

# IS DISPUTE ADJUDICATION UNDER FIDIC CONTRACTS FOR MAJOR WORKS INDEED A PRECONDITION TO ARBITRATION?

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Despite the widespread opinion that dispute adjudication is a mandatory pre-arbitral stage under the FIDIC Contracts, anecdotal evidence shows that an alternative interpretation of these contracts has been adopted in some Central and Eastern European countries which allows parties to by-pass this stage of the dispute resolution process. This article aims at informing those engaged in construction in these countries about this alternative interpretation and the risks associated with it.

## 1. INTRODUCTION

The FIDIC Contracts for Major Works (“FIDIC Contracts”)<sup>1</sup> introduce a multi-tier system for resolution of construction disputes which includes: determination of a claim by the engineer,<sup>2</sup> a referral of the dispute to a Dispute Adjudication Board (“DAB”), an attempt to reach an amicable settlement, and, finally, a referral to arbitration. The prevailing view among scholars and practitioners is that the parties should exhaust all of these pre-arbitral phases before submitting their disputes to arbitration, unless they agree otherwise. In other words, a dispute cannot be referred directly to arbitration without having first been submitted to the DAB. The present article aims at drawing the reader’s attention to an alternative interpretation of the FIDIC Contracts which allows parties to arbitrate their disputes without referring them to a DAB. Anecdotal evidence suggests that a similar interpretation has been adopted by contracting parties and arbitral tribunals in some Central and Eastern European states.

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<sup>1</sup> FIDIC is the French acronym of the International Federation of Consulting Engineers ([www.fidic.org](http://www.fidic.org)). The FIDIC Contracts for Major Works referred to in this article include the Conditions of Contract for Construction (or also known as Red Book), the Conditions of Contract for Plant and Design-Build (or Yellow Book) and the Conditions of Contract for EPC/Turnkey Projects (or Silver Book). All references in this article, unless explicitly indicated otherwise, are to the 1999 editions of these contracts.

<sup>2</sup> For the purpose of convenience, I have used the names of the parties under the FIDIC Contracts in the same way these parties are designated thereunder.

## 2. DISPUTE RESOLUTION UNDER FIDIC CONTRACTS

The FIDIC Contracts contain a detailed and self-contained system for resolution of construction disputes. The main provisions concerning claims and disputes are contained in clause 20. In order to facilitate the reader's apprehension of the subject-matter of this article, the four major steps in the dispute resolution process under the FIDIC Contracts are briefly outlined below.

### 2.1. From a "claim" to a "dispute"

First of all, there should be a "*dispute*". The mere existence of a claim filed by either party is not sufficient for such a claim to be qualified as a dispute. A dispute occurs when a party files a claim which has been rejected in whole or in part, and the same party wishes to pursue the claim further. Thus, a contractor's claim filed in compliance with the contractual requirements of sub-clause 20.1, which has been rejected by the engineer, will qualify as a dispute, provided that the contractor expresses its dissatisfaction with the engineer's rejection.

### 2.2. Review of the Dispute by a DAB

The second step in the dispute settlement process involves the referral of the dispute to a DAB. The DAB was introduced for the first time in one of the 1995 FIDIC books,<sup>3</sup> and later on, it was adopted in all the 1999 editions of the FIDIC Contracts. Nowadays, DABs are increasingly popular throughout the world on the larger projects. It is not the purpose of this article to deal with the nature of DABs which has been subject to extensive debate<sup>4</sup>. It will be sufficient for the purpose of this article to say that dispute resolution by a DAB is a contractual mechanism for settlement of disputes under which a private independent panel, comprising of one or three experts, considers a dispute and renders a decision on it which is binding on the parties under certain conditions.

The introduction of the DAB under the FIDIC Contracts had a threefold function. On one side, the DAB replaced the controversial figure of the engineer as decision-maker under the older editions of the FIDIC Contracts. The engineer was often criticised as being dependent on the

<sup>3</sup> This was the FIDIC Conditions of Contract for Design-Build and Turnkey Projects of 1995 (or also called the Orange Book).

