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# FIDIC: AN ANALYSIS OF THE FIDIC RED BOOK FIRST EDITION 1999, DISPUTE RESOLUTION CLAUSES

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**When contracts get into dispute, it is sometimes difficult to get agreement or cooperation between the Parties to the dispute/contract.**

Once an issue is referred under clause 20.4 for resolution by the Dispute Adjudication Board (DAB), obtaining a decision from the DAB is generally considered to be a pre-condition to a party being entitled to commence arbitration. This can often result in the following questions:

a) What can I do if the other party to the contract refuses to assist in the appointment of the DAB?
b) How do I resolve the dispute if there is no DAB?
c) Can I go straight to arbitration?
d) What if the matter is complex and can only feasibly be resolved by arbitration or in court and adjudication would be inappropriate and a duplication of costs?
e) Can I rely on Clause 20.8 to bypass the DAB process and go straight to arbitration?

Clause 20.2 calls for the Parties to jointly appoint the DAB by a date stated in the Appendix to Tender. This is usually shortly after the commencement of the Contract. The FIDIC Red Book anticipates that a standing DAB will be in place throughout the contract and the defects liability period.

Clause 20.8 provides as follows:

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 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].*

We are always concerned at the inception of our involvement to a dispute and there is no DAB in place, to avoid committing to a dispute before we have had the chance to get the DAB set up.

It is therefore very important to establish whether the DAB process is mandatory.

In Sub-clause 20.2 and Sub-clause 20.3, the word "*shall*" is used:

*20.2 Disputes **shall** be adjudicated by a DAB in accordance with Sub-clause 20.4. The Parties **shall** jointly appoint a DAB by the date stated in the Appendix to Tender.*

*20.3 ……. the appointing entity or official named in the Appendix to Tender **shall**, upon the request of either or both the Parties and after due consultation with both Parties, appoint this member of the DAB.*

The FIDIC Gold Book sub-clause 1.2(e) and (f) differentiate between "shall" and "may" as follows:

*" (e)"shall" means that the Party or person referred to has an obligation under the Contract to perform the duty referred to.*

*"(f) 'may' means that the Party or person referred to has the choice of whether to act or not in the matter".*

This question (the application of clause 20.8) has received the attention of the courts and in the Swiss Supreme Court decision 4A_124/2014, the court held that *"adopting a broad interpretation of sub-clause 20.8…. would ultimately turn the alternative dispute resolution mechanism devised by FIDIC, "into an empty shell".*

In the case of *Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 (TCC); [2015] 2 ALL E.R. (Comm) 423 (QBD (TCC)),* the court held that "*the right to refer a dispute to adjudication arises under Sub-clause 20.4.1 as soon as a DAB has been appointed, whether under Sub-clause 20.2 or 20.3……the process of appointment is complete once the nominating body has "appointed" the adjudicator……..therefore, a DAB is "**in place**" once its member or members have been duly appointed in this way because from that moment onwards a dispute can be referred to it."*

Therefore, even if one of the parties tries to frustrate the process by not assisting in the appointment of the DAB or (for example) refuses to sign the Adjudication Agreement, a party can follow the process in Sub-clause 20.3 for the appointment of the DAB and once the nominating body has appointed the adjudicator, the DAB is in place and the provisions of Clause 20.8 would not be applicable.

The wording "***or otherwise***" in the first paragraph of Sub-clause 20.8 is also vague and does not help in the understanding of the Sub-clause in question, accordingly, interpreting the sub clause literally would go against the desired dispute resolution process prescribed by FIDIC when the procedure to establish the DAB has been followed.

Therefore, a strict interpretation of the provisions of Sub-clause 20.8 would appear to be contrary to the intention of the drafters of the contract.

In the Peterborough case, the Employer did not want to have a DAB and preferred to go straight to a final resolution of the case (by arbitration or the courts). The Employer therefore argued that Clause 20.8 provides a by-pass by which it can proceed to refer the matter to court for final resolution. It argued that the dispute raised complex questions of construction and application of legislation, mandatory codes and standard industry practice and would require extensive disclosure and adjudication was therefore not suitable.

The court found that if the parties had agreed on a particular method by which their disputes are to be resolved, the court has an inherent jurisdiction to stay proceedings brought in breach of the agreement.

Both the England and Swiss Courts found that the DAB was a condition precedent to arbitration and in the Peterborough case, the parties had to submit to the DAB even though the Judge recognized that there was a real risk of duplication of costs.

The DAB process is a cost effective and speedy process for the resolution of disputes, however, if the courts allow parties to simply bypass the process and decide to go straight to arbitration or the courts, the DAB mechanism will turn into an "empty shell". The DAB decision is therefore a condition precedent to proceeding to Arbitration and can only be bypassed by agreement between the Parties.