

# The Dispute Board Federation

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Excellence in Dispute Resolution since 2001

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## Special Edition Developments

Dispute Adjudication Boards are successful when quick resolution of disputes is guaranteed. Under FIDIC Contracts once a DAB is in place disputes are brought to it and generally a Decision on the dispute is given within 84 days. This Decision is binding until overturned at a subsequent arbitration or the parties reach some accord and settle the matter -- usually by payment of monies from the Employer to the Contractor.

Unfortunately some Employers have realised that they can get around this "quick payment" provision by not paying anything after the Decision and waiting for the Contractor to commence arbitration for the collection of the amounts due, thus delaying the matter and payment for years. Alternatively the Employer can go to arbitration claiming that the DAB had no jurisdiction to even make a Decision and again delay the ultimate conclusion.

Either way the general result is the same, the Contractor does not get paid, is forced to endure lengthy arbitration proceedings, pay large sums to both the arbitration entity which administers the arbitration as well as to legal advisors -- all whilst the Employer keeps the needed funds. Many times the Contractor does not have sufficient funds to proceed and drops out of the process altogether. This is not good for lenders, contractors, or the public as most often it further delays the project and most projects affected are those regarding infrastructure development - roads, bridges, dams, etc.

The underlying rule is that despite disagreement with any Decision the Employer should make payment *now*. Timely payment levels the playing field and then if arbitration is necessary that is fine - so long as in the interim the funds are paid whilst waiting for an arbitration Award.

There have been very few instances where this fundamental issue has been successfully determined. The purpose of this Special Edition is to inform our readership of an exciting development arising out of just such a situation. The following article shows how this underlying principal of fairness has been recently dealt with at the ICC.

The case described below was successfully resolved by two of the DBF's distinguished Professional Members - Giovanni Di Folco and Mark Tiggeman and it shows us a way forward in the swift resolution of

### Featured Events and Continuing Professional Development Units

Dubai  
Total Immersion Programme on FIDIC Contracts  
Sept 25 - Oct 1, 2010  
33 CPD Units

Singapore  
Intensive DAB Training Programme  
28-29 October 2010  
12 CPD Units

Singapore  
Annual Symposium,  
November 3-5, 2010  
15 CPD Units

### 2011

There are several new programmes and events being planned for the New Year.

Programmes include Claims, The Use of Witnesses in DAB Hearings, DAB Advocacy & Procedures. Starting in 2011 we will also have regular DAB Member Briefings from the World Bank, the EBRD, The Millennium Challenge Corporation, and the Islamic Development Bank.

On a social and networking note we will have our Professional Member-Guest Dinners to be scheduled in London, Dubai, Singapore, Santiago, Stockholm, Beijing, Istanbul, Bogota, and Sarajevo. and an International Golf Tournament networking event for Development Bankers, Contractors, and DAB professionals

construction disputes.

**Herbert Wilson**  
Executive Director

to be at St. Andrews,  
Scotland.

For a full listing  
please go to our  
website  
[www.dbfederation.org](http://www.dbfederation.org)

## ENFORCEMENT OF A DAB DECISION THROUGH AN ICC FINAL PARTIAL AWARD

How do you enforce a binding but not final "*ex parte*" Decision of a Dispute Adjudication Board ("DAB") under a FIDIC contract?

A recent Final Partial Award in an ICC arbitration has, for the first time, provided a timely answer to this difficult but important question.

### SUMMARY

A Contractor referred various disputes arising on a construction project to a single member DAB pursuant to a slightly amended FIDIC 1999 Red Book contract. Thereafter the Employer refused to participate in any stage of the DAB process arguing that the DAB had been improperly appointed and was invalid. Despite this position taken by the Employer the DAB rendered two Decisions in favour of the Contractor, effectively on an "*ex parte*" basis, dealing with both liability and quantum respectively (the "DAB Decisions"). Even with the DAB Decisions the Employer failed to pay the Contractor the substantial sum awarded to the Contractor under one of these DAB Decisions and the Employer itself then referred various disputes to arbitration and sought, *inter alia*, a declaration from the arbitral tribunal that the DAB appointment was "*illegitimate and void*" and that the DAB Decisions were equally flawed.