<sup>4</sup> For more details about the history and nature of the DAB procedure, please see Jane Jenkins, *International Construction Arbitration Law*, 2nd Edition. (Alphen aan den Rijn/Kluwer Law International, 2013), pp. 56–64. See also Volker Mahnken, "Why International Dispute Settlement Institutions should offer ad hoc Dispute Board Rules" [2006] ICLR 433, and Götz-Sebastian Hök, "Dispute Adjudication in Civil Law Countries – Phantom or Effective Dispute Resolution Method?" [2011] ICLR 412.

employer which precluded him from making a fair and unbiased decision on disputes<sup>5</sup>. Nowadays, the engineer is still involved in the dispute settlement process at the stage when he has to make a determination on the claims submitted by the parties<sup>6</sup>. However, once the claim crystallizes into a dispute, i.e. the claim has been rejected by the engineer and the latter's rejection has also been rejected by the claiming party, then the role of the DAB comes to the fore instead. The second reason for the introduction of the DAB was to promote a new dispute avoidance mechanism. The dispute avoidance function can be seen from the obligation of the DAB under the Red Book to give opinions and recommendations if both parties jointly require the DAB to do so<sup>7</sup>. In addition, the introduction of the DAB aimed at decreasing the number of disputes which proceeded to arbitration by creating a cheaper and faster way for resolution of construction disputes while construction is still under way.

There are two types of DABs under the FIDIC Contracts<sup>8</sup>. Under the Red Book, the DAB is a standing board which is constituted at the initial stage of the construction project<sup>9</sup>. In contrast thereto, the DAB under the Silver Book and the Yellow Book is an ad hoc board which is appointed once the dispute has arisen<sup>10</sup>. As the reader will see in section 4.1 below, the answer to the question posed in the title of this article depends on the type of DAB which has been constituted.

Once seized with the dispute, the DAB should render its decision within a term of 84 days and the party dissatisfied with the decision must serve a notice of dissatisfaction if it is willing to pursue the dispute further<sup>11</sup>. The decision is binding on the parties, unless, and until, it is revised in an amicable settlement or an arbitral award<sup>12</sup>. If no notice of dissatisfaction has been served against the decision, the dispute is deemed settled and the decision becomes final. The notice of dissatisfaction triggers the next step in the procedure.

<sup>5</sup> This was due to the fact that the engineer was paid by the employer and, therefore, oftentimes played to the tune of the employer. The engineer acted more as an employer's agent and not as an independent professional. For more details about the figure of the engineer under FIDIC Contracts please see Ola Ø Nisja, "The Engineer in International Construction: Agent? Mediator? Adjudicator?" [2004] ICLR 230, and Helmut Köntges, "International Dispute Adjudication – Contractors' Experiences" [2006] ICLR 306.

<sup>6</sup> Sub-clause 3.5 FIDIC Contracts.

<sup>7</sup> However, this function is envisaged under the Red Book only (sub-clause 20.2, paragraph 7). There is no such a provision in the Yellow Book and the Silver Book.

<sup>8</sup> As regards the pros and cons of the different types of boards, please see Christian Stubbe and Michael Wietzorek, "Making Dispute Boards Better with the 'One Plus One' Model" [2013] ICLR 4.

<sup>9</sup> Sub-clause 20.2 Red Book.

<sup>10</sup> Sub-clause 20.2 Yellow Book and Silver Book.

<sup>11</sup> Sub-clause 20.4 FIDIC Contracts.

<sup>12</sup> Sub-clause 20.4, paragraph 4 FIDIC Contracts.

### 2.3. Amicable settlement

Pursuant to sub-clause 20.5 of the FIDIC Contracts, where a notice of dissatisfaction has been served, both parties should attempt to settle the dispute amicably before the commencement of arbitration proceedings, which may be commenced only after the expiry of 56 days, unless the parties agree otherwise.

### 2.4. Arbitration

The final prong of the dispute settlement process under FIDIC Contracts is arbitration under sub-clause 20.6. The arbitration clause proposed by FIDIC is self-sufficient<sup>13</sup>. It contains reference to the ICC Rules of Arbitration and envisages the composition of a three-member arbitral tribunal. The place of arbitration can be chosen by the parties or determined by the tribunal in case the contract is silent on this matter.

