Intl. J. Humanities (2017) Vol. 24 (2) (1-26)

Dispute Adjudication Boards: A New Approach to Dispute Settlement

Morteza Adel[1], Elham Anisi[2]

Received: 2017/5/12 **Accepted: 2018/6/23**

Abstract

In international construction contracts, in which huge financial, technical and human resources are needed, it is vital to solve all disputes at the site of project immediately. Dispute Adjudication Board (DAB) of the International Federation of Consulting Engineers or FIDIC which has been in use for a long time, particularly in the US, has remarkable success in avoiding prolonged arbitration or litigation. Board members are nominated by consensus at the time when the parties to the contract are focused on the agreement. They are independent with particular technical expertise appropriate to the contract. DAB is completely different from FIDIC'S old model construction contracts. DAB is close to arbitration and the enforcement of their decisions is almost similar. This is why legal evaluation of DAB's decisions seems to be very important. There is no international convention for the enforcement of DAB decisions yet. However, finding ways to enforce them can accelerate the development of DAB in international contracts. Here the 1958 New York Convention as the most applicable and famous in the field of recognition and enforcement of arbitral awards can assist us in the procedure of evaluation and enforceability of those decisions. This article aims to study the development of DAB in one introduction, three main parts and a conclusion. Part One will show what a DAB is and discusses different kinds of DAB. Enforcement of DAB decisions will be looked at in Part Two. Finally, Part Three will review the possibility of applying the 1958 New York Convention to DAB decision. The Conclusion will follow with concluding remarks.

Keywords: FIDIC, Dispute Adjudication Board, Decision Enforcement, Arbitration, Consulting Engineer.

---

1. Associate Professor of Law, Faculty of Law and Political Science, University of Tehran, Tehran, Iran. madel@ut.ac.ir.

2. Ph.D Student in Oil and Gas Law, Faculty of Law, Shahid Beheshti University, Tehran, Iran. Elham_Anisi@yahoo.com (Corresponding Author).

Introduction

In long-term international construction contracts, it is necessary to settle disputes immediately at the site of a project; otherwise great financial losses will occur to the project and to both parties. So, direct referral to arbitration cannot necessarily meet the parties' needs. FIDIC, as an international and specialized association in the field of construction contracts, for the first time had chosen consulting engineers for settling disputes in standard forms of old contracts before 1999. In a new version of FIDIC contracts in 1999, this role was given to Dispute Adjudication Board (DBA) upon which the board has to act impartially and decide on equity or fairness. The decision of DAB, if it is not challenged by either party, becomes final and binding, because of its equitable nature and not being issued based on special law of any country. This in our view is similar to delocalized arbitration. Although, the delocalized arbitration is a new approach in arbitration, its validity has been doubted by experts in most countries.

For example, under Clause 67 of the FIDIC Condition 1977 (third edition), any dispute or difference of any kind whatsoever arising between employer and contractor in connection with or out of the contract or the execution of the work, should in the first place be referred to and settled by the engineer who shall, within a period of 90 days after being requested by either party to do so, give written notice of his decision to the employer and the contractor. Such a decision in respect of every matter so referred shall be final and binding and if either the employer or the contractor be dissatisfied with any such decision, then he may within 90 days after receiving notice of such decision, or within 90 days after the expiration of the first named period of 90 days, as the case may be, require that the matter or matters in dispute be referred to arbitration.

Beside the above approach, there has been considerable international interest in Dispute Review Boards and Dispute Adjudication Boards collectively referred as "Dispute Boards". The North American concept of a panel of three experts assisting with the smooth running of substantial projects and then making recommendations to resolve issues that arise along the way was shown to have some success when initially introduced. (Gould, 2010: 9)

This concept spread and developed internationally, initially gaining support as an option to the FIDIC Orange Book in 1994 and as an option to the Red Book in 1996 then as mandatory requirement throughout the 1998 test Edition of the FIDIC Suite of Contracts. FIDIC retrenched without much explanation from the position of a mandatory DAB in Red Book to merely optional in Yellow and Silver Books. (Seppala, 1997: part 4; Gordone, 2000: 42). However, at that stage, the non-binding recommendation had changed into a binding decision thus transforming the recommendation process that was often honored because of the parties respect for the board members, into binding dispute resolution procedure. (Gordone, 2002: 135). FIDIC replaced the role of dispute settlement through consulting engineer with Dispute Adjudication Board (DAB) after compiling new edition of contracts in 1999. According to Article 20 of the standard form of FIDIC Condition of Contracts, the parties are bound to refer their dispute to DAB for making decision and the board also has to make decision regarding the dispute within 56 days. If the board has notified decision to the contractor and employer within 28 days

and after the notification of decision to parties none of them expressed their dissatisfaction, the board's decision will become final and binding on both parties.