Following this the Contractor applied to the arbitral tribunal for bifurcated proceedings to enable the legal status of the DAB Decisions, particularly the issue of their immediate enforceability, to be heard early in the arbitration, effectively as preliminary issues. The arbitral tribunal agreed and ordered bifurcated proceedings and most importantly decided in favour of the Contractor by granting a Final Partial Award upholding the validity of the "*ex parte*" DAB and ordering the Employer, among other things, to pay the Contractor the money awarded by the DAB in its Decision.

### THE FACTS

Here the Contractor (the "Respondent" in the arbitration) had entered into a contract with an Employer (the "Claimant" in the arbitration) for the construction of new infrastructure. A slightly amended version of the FIDIC 1999 Red Book form of contract (the "Red Book Contract") was used by the parties. The standard version of the Red Book's Clause 20 was adopted with few amendments; a single member DAB was chosen, as were the ICC Rules of Arbitration. The substantive law to be applied was that of the Employer's national civil law jurisdiction.

Disputes arose between the parties during the course of the Works culminating in the Employer serving a Notice of Termination on the Contractor for allegedly fundamental breaches of contract. The Contractor considered such Notice to be in breach of the Red Book Contract and proceeded to refer that dispute, among others, to the DAB.

Not in dispute was the fact that the parties had jointly failed to enter into a DAB Agreement within 42 days after the Commencement Date for the Works (the "42 Day Period") as contractually required. What was not agreed between them, however, was the legal consequence of that joint failure.

In fact, many months had passed since the expiration of the 42 Day Period. Once disputes had arisen the Contractor wrote (repeatedly) to the Employer seeking a joint appointment of a single member DAB. The Employer refused to do. At first it simply failed to respond and later argued that, given that the time for entering into the DAB Agreement had expired, a DAB could no longer be appointed.

Unhappy with this position and determined to comply with what it perceived to be a mandatory pre-condition of the Red Book Contract, the Contractor relied upon Sub-Clause 20.3(a) thereof and applied to the President of FIDIC (the appointing entity under the Red Book Contract) to nominate a single member DAB in the face of the Employer's continuing refusal to do so. The

President duly proceeded to appoint.

The Employer disputed the validity of that appointment. It continued to refuse to sign the DAB Agreement despite being invited to do so by the Contractor and notwithstanding the appointment of the single member DAB. The Employer maintained that the nomination of the DAB was not in accordance with the Red Book Contract because of the expiry of the 42 Day Period. It said that the 42 Day Period was an "*extinctive term*" under the substantive law of the Red Book Contract and therefore legally incapable of being complied with after its expiration. The Employer additionally argued that its own refusal to participate in the DAB process was fatal to its validity. The consequence of all of this, it argued, was that the DAB was improperly constituted and illegitimate, resulting in any decisions it rendered being void.

The Contractor proceeded to refer various disputes to the DAB notwithstanding the Employer's objections. This effectively resulted in the DAB proceedings being conducted *ex parte*. The DAB eventually rendered two decisions (on liability and quantum) in favour of the Contractor.

## THE DAB

The DAB decided that:

1. It had jurisdiction to hear the disputes;
2. The Employer's Notice of Termination was invalid and unlawful;
3. A substantial sum was payable by the Employer to the Contractor as damages for the invalid and unlawful termination of the Red Book Contract; and
4. Such damages should be paid by the Employer within 28 days of the delivery of the second of the DAB's Decisions.

Notwithstanding that it disputed both the validity and jurisdiction of the DAB, the Employer proceeded to serve Notices of Dissatisfaction against both DAB Decisions, citing alleged procedural irregularities and also dissatisfaction with the merits of both DAB Decisions. The Employer's position was that the DAB Decisions were neither final nor binding and that the matters in dispute should be decided *ab initio* by an arbitral tribunal which had the full power to open up, review and revise any Decision of the DAB, including the parties' failure jointly to agree on the appointment of the DAB itself.

The Employer also served a Notice of Dissatisfaction against the second of the DAB Decisions challenging the sufficiency of the quantum of damages awarded.

## THE ARBITRATION

The Employer decided to refer its own disputes to arbitration seeking damages from the Contractor for alleged breaches of the Red Book Contract. It also impugned the validity and jurisdiction of the DAB and, therefore, its Decisions by repeating its previous objections to the appointment of the DAB.

In its Answer to the Employer's Request for Arbitration, the Contractor restated that Sub-Clause 20.3 of the Red Book Contract [Failure to Agree Dispute Adjudication Board] clearly applied in circumstances where the Employer refused jointly to agree to appoint the DAB and accordingly permitted the Contractor to proceed to do so unilaterally. It also counterclaimed substantial damages against the Employer.