## 3. DISPUTE ADJUDICATION AS A PRECONDITION TO ARBITRATION

The prevailing opinion among scholars and practitioners nowadays is that the three steps mentioned in sections 2.1–2.3 above are preconditions to the commencement of arbitration proceedings<sup>14</sup>. Of course, parties are always free to deviate from the default dispute resolution mechanism. For example, they may modify clause 20 and agree that arbitration or a court will be the sole and only dispute resolution method which can be invoked directly by the parties. The same effect would be achieved if one of the parties files a premature request of arbitration (because of non-completion of the steps in sections 2.1–2.3) and the other party participates in the proceedings without objecting to tribunal's jurisdiction to review the dispute<sup>15</sup>. Apparently, in these two cases dispute adjudication is not a precondition to arbitration because the parties are treated to have agreed otherwise. Therefore, this section deals only with cases where the parties have agreed to use one of the FIDIC Contracts without modifying the default dispute resolution clauses.

<sup>13</sup> Christopher R. Seppälä, "The Arbitration Clause in FIDIC Contracts for Major Works" [2005] ICLR 4.

<sup>14</sup> See Seppälä, fn. 13 above, pp. 6–7. See also Dyalá Jiménez Figueres, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration: Introduction and Commentary", in 14 *ICC International Court of Arbitration Bulletin*, No 1 (2003), p. 71, Hök, fn. 4 above, pp. 422–423, 426.

<sup>15</sup> Please see Article 4 of the UNCITRAL Model Law in International Commercial Arbitration, available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (Last accessed 22 April 2014), pursuant to which, the party who knows that any requirement under the arbitration agreement was not complied with and yet proceeds with the application without stating its objection, shall be deemed to have waived his right to object.

In these cases, parties should generally go through all the stages in sections 2.1–2.3 above<sup>16</sup>. This widespread opinion rests on three main arguments. First of all, it is based on the interpretation of the FIDIC Contracts provisions. Secondly, there are some arbitral awards which supposedly support the opinion that dispute adjudication is a mandatory pre-arbitral step under the FIDIC Contracts. And thirdly, the rationale for the introduction of the DAB under the FIDIC Contracts further strengthens this argument. I will now deal with each of these arguments below.

### **3.1. Contractual interpretation**

Several parts of clause 20 of the FIDIC Conditions have been cited in support of the opinion that the DAB is a mandatory pre-arbitral phase. First of all, sub-clause 20.2 stipulates that “Disputes shall be adjudicated by a DAB in compliance with sub-clause 20.4 [Obtaining Dispute Adjudication Board’s Decision]”. Allegedly, this means that all claims which turn into disputes should be subject to review by a DAB. Furthermore, paragraph 6 of sub-clause 20.4, which deals with the notice of dissatisfaction against a DAB decision, contains probably the most cogent argument. Pursuant to this provision:

“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.”

This provision, read in conjunction with sub-clause 20.2, suggests that a dispute may be referred to arbitration only after the dispute has been referred to a DAB and a notice of dissatisfaction has been served against DAB’s decision or the lack of such a decision<sup>17</sup>. These provisions set forth the general rule which applies in the dispute settlement process under the FIDIC Contracts. Any deviations from this rule are exceptional, and, as is evident from the wording of sub-clause 20.4, should satisfy either the conditions of sub-clause 20.7 or those of sub-clause 20.8. Sub-clause 20.7 concerns only cases where a DAB’s decision has become final and binding, and one of the parties fails to comply with it. In such a case, the other party may refer this default directly to arbitration without having to go through dispute adjudication and amicable settlement a second time. This approach is understandable and needs no further explanation.

<sup>16</sup> Seppälä, fn. 13 above, pp. 6–7. As Christopher R Seppälä has pointed out: “The scope of the arbitration clause is a narrow one as no dispute under the contracts may ordinarily go to arbitration until it has run the gauntlet, so to speak, of clause 20”. However, the author admits that the wording under the 1999 Silver Book and 1999 Yellow Book is not satisfactory and might be interpreted in a way which would allow the parties to by-pass the DAB phase of the dispute resolution process.

<sup>17</sup> Pursuant to paragraph 5 of sub-clause 20.4, a notice of dissatisfaction should be given also in cases where the DAB fails to give its decision within the prescribed period of time.