DAB and its Types

A DAB is a panel of experienced, respected, impartial and independent technical adjudicators. The board is normally organized before the start of construction project and meets at the job site periodically. The DAB members are provided from the outset with the contract documents, plans and specifications and become familiar with the project procedures and the participants, and are kept abreast of job progress and developments. The DAB meets with the Employer's and Contractor's representatives during regular site visits and encourages the resolution of disputes during the execution of works. When any dispute arises from the contract and cannot be resolved by the parties, it is referred to the DAB for their Decision (Owen, 1999: 6). The nature of such decision is not clear.

In practice, establishing, appointing, working with DABs and knowing how to enforce their decision are very important. Generally, from the legal point of view, one might ask what is the nature and standing of DAB decision. This article will show that although such decision is not based on the rules of a special legal system, but it is comparable with national or delocalized arbitral awards which are also named as transnational, expatriate or floating arbitration.

DAB, Consulting Engineer and Arbitration

Today, DABs play an important role in dispute settlement. Under all of FIDIC Conditions, the consulting engineer is defined as the employer's representative. In the old version of the FIDIC contracts, the consulting engineer was involved in claims of one party against the other, but because of his dependency on the employer, in the new version, he no longer is responsible for settling disputes.

There are three major descriptions for a dispute settlement board; mutually agreed upon, using equity or fairness in their reasoning for writing decisions instead of referring to special legal system, and independency of members. Article 67 of FIDIC's old contracts' conditions permitted the consulting engineer to attend in the next investigation of parties as an arbitrator, witness …., while such an authority has not been given to DAB members in Article 20 of FIDIC's new contracts in order to secure ever-increasing independence of dispute settlement board. The consulting engineer is dependent on employer, although he has to consider all aspects of fairness and impartiality, but essentially, doing such a duty for a consulting engineer is only true in theory, without any effect in practice. Because of job affiliation of consulting engineers to the employer, subject to Article 67 of FIDIC's old contracts' conditions, his independency had been always doubted and he couldn't naturally act independent from parties and reach a fair decision. To the contrary, DAB members could not participate in the next adjudications between the parties regarding the subject which has been investigated before. Therefore, in Article 20 of FIDIC's new contracts' conditions it has been attempted that dispute adjudication board is selected mutually and agreed upon by the parties. So "independence" and "applying equity in the decision" of DAB members are basic and in this sense their nature is similar to the arbitrators as long as DAB can be renamed

as quasi arbitration. This does not include all kind of arbitration, but only delocalized arbitration which does not belong to a special domestic law.

Creation of DAB by FIDIC's new contracts was to answer the criticisms made about the independence of a consulting engineer. But this does not mean there is no similarity between the two said methods. Although, DAB and consulting engineer get involved in the dispute settlement procedure based upon the related clause in the main contract, but the appointment procedure and the details of their rights and duties will be determined through a separate agreement concluded between the parties (similar to arbitration agreements). In Article 67 of FIDIC's old contracts' conditions, consulting engineer was clearly authorized to decide as an arbitrator, judge, witness and the like in the later proceeding between the parties on the disputes, but this is not similar to the authority that the member of DAB have, which secures their independence from the parties in comparison with consulting engineer.

International Chamber of Commerce (ICC) has chosen arbitration as a suitable method for settling disputes from trivial claims to disputes relating to the huge construction plans. Although, arbitration, as a method for settling disputes outside the court has more advantages in comparison with judicial procedure, but referring disputes to arbitration is not always desirable. According to the Rules of Arbitration of ICC[1] and especially considering the deadlines in the aforesaid rules, in case no objection is made during preparation of a file in the secretariat or in arranging terms of reference to arbitration, a prompt arbitral process will take at least 6 to 12 months' time.