The Contractor also applied for bifurcation of the arbitral proceedings seeking a Partial Award that, *inter alia*, the DAB was duly and properly appointed and that its Decisions were valid, binding and enforceable against the Employer forthwith.

A brief note as to procedure: A bifurcated process was sought by the Contractor to allow the arbitral tribunal to decide on the enforceability of the original DAB Decisions on an expedited basis. It was intended that the substantive issues disputed by the parties, including those that had already been decided by the DAB effectively on an interim basis, be heard and determined in due course by the arbitral tribunal under a Final Award.

Whilst the Employer opposed that approach, the arbitral tribunal agreed and ordered that a separate procedural timetable be adopted for the early resolution of those arguments, effectively as preliminary issues. Further, a Partial Award, rather than an Interim Award, was sought on the basis that the former was considered to be more straightforward to enforce before the courts of the Employer's jurisdiction than the latter, should enforcement become necessary.

The Contractor requested the arbitral tribunal to find that the Employer's refusal to agree to the appointment of a DAB itself represented a breach of the principle of good faith which applied as part of the applicable substantive law. It was argued that acting in good faith implies an obligation of cooperation between the contracting parties, including a duty to facilitate the performance of the Red Book Contract. The Contractor also argued that the effect of Sub-

Clause 20.4 of the Red Book Contract [Obtaining the Dispute Adjudication Board's Decision] is that any Decision of the DAB is immediately binding upon the parties and, therefore, should be fully complied with even if it is not final. This was said to be derived from the relevant wording of the Sub-Clause itself, namely:

*"...The [DAB] 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..."*(emphasis added)

Despite the obvious practical importance of the enforceability of DAB Decisions for participants in construction projects, it is noteworthy that there do not appear to have been any awards published by the ICC dealing squarely with this point. This is so notwithstanding that there does seem to be some significant support to be derived from analogous awards.

An example of such support is ICC Case No. 10619 which dealt with the meaning of the predecessor to Clause 20 of the 1999 FIDIC Red Book, namely Clause 67 of the Fourth Edition Red Book (1987). In that case the arbitral tribunal granted an (interim) award in favour of a Claimant that was seeking to enforce an Engineer's decision awarding it money. The case has been the subject of detailed commentary to the effect that<sup>[1]</sup>:

*"...the interim award in ICC Case No. 10619 is directly applicable to a decision of a DAB under the 1999 FIDIC Books. Even if one or both parties have given a notice of dissatisfaction with respect to a decision of a DAB pursuant to Sub-Clause 20.4, each party is bound to give effect to that decision and, if that Decision calls for a payment to be made by one party to the other, then that decision should be enforceable directly by an interim or partial award pursuant to the ICC Rules. This is the consequence, the author submits, of the interim award in ICC Case No. 10619"* (emphasis added).

The interim award in ICC Case No. 10619, among other arguments, was relied upon by the Contractor in the present case under consideration.

## **THE PARTIAL AWARD**

In reaching its Partial Award in the present case, the arbitral tribunal considered the priority that should be given to the documents comprising the Red Book Contract. It found that the Appendix to Tender took precedence over both the Particular and General Conditions of Contract. That was particularly significant on the facts as the Appendix to Tender contained the 42 Day Period and also provided that the President of FIDIC, or his nominee, was to be the appointing entity.

The arbitral tribunal also examined the intentions of the parties with regard to the appointment of the DAB. In particular, it noted the numerous requests made by the Contractor to the Employer to agree that appointment and also the fact that, at the time the disputes in question arose on the project (well after the expiration of the 42 Day period), the Engineer had himself agreed that a DAB should be appointed and had urged the Employer to do so.

Ultimately, the arbitral tribunal decided that the appointment of the DAB was made validly and in compliance with the terms of the Red Book Contract. In reaching this view, the parties' intentions in choosing to include a DAB dispute resolution process were key to giving "*effet utile*" (proper effect) to their bargain, being an important principle enshrined in the substantive law chosen by the parties to apply to their Red Book Contract.