Enforcement of DABs' decisions has been extensively discussed in the legal literature and this question is outside the scope of this article<sup>18</sup>. The second exception under sub-clause 20.8 allegedly deals with cases where the DAB's appointment has expired. This clause is analysed in more detail in section 4 below.

It has been stated that sub-clause 20.5 also strengthens the view that a dispute should be referred to a DAB before proceeding to arbitration. The provision specifies that prior to arbitration the parties should try to reach an amicable settlement of their dispute in relation to which a notice of dissatisfaction has been served. Thus, the sub-clause outlines in a clear way the sequence of steps which should be undertaken before the commencement of arbitration, namely adjudication of the dispute, serving of a notice of dissatisfaction, and, finally, an attempt at amicable solution.

A further argument supporting the mandatory character of the DAB stage of the dispute settlement process is contained in sub-clause 20.6 which provides that: "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." As Christopher Seppälä has noted, it follows from this sentence that only a dispute which has been referred to the DAB for a decision and which has not become the subject of DAB's final and binding decision may be submitted to arbitration<sup>19</sup>. Accordingly, a dispute which has not been referred to the DAB is premature and cannot proceed to arbitration. The arbitral tribunal will lack jurisdiction to review such a dispute. If it does so, it risks its award being set aside in the country where arbitration took place and/or its recognition and enforcement being denied in third countries<sup>20</sup>.

### 3.2. Arbitral awards

The second main argument in favour of the mandatory character of the DAB is based on the content of some arbitral awards rendered under the auspices of the ICC International Court of Arbitration<sup>21</sup>. It should be mentioned, however, that these awards dealt with disputes under earlier editions of the FIDIC Contracts<sup>22</sup> in which the DAB was unknown and the

<sup>18</sup> For a detailed analysis about the topic see, for example, Christopher R Seppälä, "Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's Decision under the FIDIC Conditions" [2009] ICLR 414. See also Götz-Sebastian Hök, "Dispute Adjudication Boards – The International or Third Dimension" [2012] ICLR 420.

<sup>19</sup> Seppälä, fn. 13 above, pp. 6–7.

<sup>20</sup> Seppälä, fn. 13 above, pp. 6–7.

<sup>21</sup> Excerpts from these awards have been published in the *ICC International Court of Arbitration Bulletin* and have been commented on by Christopher R Seppälä in a series of commentaries.

<sup>22</sup> The awards deal with disputes that have arisen under the second (1969), third (1977) and fourth (1987) Editions of the FIDIC Contracts.

engineer fulfilled the role of a dispute adjudicator instead. Nevertheless, it has been stated that these awards may remain relevant also in respect to the resolution of disputes by a DAB because of the similarity of the dispute resolution clauses under the older and the current 1999 FIDIC Contracts. Most of the known ICC awards are consistent in their approach towards the pre-arbitral procedure and conclude that a decision of the engineer (who at that time was exercising the same role as that of the DAB under the current FIDIC editions) was a precondition to the commencement of arbitral proceedings. In ICC Case 6535, the tribunal decided that it did not have jurisdiction to review a contractor's claim which had previously been referred to the engineer but was not rejected by the latter<sup>23</sup>. In addition, in ICC Case 6276 and Case 6277 of 1990, the arbitral tribunal concluded that the contractor's claim was premature because it had not satisfied the prerequisites for arbitration set forth under the contract, as it had not been submitted for decision by the engineer<sup>24</sup>. The tribunal reached this conclusion despite the fact that the engineer was actually never appointed by the employer<sup>25</sup>. The partial award in ICC Case 12048 of 2003 contains probably the most explicit wording concerning the compulsory character of the pre-arbitral phase of the dispute resolution process. In this case, the tribunal refused to consider counterclaims filed by the employer which had not previously been submitted to the engineer<sup>26</sup>.

However, there is one ICC award rendered by a sole arbitrator in which the opposite conclusion was reached. In ICC Case 8677 of 1997, the arbitrator decided to grant contractor's claim to recover from the employer the retention money under the contract despite the fact that the contractor failed to refer such a claim to the engineer<sup>27</sup>. What contributed to this extraordinary outcome was probably the fact that the employer did not object that the requested amount was a "debt due"<sup>28</sup>.

