

The Dispute Board Federation

Geneva - Singapore

Excellence in Dispute Resolution since 2001

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Featured Events and Continuing Professional Development Units

2011

There are several new programmes and events which are shown on our website and these include:

DBF Members Dinner
April 15, 2011
London

**The 2011 FIDIC Contracts
Total Immersion
Programme**
May 20 - 27, 2011
Luxembourg

**The DBF - FIDIC Intensive
DAB Training Programme**
June 20 - 21, 2011
Rome

For further information on any of these please contact Anne Eve our Programme Administrator at anne.eve@dbfederation.org

For a full listing please go to our website www.dbfederation.org

Events & Programmes

The DBF is pleased to announce that the new Chair of our Programmes Committee is Dr. Götz-Sebastian Hök. He has been mandated with the role of restructuring not only the Committee but also the various programmes put on by the DBF. In this regard he will be establishing new methods and means of training for the DBF and its members which will deal with pressing issues facing dispute board members and those in the construction field. As a first step he will also be writing a monthly column for our Newsletter and we have included the first of these articles below dealing with VAT for dispute board members.

The DBF is now one-quarter of the way into 2011 and has several events and programmes underway. Our Members Dinner is taking place on April 15, 2011 at the Athenaeum Club in London. If you would like to attend please contact Anne Eve for registration details anne.eve@dbfederation.org

Our FIDIC Contracts *Total Immersion* Programme has now opened for 2011 Registration and the first Programme will be taking place May 20-27 in Luxembourg. A separate email will be circulated giving further details about this exclusive Programme. If you would like further information about this Programme please see the following link: [FTIP 2011 Brochure](#) or if you would like to be considered for admittance to this Programme please send me your CV and a short note on what you hope to attain from taking this Programme. You may send this to me at h.wilson@dbfederation.org.

We are also pleased to announce that our Intensive Dispute Board Training Programme presented jointly with FIDIC is now scheduled for June 20 & 21, 2011 in Rome and a separate email will be going out regarding registration



and other details. The brochure for this Programme can be seen at: [DBF-FIDIC Intensive Dispute Board Training Programme](#). For those that want to learn how to effectively administer and run a dispute board we urge you to attend.

Herbert Wilson
Executive Director



DISPUTE ADJUDICATOR'S ENTITLEMENT TO PAYMENT AND SUBSEQUENT VAT LIABILITY IN ACCORDANCE WITH THE EUROPEAN VAT PACKAGE

By: Dr. Götz-Sebastian Hök, Berlin



Regarding taxation adjudicators find themselves in a difficult situation. They are providing services worldwide having legal relationships with both parties of the dispute. It is to be noted that it is, on analysis, a contractual relationship aimed to exchange services against payments. By providing adjudication services internationally working adjudicators do only have minimum contacts with their home country. However, from the point of view of European fiscal authorities any of their services are deemed being provided at the place where the arbitrator or adjudicator has its residence where ever the arbitrator or adjudicator actually has performed hearings and or site visits [1]. Hence, in principle they are subject to taxation in accordance with local VAT laws. However, since 1 January 2010, the so-called "VAT package"

rules for cross-border services have a fundamental impact on the VAT issue. The "VAT Package" comprises the Council Directive 2008/8/EC, the Council Directive 2008/9/EC and the Council Regulation (EC) No 143/2008 and has been transposed into the domestic VAT legislation of each Member State. However, the VAT Package will be implemented gradually: 1 January 2010, 1 January 2011, 1 January 2013, 1 January 2015. In particular the existing rules regarding the place of supply have been altered. From 1 January 2010 most services provided to business customers will be treated as supplied in the country where the business customer is established, and the business customer will account for VAT under the reverse charge mechanism. This has major consequences for the place of supply rules for DAB services and invoicing of such services. These changes create a considerable risk to become liable for VAT towards the domestic fiscal authorities in the country of the seat of any adjudicator since he is based in a European country.

The basic legal principle of VAT law is simple: Services which are supplied in consideration of payments involve VAT. In order to determine VAT liability the question is with whom the adjudicator enters into a contractual relationship. The ordinary way is that adjudicators enter into a contract with both parties of the dispute. However it seems to be helpful to discuss the relationship in more detail in order to have a clear view on any detail of the relationship between adjudicator and client and subsequent VAT issues.

Basically the adjudication process consists of two agreements. One agreement, the Adjudication Agreement (under FIDIC Sub-Clause 20.4), is that made between the parties to a construction contract. The second agreement, the Adjudicator's Agreement (or Dispute Adjudication Agreement as referred to in the FIDIC Books), is an agreement which may be made between the adjudicator and one or both of the parties [2]. The construction contract adjudication provisions are concerned only with the Adjudication Agreement. By means of the Adjudication Agreement the parties agree upon certain terms in their contract. Apart from the jurisdiction clause contained therein these terms usually include provisions requiring the adjudicator to reach his decision within a given period; imposing a duty on the adjudicator to act impartially and providing that the adjudicator is not liable to the parties unless there is bad faith. Those provisions are essentially obligations or rights of the adjudicator which would be expected to be contained in any subsequent Adjudicator's Agreement. In adjudication, the ability of an adjudicator to obtain fees depends on there being a contractual right to payment under the Adjudicator's Agreement with one or both of the parties [3].