In general, there are two kinds of arbitration with respect to its nature: Localized Arbitration or Legal Arbitration in which the award is based on the rules of a special country's law, and Delocalized Arbitration in which the arbitrator is not obliged to respect special law, but to decide based on transnational principles, such as equity. Since there are so many arguments about the arbitration as an extra-legal method of dispute adjudication accepted by the parties outside courts[2] but except in the compulsory arbitration, the arbitrator gets his jurisdiction from the parties' mutual agreement, and the terms of reference arranges the arbitrator's relation with the parties and determines the extent of his authorities; similar to DAB members' term of reference which is concluded between two parties and each member. The Terms of Reference is attached as an appendix to FIDIC regulations and also to the regulation of Dispute Board of ICC.

A) Independence of DAB Members

DAB members must be independent from parties. They are not permitted to be commercially linked, in any way, to the parties, nor have any financial interest in the project. This restriction stretches to direct financial relationships, such as employment or consulting services, as well as other financial dealings, such as a share ownership. It is incumbent upon a potential board member to declare any interest he has

[1] Clauses 5.1, 5.6, 18.2 and 24.1

[2] Article 1(3)(a) of UNCITRAL Model Law on International Commercial Arbitration: "An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States

or has ever had with the parties as soon as possible. The parties may then decide by agreement whether they perceived the declared interest to be of any significance.

According to the ICC rules on dispute board, every dispute board member must be and remain independent of the parties concerned. Every prospective member shall sign a statement of independence and disclose to the parties and to the other members in writing any facts or circumstances which might be of such a nature as to call into question his independence in the eyes of the parties[3]. The arbitration is a democratic way for dispute resolution. An arbitrator has not any governmental dependence, and contrary to a national court judge's duty, his duty is not to enforce the law, he must adjudicate the dispute. The arbitrator must maintain this independence during investigation, and having not doing such a duty might lead to challenge an arbitrator.

Moreover, a person who adjudicates should not have a servant-master relationship with the parties or be interested in a dispute referred to him, directly or indirectly. An arbitrator's independence and impartiality guarantees the accuracy of the arbitration and observing the equity or fairness. However, there is a difference between independence and impartiality; an arbitrator might be independent but may adjudicate a dispute one-sided. Although, there might be dispute in determining the guideline of independence, but having no interest in the adjudication is accepted in all legal systems. This is why in Article 67 of the FIDIC's old contracts' conditions, the employment relation between consulting engineer and the employer and his interest in the dispute has led to the amendment of the dispute adjudication term in FIDIC old contracts and the replacement of consulting engineer with the selected and independent board named Dispute Adjudication Board. So, in FIDIC contracts, adjudicator's independence is an accepted term.

B) Impartiality of DAB Members

Impartiality is of fundamental importance to the DAB decision. Members are required to be impartial and remain impartial during the mission. Although, at times a member may be called upon to use his own knowledge and experience, if he intends to rely on that knowledge or experience, then he must inform the parties and give them an opportunity to address him on that particular submission. The rules of natural justice must prevail in all dealings between the DAB and the parties, and all information must be provided to all parties. Correspondence between the parties and the DAB is to be copied to the other parties and other DAB members. DAB members must not meet privately with either of the parties (Owen, 1999: 31).

In most national and international laws, the equitable behavior with two parties and impartiality is an imperative principle in legal proceedings[4], Also Article 18 of the UNCITRAL Model Law on the 1985 International Commercial Arbitration emphasizes on the equal treatment of the parties[5]. Also Article 9 of the European Convention on International Commercial

[3] Articles 8.1 & 8.2 of ICC Dispute Board Rules 2004

[4] Article 182 of Swiss International Private Law indicates that: In any cases of legal proceedings, court must treat the same to the parties and preserve parties right in expression of their statements.

[5] The Parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Arbitration of 1961 and Article 2 of the Geneva Convention on the Execution of Foreign Arbitral Awards in 1927 emphasize that notifying must be in time and observing the defense right. The independence is considered through external scales, but the impartiality which is required by independence, is an internal matter and has a close relationship with the impartiality of the board member. If the impartiality of the DAB member leads to equality, we can make a rational relation between him and the parties.