<sup>23</sup> Final Award in Case 6535 (Extract), in 9 *ICC International Court of Arbitration Bulletin*, No 2 (1992), p. 60. The tribunal stated that: "if the matters submitted to the Engineer are claims which have not previously been rejected, they cannot be regarded as submitted under clause 67 whatever language is used in the submission."

<sup>24</sup> Partial Award in Cases 6276 and 6277 (Extract), in 9 *ICC International Court of Arbitration Bulletin*, No 2 (1998), p. 58.

<sup>25</sup> The tribunal stated that: "the claimant ... was under a duty to put the defendant (Employer) on notice to indicate to it the name of the Engineer to whom the dispute could be submitted. It was only if it had met with a refusal or in the event of the failure to reply on the part of the defendant that the claimant could have been dispensed from complying with this pre-arbitral phase".

<sup>26</sup> Cited by Christopher R Seppälä, "International Construction Contract Disputes: Third Commentary on ICC Awards", in 23 *ICC International Court of Arbitration Bulletin*, No 2 (2012), p. 27. The tribunal concluded: "before such claims may be referred to arbitration ... they must 'in the first place, be referred in writing to the Engineer ...' Pursuant to the express terms of clause 67, therefore, this Arbitral Tribunal has no jurisdiction to consider any claims that have not been so referred."

<sup>27</sup> Final Award in Case 8677 (Extract), in 19 *ICC International Court of Arbitration Bulletin*, No 2 (2008), p. 71.

<sup>28</sup> See Christopher R Seppälä, "International Construction Contract Disputes: Second Commentary on ICC Awards", in 19 *ICC International Court of Arbitration Bulletin*, No 2 (2008), p. 63.

### 3.3. Purpose of DAB

As already indicated in section 2.2, one of the purposes of the new DAB under the FIDIC Contracts was to decrease the number of disputes proceeding to arbitration by offering both an early dispute avoidance mechanism and a fast-track and cheaper procedure for resolution of disputes which is neutral and acceptable to both parties. That is why the engineer, in his role of decider of disputes, was replaced by the DAB. Therefore, the more consistent approach of the FIDIC drafters when introducing the DAB seems to be the adoption of a mandatory pre-arbitral stage in dispute resolution. And indeed, it seems illogical that the drafters of the FIDIC Contracts would aim at creating a multi-level dispute settlement procedure where the parties could easily leapfrog a procedural step. Moreover, at the time when the engineer was still performing his role of dispute adjudicator under the older FIDIC editions there was no possibility for the parties to circumvent the pre-arbitral referral of the disputes to the engineer. Therefore, it is hard to believe that the drafters of the FIDIC Contracts wanted to depart from the idea of having a mandatory pre-arbitral stage of dispute resolution.

## 4. THE EXCEPTION UNDER SUB-CLAUSE 20.8

As already stated in section 3.1 above, the general rule under FIDIC Contracts is that a dispute should go through the review of a DAB and an attempt to settle the dispute amicably before being referred to arbitration. Sub-clause 20.8 is one of the exceptions to this rule, since it allows either party to refer disputes directly to arbitration without having to comply with the two pre-arbitral steps described above, provided that the conditions for application of sub-clause 20.8 are fulfilled. These conditions will now be examined in some more detail.

### 4.1. Expiry of DAB's Appointment

Pursuant to sub-clause 20.8:

“If a dispute arises between the parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-clause 20.4. [Obtaining Dispute Adjudication Board's Decision] and sub-clause 20.5 [Amicable Settlement] shall not apply, and
- (b) the dispute may be referred directly to arbitration under sub-clause 20.6 [Arbitration].”

On its face, it seems that sub-clause 20.8, which bears the sub-title “*Expiry of Dispute Adjudication Board's Appointment*”, will apply only in cases

where a DAB has been appointed and its mandate has expired. In cases where the DAB is a standing board, as under the Red Book, this approach is understandable. The standing DAB is appointed at the beginning of the project and its mandate expires after its completion and the issuance of the performance certificate under sub-clause 11.9 which certifies the completion of contractor's obligations under the contract<sup>29</sup>. It cannot be expected from a DAB to stand for an indefinite period of time after the project completion. The appointment of the engineer would probably also have expired by that time. Therefore, in these cases, FIDIC introduces a less stringent dispute settlement procedure which allows either party to refer disputes directly to arbitration.