It should be noted that, in most cases, under the Building Contract it is envisaged that the parties and the adjudicator would all execute the Adjudication Agreement thereto annexed (as under FIDIC) which would, amongst other things, provide the adjudicator with a direct route to payment of his fees from both the referring and the responding party. In the absence of any other route, the necessary terms of the Adjudicator's Agreement would have to be implied into that agreement. Unfortunately sometimes no such tripartite adjudication agreement is entered into between both parties and the adjudicator. However, there is nothing objectable in an adjudicator being appointed unilaterally [4]. Hence, sometimes adjudicators will provide adjudication services under a unilateral Adjudicator's Agreement though in fact both parties may participate in the proceedings.

In general terms there is authority for that if an adjudicator is appointed and neither party makes a contract with the adjudicator, the parties by participating in the adjudication and thereby requesting the adjudicator to act, enter into a contract with the adjudicator who acts in that capacity as a result of that request. Such a contract would be formed by conduct. Thereupon the courts would assume implied terms that the participating party (or parties) would be liable to pay the reasonable fees and expenses of the adjudicator and would be jointly and severally liable with the other party to do so.

However, in order to avoid disadvantages a party who has expressed its reservations as to the jurisdiction of the adjudicator may or may not participate in the adjudication. By having made an assertion of lack of jurisdiction but continuing to participate in the proceedings, without prejudice to that contention, the participating party is anyway requesting the adjudicator to carry out work and make a decision. If, a party has participated in the adjudication process, albeit without prejudice to its contention that the adjudicator did not have jurisdiction, then in principle by participating and thereby requesting the adjudicator to adjudicate on the dispute also this party will generally be liable for the reasonable fees and expenses of the adjudicator as the other party will be.

On the basis of the observations above there is authority for the view [5] that the general position in relation to an adjudicator is this:

- (1) Where a person acts as an adjudicator then by accepting the appointment, that person is entitled to reasonable remuneration from the parties for work done;
- (2) Where a person acts as an adjudicator then the parties are jointly and severally liable for that person's fees and expenses;
- (3) Where a person acts as adjudicator where one party has asserted lack of jurisdiction and that person does not have jurisdiction then that person may have a claim based on the fact that the useless work was carried out at the request of the parties or one of them.
- (4) Where a person acts as adjudicator having jurisdiction though one party has objected the adjudicator's jurisdiction, then that person may have a claim against both parties if both of them have participated in the adjudication.

Since 1 January 2010 the consequences regarding VAT liability are such:

- a) The basic rule is this that the service will be supplied at the place where the service purchaser has its seat if the purchaser is an "entrepreneur". As a result only the purchaser VAT law applies.
- b) In case of trans-border supplies to an "entrepreneur" the service provider is not liable for VAT, however the supplier has to show evidence for the fact that the purchaser is an "entrepreneur" and he shall indicate this in its invoice.
- c) Contrariwise, if the service purchaser is not an "entrepreneur" the adjudicator is liable for VAT in its home country.

Since 1 January 2010 arbitrators and adjudicators must also comply with the following duties:

In domestic cases adjudicators will have to charge the parties with VAT (in accordance with domestic laws). In cross border cases the situation is such:

1. If the parties do not have the quality of an "entrepreneur" adjudicators shall charge VAT in accordance with the law of the supplier's seat.
2. If the parties have the quality of an "entrepreneur" (whether having its relevant seat in or off the European Union) adjudicators will not add any VAT. European "entrepreneurs" being involved as a service purchaser will account for VAT under the reverse charge mechanism. Non European "entrepreneurs" shall comply with their local laws.

As adjudicators usually have contractual relationships with both parties mixed situations exist where the service purchasers are not jointly dealt with as "entrepreneur". In such cases the adjudicators have to split their invoices though the parties are jointly and severally liable for the fees subject to further assessment as the case may be.

In any case adjudicators having their relevant domicile or residence within the European Union shall investigate whether the parties do have the quality of an "entrepreneur" in the sense of VAT laws. The parties may either refer to a VAT identification number or other appropriate evidence must be produced.

In a nutshell [6], an adjudicator will not charge VAT on its services if parties in adjudication are legal entities or entrepreneurs established within the EU but will need to report the value of the services provided to the domestic tax authorities. As a consequence of the new rules, arbitrators will also need to collect information concerning the VAT numbers of parties. Arbitrators' services to parties having the quality of an entrepreneur and established outside the EU are, as before, exempt from VAT.

[1] ECJ, *von Hoffmann v. Finanzamt Trier*, Judgment C-145/96; [1997] EUECJ C-145/96 = Rec 1997, p I-4857

[2] See *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) (24 February 2009)

[3] See *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) (24 February 2009)

[4] See *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) (24 February 2009)

[5] See *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) (24 February 2009)

[6] For a more detailed analysis see *Risse and Meyer-Burow*, *SchiedsVZ* 2009, p. 330 et seqq.

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