As we know, beside arbitrations based on law, there are arbitrations based on equity[6]. DAB members shall treat the parties in an impartial manner, so that it seems they have made decisions based on equity as a part of general legal principles. The formalities of an arbitration procedure is not applicable on DAB proceeding, and contrary to the arbitrations based on law, in which the decision must be issued according to the applicable law of the contract (unless the parties authorized the arbitrator to decide based on equity or fairness), the DAB decides on the basis of contract's terms and doesn't require the permission of the parties for deciding on equity; the board shall act equitable and decide impartial.

Natural justice and equity are the main basis in DAB's reasoning, and disregarding such principles will make the decision unfair and invalid. Some examples of cases where the behavior of the adjudicator was considered to be in breach of the rules of natural justice are given below (Gidwani, 2006: 4)

1- Discain v Opecprime[7]: An adjudicator spoke to one party on the telephone without communicating the contents to the other.
2- Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd[8]: The adjudicator became involved in mediating some of the issues between the parties.
3- Balfour Beatty v Lambeth Borough Council[9]: The adjudicator undertook delay analysis work without giving the parties the opportunity for further comment.
4- Shimizu Europe Limited v LBJ Fabrications Limited[10]: The adjudicator rejected the position of both parties that they had contracted on the basis of a letter of intent, and did not give the parties the opportunity to make further submissions on the question of contract formation.
5- London & Amsterdam Properties Ltd. v Waterman[11]: The adjudicator allowed late evidence from the referring party.
6- Costain v Strathclyde[12]: Strathclyde claimed that the adjudicator had obtained professional advice but failed to disclose the results to the parties.
7- Buxton Building Contractors Limited v Governors of Durand

[6] Article 28 of UNCITRAL Model Law on International Commercial Arbitration.

[7] 2000, BLR 402 (TCC)

[8] 2001, EWHC (England & Wales High court) Technology 15

[9] 2002, EWHC 597 (TCC)

[10] 2003, EWHC 1229

[11] 2003, EWHC 3059

[12] 2003, Scot CS 316

Primary School[13]: The adjudicator failed to consider relevant information submitted in relation to a cross-claim.

8- A&S Enterprises v Kema[14]: The adjudicator made adverse comments on the failure of an individual to attend a meeting.

9- Amec Capital Projects Limited v White friars Estates[15]: (at first instance it was held that there was a real possibility that the adjudicator was biased. The adjudicator had obtained legal advice some of which he had not disclosed to the parties and another part of which (on jurisdiction) he had not disclosed until after he had decided the question of jurisdiction. This decision was overturned by the Court of Appeal in October 2004.

10- Ardmore Construction Limited v Taylor Woodrow Construction Limited[16]: The adjudicator agreed to an alternative claim in relation to overtime working which he did not raise with the responding party.

C) Different Kinds of DAB

The terms "Dispute Review Board", "Dispute Adjudication Board" and "Combined Dispute Board" are relatively new ones. These boards can be appointed in different times and situations. Dispute Boards (DB) can be Ad hoc in which the members of the board are called when the dispute arises, or can be standing in which the board is appointed at the initial time when concluding on contract and when there is no dispute between the parties. In other words, most of the time DRB, DAB or CDB are used to describe a dispute resolution procedure that is normally established at the outset of the project and remains in place throughout the project duration.

The DRB is a consensual, amicable procedure with non-binding recommendation and the DAB is a kind of pre-arbitration step with binding decision (Gidwani, 2006: 7-029). The board may be comprised of one or three members who become acquainted with the contract, the project and the individuals involved with the project, in order to provide informal assistance and recommendation about how disputes should be resolved and provide binding decision. According to recent statistics (Harmon, 2011), DBs have been used at least on 2150 projects based on DRBF's[17] inception between 1975 and 2010. They have mostly been used on projects amongst other things such as tunnels, highways, rail, bridge, airport, buildings, schools, hospitals, sport stadiums, shopping centers etc.

In 2002, the ICC prepared rules for DB's Adapting. Terminology of the ICC describes the DAB approach as a kind of pre-arbitration, requiring the immediate implementation of decision (Dorgan, 2005: 142). In ICC viewpoint, Dispute Boards are established in accordance with the Dispute Board Rules of the International Chamber of Commerce to aid the parties in resolving their business disagreements and disputes.

[13] 2004, EWHC 733

[14] 2004, QBD HT 04 199

[15] 2004, EWHC 393 (TCC)

[16] 2006, CSOH3

[17] Dispute Resolution Board Foundation (DRBF) was founded in 1996 as a global not-for-profit organization dedicated to promoting the avoidance and resolution of contract disputes using the unique and proven Dispute Board (DB) method.