However, under the FIDIC Yellow Book and Silver Book, the DABs are ad hoc boards. Pursuant to sub-clause 20.2 thereunder, the respective DAB is appointed when a dispute has arisen and its appointment expires once the DAB has given its decision on the dispute. If any other disputes are submitted to the DAB by the date it has given its decision on the first dispute, then its mandate shall expire on the date when it has also given its decision on these other disputes<sup>30</sup>. Thus, there is a gap in respect of all disputes submitted for review after the date of DAB's decision. In practice, these disputes may arise well before the completion of the project. Read in conjunction with sub-clause 20.8, the wording of sub-clause 20.2 creates the impression that the parties do not have to submit these disputes to a DAB<sup>31</sup>. Moreover, they do not have the obligation to try to reach an amicable settlement. Thus, it turns out that disputes under the Yellow Book and Silver Book are treated differently regardless of the phase of completion of the project. The criterion for the differentiation seems to be temporal, i.e. whether the dispute in question has been referred before the date when the DAB has taken its decision on previous disputes or afterwards. Such a difference in the treatment of disputes could hardly be justified but, unfortunately, it is rooted in the contractual provisions.

<sup>29</sup> More precisely, under the last paragraph of sub-clause 20.2 the appointment of the DAB shall expire when the discharge under sub-clause 14.12 becomes effective, unless otherwise agreed between the parties. The discharge is provided by the contractor after the issuance of the performance certificate for the works and in the discharge the contractor acknowledges that the amounts indicated in his application for a final payment certificate are all the amounts due to the contractor under the contract. The entry into force of the discharge may be made conditional upon the return of the performance certificate and the payment of any outstanding amounts to the contractor.

<sup>30</sup> Last paragraph of sub-clause 20.2 Silver Book and Yellow Book.

<sup>31</sup> The problematic wording of sub-clause 20.8 under the FIDIC Yellow and Silver Books has been noticed by Christopher R Seppälä. See Seppälä, fn. 13 above, p. 13 (fn. 21). The author commented that: "the language is unsatisfactory as it could be interpreted as entitling a party to go directly to arbitration and bypass the DAB, which was certainly not the intention."

#### 4.2. Other reasons for lack of DAB

Leaving aside the question of the expiry of the DAB, an examination of the use of the word “*otherwise*” in sub-clause 20.8 might be illustrative. As already mentioned, this provision will apply if there is no DAB in place “*whether by reason of the expiry of the DAB’s appointment or otherwise*”. The expiry of the DAB’s appointment is only one of the reasons for the lack of the DAB’s existence. Therefore, it may be argued that the narrow application of the provision only to cases where DAB’s appointment has expired (as hinted also by the sub-title of the sub-clause) has been refuted by the existence of the word “*otherwise*” therein. Unfortunately, there is nothing in the FIDIC Contracts which clarifies the rationale for the use of this word. The clause, literally read, creates the impression that it will find application in all cases where there is no DAB in place for whatever reason. This means that sub-clause 20.8 may be put into practice in cases where a DAB was never appointed even though the parties signed a FIDIC Contract containing dispute resolution clauses requiring a DAB. This will enable either party (usually the contractor) to refer its claim directly to arbitration by-passing the pre-arbitral phases of dispute resolution (i.e. the DAB and amicable settlement). Moreover, one of the parties may even decide to thwart the appointment of a DAB with the ulterior motive of receiving a faster redress by way of circumventing the DAB stage in the dispute resolution process. It has been suggested that such behaviour may take the form of either party’s refusal to sign the tripartite Dispute Adjudication Agreement envisaged under the fifth paragraph of sub-clause 20.2. This agreement regulates the procedural rules to be followed by the DAB, and, therefore, the unwillingness of one of the parties to sign this agreement may be considered as an obstacle for the DAB’s commencement of work<sup>32</sup>. Whether such behaviour will be recognized as valid and enforceable is another question which will very much depend on the law governing the contract and the subjective opinion of the arbitral tribunal reviewing the case.

