

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.



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SUMMARY

1. 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;
2. The Employer refused to participate in any stage of the DAB process arguing that the DAB had been improperly appointed and was invalid;
3. 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”);
4. The Employer failed to pay a substantial sum awarded to the Contractor under one of the DAB Decisions;
5. 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;
6. 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; and
7. The arbitral tribunal ordered bifurcated proceedings and 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.



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Enforcement of a DAB decision through an ICC final partial award

THE FACTS

A 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.

It was not in dispute 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.

Enforcement of a DAB decision through an ICC final partial award

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 Contractor 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

Enforcement of a DAB decision through an ICC final partial award

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 that¹:

...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.

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.

Enforcement of a DAB decision through an ICC final partial award

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.

Enforcement of a DAB decision through an ICC final partial award

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.

Enforcement of a DAB decision through an ICC final partial award

A NOTE ABOUT THE AUTHORS

The authors were both acting as counsel for the Contractor.

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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.

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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.



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