They may provide informal assistance or issue Determinations. Dispute Boards are not arbitral tribunals and their determinations are not enforceable like arbitral awards. Rather, the parties contractually agree to be bound by their determinations under certain specific conditions set forth in these rules[18] So, although the ICC rules have been adapted later than FIDIC provisions, but it seems that by the definition of awards as not being binding, it goes back instead of promoting the value of dispute boards' decision.

Enforcement of DAB Decisions

1- Challenges Facing DAB'S Decision Enforcement

Before starting to review the real nature of DAB decision, it is necessary to review the initial problems which can be assumed for DAB decisions and the recent development in dealing with such decisions.

One is the enforceability of DAB decisions. In some cases, the nature of being binding and conclusive has been developed that shows the importance of DAB decision. For example, in Balfour Beauty Civil Engineering Limited v Docklands Light Railway Limited[19], the contract provided that the employer's representative could carry out the usual function of the engineer. The arbitration clause had been deleted. The Court of Appeal held that despite there being no provision, the decision of the engineer (in this case the employer who had taken on the role of engineer) were to be binding or conclusive. The court held; it nevertheless had no power to open up, to review or revise that decision. The contractor's entitlement was therefore dependent upon the employer's judgment. However, this cannot be said to be the current English law. This case was contrasted with a decision of an expert given under a contractual expert determination provision. In those circumstances the court will consider that the decision is final and cannot be reconsidered or appealed, provided that the neutral expert has answered the question. Then the decision will be final and binding, regardless of any errors of fact or law[20].

In the case of Parsons Plastics[21], a dispute was referred to an adjudicator (England Construction Act 1996)[22] the contract stated that the adjudicator's decision would be final and binding on the parties. The adjudicator found in favor of Parsons. Purac sought to set off against that decision. The contract provided that Purac could serve a contractual withholding notice, but there was an argument that this procedure had not been followed. Upon appeal, Lord Justice Pill stated, at Paragraph 15, that:

> "It is open to the respondents to set off against the adjudicator's decision any other claim they have against the appellants which had

[18] Article 1, Dispute Board Rules of The International Chamber of Commerce, 2004

[19] 1996, 78 BLR, 42

[20] Jones v Sherwood Computer Service Plc (1992) 1 WLR 277; Nikko Hotels (UK) Ltd v NEPC (1991) 2 EG 86; Mercury Communication v Director General of Telecommunication & Another (1996) 1 All ER 575

[21] Research & Development) Limited v Purac Limited (2002) EWCA Civ, 459

[22] In England, Wales and Scotland the Housing Grants, Construction and Regeneration Act 1996 provides a statutory adjudication procedure for construction contracts as defined in the Act. However, the case of Parson arose outside of the Act purely as a contractual dispute resolution process.

> not been determined by the adjudicator. The adjudicator's decision cannot be re-litigated in other proceeding, but, on the wording of this sub-contract, can be made subject to set off and counterclaim. It is accepted that the respondents' counterclaim, if they are entitled under the terms of sub-contract to set off against the claim, is arguable".

In this case, it was apparently argued that a provision allowing set-off against sums due "under the sub-contract" did not bite, because the sum was due pursuant to the adjudicator's decision, not under the sub-contract. There was thus an opportunity for the Court of Appeal to rule on the cause of action, but instead Pill L J declined to decide the point, merely expressing doubt about that argument.

Applying this logic, then surely a DAB decision that has become final and binding might still be subject to being opened up and reviewed and revised, not just because the power is set out in clause 20.6, but because there is no express bar against an appeal of a decision (Gould, 2010: 17). So, it shows that all matters which have been discussed by adjudicator cannot be reviewed by courts and can be enforced straight away.