The absence of a working DAB may also be due to circumstances which arise following the appointment of the DAB. This will be the case, for example, when the sole member or one of the members of the DAB is not able to continue its work due to resignation, termination of appointment, death or disability. The FIDIC Contracts make an attempt at overcoming these difficulties by ensuring the appointment of a replacement person. At first, it is up to the parties to agree on a suitably qualified person who

<sup>32</sup> Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC: A Guide for Practitioners*, (New York, 2009), pp. 407–409. Pursuant to sub-clause 20.2, such a tripartite agreement shall incorporate by reference the General Conditions of Dispute Adjudication Agreement which are contained in the Appendix to the FIDIC Contract. Therefore, the lack of such a tripartite agreement will actually mean that these General Conditions will not enter into force.

can replace the member who is unable to act<sup>33</sup>. If the parties fail to agree on a replacement, then the fall-back provision of sub-clause 20.3 comes into play. It envisages that the appointing authority or the official named in the Appendix of Tender (under the Red Book and the Yellow Book) or the Particular Conditions (under the Silver Book) will appoint the replacement in parties' stead<sup>34</sup>. However, this mechanism will not always lead to the desired result. It will not be possible to appoint a replacement person if the parties have not specified an appointing authority in the FIDIC Contract or if the specified authority has failed to act<sup>35</sup>. These circumstances may be considered as stumbling-blocks for the continuation of the work of the initially appointed DAB which may be overcome only by agreement between the parties as regards the appointment of the replacement member. If the parties fail to co-operate, the only way forward seems to be the application of the exception under sub-clause 20.8 which will open the way to arbitration.

It follows that the vague wording of sub-clause 20.8 gives some leeway for the parties to assert that they are not obliged to use the services of the DAB. This makes it possible for the arbitral tribunal reviewing the dispute to reach the conclusion that the DAB and the attempts for amicable settlement are non-mandatory phases of the dispute resolution under the FIDIC Contracts. Anecdotal information suggests that in Central and Eastern Europe claimants in arbitration proceedings have often relied on this interpretation of sub-clause 20.8 in order to have their disputes reviewed directly by arbitration. The reasons for such an approach could be varied. One of them is the fear of the unknown. In Central and Eastern Europe, dispute adjudication is still not well comprehended, despite the widespread use of the FIDIC Conditions in these countries. The review of construction disputes by a DAB is often perceived as a procedure which increases the costs and prolongs the time for dispute resolution. Claimants' reluctance to use DABs can be further explained by the uncertainties related to the enforcement of a DAB's decision which has not been complied with by the defaulting party<sup>36</sup>. Further anecdotal evidence suggests that, when faced

<sup>33</sup> Pursuant to sub-clause 20.2, the parties may at any time appoint a replacement person. The appointment of such a person will come into effect if a DAB member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. However, if any of these circumstances occurs and no replacement is available, the replacement should be appointed in the same manner as the replaced person was required to have been nominated or agreed upon.

<sup>34</sup> FIDIC has suggested that the functions of the appointing authority may be exercised by the president of FIDIC or a person appointed by the president but in practice the parties often modify the default provision and specify another person or legal entity to act as an appointing authority.

<sup>35</sup> I have seen several FIDIC Contracts concerning projects in Central and Eastern Europe where the engineer or another person related to the employer was designated to act as an appointing authority for the purposes of sub-clause 20.3. In these cases, the employer might try to "persuade" the appointing authority to refrain from appointing a replacement member of the DAB if the employer wants to avoid the continuation of the dispute adjudication and refer its dispute with the contractor to arbitration.

<sup>36</sup> See Seppälä, fn. 18 above, pp. 414–427. See also Hök, fn. 4 above, pp. 435–437.

