- Future contracts: helpful
  - ▶ lends credibility to party wanting to deal with uncertainty upfront
- Existing contracts: less helpful
  - ▶ only guidance / contracts need to be amended
- Stopgap until new editions of Red, Yellow and Silver Books (to be expected soon)
  - ▶ issue already dealt with in FIDIC Gold Book (2008)



## Problems solved?

- In practice: will arbitrators feel comfortable to give summary or expedited relief?
  - ▶ There will potentially be two inconsistent final awards ...
- Parties better off concentrating on arbitrating the substantive dispute?
- ICC emergency arbitration rules unlikely to be applicable as contract already provides for expedited procedure (DAB)

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### QUESTIONS?

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