The arbitral tribunal also agreed with the Contractor's primary argument that the DAB Decisions were enforceable directly and finally under a Partial Award. In reaching that view the arbitral tribunal made it very clear that the subject matter of those DAB Decisions is, of course, able to be opened up, reviewed and revised by the arbitral tribunal later in the arbitration in accordance with the express power to do so granted by Sub-Clause 20.6 of the Red Book Contract. Accordingly, in that sense the result is to be treated as interim but, nonetheless, immediately enforceable.

## **THE "APPEAL"**

An interesting "twist" to this case occurred in the form of an application which was made by the Employer to the arbitral tribunal, purportedly in accordance with Article 23(1) of the ICC Rules, to obtain an "*interim measure*" suspending the effects of the Partial Award. The Employer argued that such an "*interim measure*" would preserve the "*status quo*" between the parties as it existed before the Partial Award was made. The Contractor opposed the application on the basis that it was not a genuine interim measure in the sense contemplated by Article 23(1) but, rather, an attempt to evade the effect of the Final Partial Award.

The arbitral tribunal refused to grant the "*interim measure*" primarily on the ground that the Employer failed to establish that the relief sought was urgently required in order to avoid serious and irreparable harm being caused to it.

## SIGNIFICANCE OF THIS RESULT

In deciding this case the arbitral tribunal has answered a number of potentially difficult and important questions arising from the widespread use of the Red Book form of contract on international construction projects.

The key consequences appear to the authors to be:

1. Parties who include DAB provisions in a contract but fail to comply with them should (subject to the precise wording of their contract) expect to find arbitral tribunals unsympathetic to non-compliance with the DAB procedure, including any failure by one of the parties to participate in the DAB process;
2. Arbitral tribunals are likely to be sympathetic to applications to bifurcate proceedings to hear arguments about the enforcement of DAB Decisions as soon as possible in the arbitration;
3. Notwithstanding any Notice of Dissatisfaction having been given by either or both parties, DAB Decisions are likely to be enforceable by Partial or Interim Arbitral Awards being made early in an arbitration, albeit usually in circumstances where they are subject to the power of the arbitral tribunal to open up, review and revise any Decision of a DAB later in the arbitration; and
4. An attempt by an unsuccessful party to avoid compliance with a Partial or Interim Award enforcing a DAB Decision by seeking an "*interim measure*" to suspend the effect of such Partial or Interim Award (e.g. under Article 23(1) of the current ICC Rules of Arbitration) is likely to fail.

In the authors' opinion, this useful and timely case should provide some much needed clarity, if not certainty, regarding the enforceability of DAB Decisions. It is submitted that all parties involved in international construction projects can have greater confidence that the DAB process will lead to Decisions that will be given "teeth" by arbitral tribunals. That is so even when DAB proceedings are forced to be conducted on an *ex parte* basis due to the unwillingness of a party to participate. Defaulters beware!

The authors will be pleased to answer queries that may arise from this article whilst being both mindful and respectful of the need to preserve the confidentiality of the arbitration concerned.

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## A NOTE ABOUT THE AUTHORS

The authors were both acting as counsel for the Contractor.



**Giovanni Di Folco** is the Senior Partner of Techno Engineering & Associates, an international consulting firm specializing in claims and dispute resolution internationally. He is a civil engineer with more than 25 years experience of managing multi-disciplinary civil engineering projects around the world, including Italy, Iran, Libya, South Africa, the Kingdom of Lesotho, the Sultanate of Oman, the United Arab Emirates, Greece and Romania.

Mr Di Folco is an expert in project and contract management, contract administration, claims preparation and defence. He has gained extensive experience in both international arbitration and adjudication work whilst acting as counsel for a wide variety of clients. In particular, he has represented international contractors on more than thirty international dispute adjudication procedures and in many international arbitrations conducted under the ICC Rules relating to disputes under the FIDIC Red, Yellow and Silver Books.



**Mark Tiggeman** is a lawyer and partner of English international law firm Kennedys. He has more than 20 years experience in international dispute resolution, with more than a decade being dedicated to resolving disputes on construction projects. He has practiced in diverse jurisdictions throughout the world including countries within the Asia-Pacific region, the Middle East, South America and Europe.

Mr Tiggeman is currently based in Kennedys' London office and continues to work on contentious cases internationally. He is admitted as a barrister and solicitor in Australia and as a solicitor in England & Wales. He regularly undertakes advocacy in arbitrations in which he appears, particularly those in which he represents clients within the construction industry.

[1] Vide "*An Engineer's/Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award*" by Christopher R. Seppala published by White & Case in December 2009.

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