with premature requests for arbitration of disputes which have not gone to a DAB, arbitral tribunals in Central and Eastern Europe are inclined to adopt the interpretation of sub-clause 20.8 posed above. Frequently, in such cases the respondents will raise a jurisdictional objection claiming that the pre-arbitral phases of the dispute settlement process have not been exhausted and that the tribunal does not have jurisdiction to review the dispute. However, when faced with such objections the arbitral tribunals often confirm their jurisdiction by leaning on the word “*otherwise*” in sub-clause 20.8. How local courts in these countries would decide on the jurisdictional objection if seized with it remains to be seen. In the cases under both section 4.1 and section 4.2 above, it can be easily seen how the general rule regarding the preconditions to arbitration may be defeated by the exception provided in sub-clause 20.8. The exception creates broad opportunities for the parties to by-pass the pre-arbitral stages of dispute resolution under the FIDIC Contracts. Most likely, the arbitral awards mentioned in section 3.2 above would not limit the established practice in Central and Eastern Europe to evade DABs. It is true that an arbitral tribunal acting under the auspices of the ICC International Court of Arbitration might be influenced by the content of these awards. However, they do not have the value of precedents. Their influence is even less certain when it comes to disputes reviewed by ad hoc arbitral tribunals or tribunals acting under the auspices of other arbitration institutions. Moreover, as mentioned earlier, these awards dealt with disputes based on earlier editions of the FIDIC Contracts in which the engineer fulfilled the role of the DAB. However, under these editions there were no exceptions similar to sub-clause 20.8 which allowed parties to by-pass the review of the dispute by the engineer. Therefore, the considerations underlying these awards could not be directly transposed to the question discussed in the present article.

## 5. GOVERNING LAW

It is beyond any doubt that the dispute resolution mechanism under FIDIC Conditions can be significantly affected by the law governing the respective contract. It is outside the scope of this article to provide an overview of statutory provisions in different countries that may influence the settlement of construction disputes based on FIDIC Contracts. However, two cases can be mentioned here. They are of direct relevance to the question posed in the title of this article and have an impact on the sequence and character of the contractually agreed dispute settlement procedures. First of all, dispute adjudication of construction claims under certain types of contract and project in Great Britain is mandatory under the provisions of the Housing Grants, Construction and Regeneration Act 1996. Obviously, in these cases parties have to allow their disputes to be adjudicated whatever the contract

may have said. There are also other countries which have introduced statutory adjudication in their legislation<sup>37</sup>. On the other hand, there are some states where the jurisdiction of arbitral institutions over disputes is conferred by law. As a result, courts have held that the respective arbitration institution may assume jurisdiction over disputes even though the parties have agreed to follow certain pre-arbitration steps which they have not complied with. The Supreme Court of Manila has followed this approach in a recent case<sup>38</sup>.

However, it is argued that states which recognise the principle of contractual freedom typically do not adopt legislation which affects contractually agreed pre-arbitral phases of dispute resolution<sup>39</sup>. The issue discussed in this article may well be relevant in all these states.

## 6. CONCLUSION

Despite the widespread opinion that adjudication of disputes under the FIDIC Contracts is a mandatory precondition for the commencement of arbitration proceedings, the analysis in this paper reveals that this presumption is not beyond any doubt. Anecdotal evidence suggests that alternative interpretation of the FIDIC Conditions has been employed in some Central and Eastern European countries which allows either party to by-pass the DAB phase of the dispute resolution process and refer disputes directly to arbitration. Such an approach is based on the broad and ambiguous wording of the exception under sub-clause 20.8 of the FIDIC Contracts. And while I do not necessarily embrace this approach, I should admit that it is not completely devoid of any substance and legal reasoning. Therefore, future editions of the FIDIC Contracts should settle this lack of clarity. By that time, it is up to the parties to address the matter. If parties prefer to subject all their contractual disputes to adjudication by a DAB, then it is recommended that an amendment of sub-clause 20.8 is agreed and included in the Particular Conditions to the FIDIC Contracts.

<sup>37</sup> This is the case, for example, with Singapore (see Chapter 30B of the Building and Construction Industry Security of Payment Act), New Zealand (New Zealand Construction Contracts Bill), Malaysia (Construction Industry Payment and Adjudication Act 2012) and some jurisdictions in Australia.

<sup>38</sup> *Hutama-RSEA Joint Operations Inc v Citra Metro Manila Tollways Corp*, GR No 180640, 24 April 2009, cited by Hök, fn. 18 above, pp. 422–423. The court held:

“It is true that clause 20.4 of [FIDIC] states that a dispute between petitioner and respondent as regards the contract shall be initially referred to the DAB for decision, and only when the parties are dissatisfied with the decision of the DAB should arbitration commence. This does not mean, however, that the CIAC is barred from assuming jurisdiction over the dispute if such clause was not complied with.”

<sup>39</sup> Hök, fn. 18 above, p. 423.