In AMEC Capitol Projects Ltd v Whitefriars City Estates Ltd[23] that was an appeal from the decision of HHJ Toulmin QC at the TCC[24], the Court of Appeal effectively found that an advice relating to jurisdiction, in a case where in fact there was no jurisdiction, and where the adjudicator had no jurisdiction to decide his own jurisdiction, cannot amount to an advice that can affect the parties' legal rights. If the parties' legal rights cannot be affected, then the advice does not require any representations from the parties, before the adjudicator makes his decision; as his decision on his jurisdiction can have no legal effect. Therefore, there cannot be a breach of natural justice. But simply, if the adjudicator has no power to decide his own jurisdiction, then the fact that he takes advice on the matter of his jurisdiction cannot be seen to be affecting the parties' respective cases, no matter what the outcome of his consideration on his jurisdiction. This being the case, the fact that the adjudicator does not avail the parties of the advice that he has taken, cannot be used as an argument that he has breached the rules of natural justice [25]

The case of William Verry Ltd v NW London Communal Mikvah[26] H H J Toulmin QC at the TCC shows that adjudicators needed to be very careful in their reading of the contract and the law. In summary, the adjudicator failed to apply the law correctly, but this was insufficient to refuse enforcement of his decision. To avoid an unfair result, the judge did not hand down his judgment for some nine weeks allowing the other responding party to carry out its own adjudication to effectively correct the wrong decision. The case of William Verry is not likely to be repeated too often and can be viewed in a category all of its own. As far as adjudicators are concerned, it would be wise to obtain legal opinion before deciding on the meaning of a previous judgment if in any doubt, especially if that decision can have a major impact on the one that he is making. As

[23] (2004) 96 Con LR 164.

[24] Technology and Construction Court

[25] First published in Construction News, Spring 2005

[26] 2004, 96 Con LR 96, 2004

noted, the decision is likely to be enforced even where it seems wrong, which cannot be good for adjudication in general[27].

In AWG Construction Services Ltd. v Rockingham Motor Speedway Ltd [28]H H J Toulmin QC at the TCC found that the adjudicator had exceeded his jurisdiction by deciding an issue that was submitted at a late stage, and that this issue was central to his decision in the adjudication. His honor also found that the adjudicator had breached natural justice in considering new material that Rockingham had not provided to AWG prior to the adjudication. Clearly the issues here are similar to those of *McAlpine PPS* and the lessons to be learnt are essentially the same. The adjudicator must consider the effects of him trying to decide what he believes the true issue is, rather than the issue as presented to him in the notice of adjudication[29].

So the above cases declare that there are no clear cut measures in the nature of DAB decisions; in some cases courts reviewed the decision and in some others resorted to its finality. The cases do not show that the nature of DAB decision is as an arbitral award. So, finding the nature of these decisions will help in future understandings.

2- Legal Nature of DAB Decision

What is the nature of DAB decision; a replacement of the engineer's decision making function, or similar to an expert determination?

A DAB does not have the powers of an arbitral tribunal, nor can their decision be enforced in its own right as if it was an award. The New York Convention 1958 does not apply to the decisions of DAB, and so cannot assist in the enforcement of a DAB decision (Gould, 2010: 13). But this article shows that DAB decision is not an expert determination, but it is very similar to delocalized arbitration award. An expert decides on the basis of his knowledge, irrespective of the contract, while DAB member has to decide on the terms of the contract and it must contain reasoning, so it cannot be like expert determination. Although, there is no case in practice that shows the exact meaning of this phrase, but the bases of reasoning in different cases mentioned herein will make this theory clear and improve the idea.

On the nature of DAB decision, one must investigate different sources. The available regulations about these decisions are the regulations of International Chamber of Commerce (ICC) and regulations of FIDIC. The FIDIC's DAB is regarded as a kind of alternative dispute resolution (ADR), so the ADR specifications can be applied to DAB decisions. Here, we explain the issue under different headings to discover the real legal nature of DAB decision: This includes when DAB is found as a kind of ADR, and other, which is followed the result of the first part, when DAB nature is comparable to the delocalized arbitration.

A) Legal Nature of DAB Decision as a Kind of ADR

The term "ADR" as amicable dispute resolution or alternative dispute resolution is the special solution for adjudicating disputes out of judicial courts. If we consider these as the substituting ways of judicial proceeding in national courts, in addition to Arbitration, we can put Mini Trial,

[27] Construction News, Spring 2005

[28] 2004, EWHC 888

[29] McAlpine PPS Pipeline Systems Joint Venture v Transco Plc (2004) EWHC 2003 (TCC)

Conciliation, Mediation, Dispute Board, DOCDEX[30] and others in this group.

ADR is divided into two different groups: The first only acts as facilitator in the process of dispute resolution and do not make a binding decision, like mediation or conciliation, in which the parties try to resolve the disputes amicably through a third party. The second way is determinative, in which the parties authorize a third party as consulting engineer to issue a decision and resolve their disputes with his decision that will be final and binding upon them[31].

Since DAB decisions are alternative ways and also decisive[32], they can be grouped into the latter group of ADR. So, simply the legal nature of ADR decision could be generalized and extended to the legal nature of DAB decision. This classification, in author's view, can lead to two main groups: First, those who believe arbitration is an alternative way and confirm that the third person's decision for resolving the dispute, either as an arbitrator, consulting engineer or member of DAB, have the same value as arbitration award, because they all are methods for settling dispute out of court. Second, those who do not consider the arbitration as an alternative way and believe that arbitrators' and national courts judges' decisions are awards which are enforceable according to the related regulations. On the contrary, other dispute resolution methods such as DAB are only contractual.

Clearly, the second group that apart from arbitration of other alternative dispute resolutions believe that the similarity between all different kinds of ADR is the non-obligatory nature of the decisions made by them. They also believe that, in order to lead to acceptable result for enforcing the decisions by the parties, it must be satisfactory in its nature. Researchers believe that in ADR techniques the most important success and the most important weakness is the parties' sincere will for amicable resolution of the disputes i.e. good will and mutual confidence (Joneydi, 2002: 34).

On the contrary, in an unusual assumption that is against the nature of ADR, the right of adopting a binding decision from a third person, who is impartial, that person is not just an expert, but an arbitrator to whom the authority of arbitration must be given (Davide, 1982: 10). So, it can clearly be said that granting the authority of making decision to a third person in order to become binding upon the parties, like DAB, apart from the title used for that person, has the same result as the arbitration, whether it is named DAB or Arbitration. This is in contrast with the opinion of those who believe giving authority to a third person in order to issue a binding decision in ADR techniques is a rare assumption and is incompatible with the nature of ADR (as the great French jurist "Rene David" said) (Joneiydi, 2002: 33). In their view, this is because the ADR techniques do not result in a binding decision. However, if a binding decision is sought, that has the nature of arbitration. Because of this character, they do not see the arbitration as an alternative way, since an arbitrator always adopts a binding decision that not only is backed up by national rules, but also by international regulation and conventions. Yet, it makes no difference, whether for an ADR, we select the name of alternative ways, amicable ways, or

[30] ICC's Documentary Instruments Dispute Resolution Expertise

[31] Article 67 of the FIDIC Old Contract Conditions

[32] Article 20 of FIDIC 1999 Contract Conditions

appropriate ways to determine a dispute, we cannot deny that arbitration, like as DAB procedure, initially is a way for resolving disputes outside the courts. We also know that all kinds of substitutes or ADR, have not the same importance; but some of them only make suggestions or advice for the parties, like mediation and conciliation, but others lead to a binding decision between the parties, and DAB decision is in this group.

On contractual nature of DAB's decision, it is apparent that such a decision cannot be enforced immediately, particularly when the decision is about the parties' accord on a defective plan or procedure of the project. So, it is much easier if we do not give those decisions a contractual nature. Therefore, three aspects on the legal nature of dispute adjudication board's decision in FIDIC contracts can be assumed: First, the board's decision does not constitute an arbitration award, but has a contractual value. Second, the board's decision is like a delocalized arbitration award. Third, apart from comparing DAB's decision with arbitration award, the DAB's decision has an independent nature which requires adopting new regulation for its support.

B) Legal Nature of DAB Decision not as an Award but as a Contract

If we suppose that the board's decision is a contract, disregarding the agreement concluded between two parties for appointing the third person, in case either party fails to comply, the matter must be referred to the court or other competent authority for enforcement. Whenever the used dispute adjudication technique is effective and the parties reach an agreement, the legal documents are compiled and signed. So, although, this is an enforceable and binding agreement, but its legal value is just as an agreement and not considered as an arbitral award. In other words, if either party disclaims the obligations written in the agreement, the other party has to ask the national court to bind him to the agreement (Joneidi, 2003).

Comparing DAB with a pre-arbitral referee could help understand this view. As we know, in 1990 the International Court of Arbitration created a pre-arbitration referee procedure. This allows the parties to apply for a referee for urgent provisional measures in relation to a dispute before a tribunal is formed. The rules of the procedure provide that the referee shall be appointed by the parties or the chairman of the International Court of Arbitration. The referee should make an order within 30 days of his appointment, and the order is binding on the parties. The referee has no further role in the arbitration. The pre-arbitral referee procedure only applies if the procedure has been expressly agreed upon by the parties[33]. Ordinary ICC arbitration clauses are therefore not sufficient to allow the parties to use this procedure. That is probably the reason why there have so far been few such orders made under the rules. Parties may also have been reluctant to include a pre-arbitral referee clause, because the legal

[33] On January 1, 2012 a new version of the ICC Rules of Arbitration (2012 ICC Rules) came into force. They will apply to all new cases that the ICC has received since January 2, 2012 regardless of the date of the arbitration agreement under which the arbitration is brought. The 2012 ICC Rules have also introduced new "Emergency Arbitrator Provisions" in Article 29 and Appendix V. These give a party the option to apply for interim measures, in the period before the arbitral tribunal has been constituted, to an "emergency arbitrator" instead of having to apply to national courts for such relief.

nature of the procedure remained uncertain. In particular, it was unclear whether (i) the procedure was arbitral in nature and thus the resultant order could be challenged and enforced as an award, or (ii) it felt short of an arbitration, such that the ability of the courts to intervene was much more limited (Poudret and Besson, 2007: 73)

On April 29, 2003 in the case of The Republic of Congo and the Congolese State Oil Company and Total, a decision of the Paris Court of Appeal held that the challenge was inadmissible because the rules of the pre-arbitral referee procedure were such that it was clear the referee was not acting as an arbitrator. As a consequence, his decision could not be characterized as an arbitral award. The court reasoned that the drafters of the rules of the pre-arbitral referee procedure did not use the term "arbitration" and this was clearly deliberate; the referee's decision did not prejudice in any way the arbitrators' own decision on the merits (i.e., the referee's decision was not binding on the arbitrators), and therefore, it did not alter in any way the parties' position as long as the arbitrators had not issued their award, and the pre-arbitral referee procedure was contractual rather than arbitral in nature. The order was therefore binding on the parties in the same way as a contractual provision would be, and had no more authority than a contract. Therefore, it could not be considered an award and could not be challenged as an award before French courts. The French court believed that referee's order was not an award, because it was not rendering a final decision on the merits. So, the finality was important to the French court. Pre-arbitral referee decision is an order, because it is not final and will be reviewed by the next arbitral procedure. But the result would be that if the finality will be provided to the decision, it can be dealt with in a different manner. It means it is not important that the procedure is contractual, because arbitration is contractual and mutually agreed by the parties. What is important is the finality. We can compare DAB's final decision when none of the parties are dissatisfied and the decision will be final. Only in the case of failure to enforce, the failure, and not the main decision, will be the subject of next arbitration proceeding (Gaillard and Pinsolle, 2004: 17).

One potential negative consequence of the court's decision on international arbitration arises from the fact that, under the French law, only arbitral awards can be declared enforceable by French courts. Although this issue was not directly addressed by the court, it seems that one of the consequences of its decision and of its policy is that provisional measures ordered by arbitrators or referees are not directly enforceable in France. In the *Congo/Total* decision (Gaillard, Pinsolle, 2004: 20) the court held that the pre-arbitral referee procedure is a contractual mechanism based on the parties' cooperation. It is arguable that it may have been more beneficial for international arbitration if orders of pre-arbitral referees were considered awards and were hence enforceable, rather than characterized as mere contractual obligations of the parties. So, in comparison to DAB decisions, they cannot be enforced as an award. Because in French law among all the methods for out of courts dispute settlement, as considered in the practice of pre-arbitral referee in the above case, only the decision of arbitrator is an award and other alternative dispute resolutions cannot be considered as such.

But in author's view, we must remember that not only the DAB decision is not in a form of an agreement, but also it must be made after a detailed adjudication process (required procedural regulations is attached to the principles of FIDIC contracts' conditions and also to the Dispute Board Regulations of International Chamber of Commerce). Considering procedural rules, hearing statements, exchanging the bills, and inspecting the place of project (site), the board makes decision regarding the situation and according to the terms of contract, documents, and the parties' statements, which must be documented and reasoned. So, it seems such decisions never resemble the results of other alternative ways, such as conciliation or an expert work which are in the form of an agreement.

Van Den Berg, the great French interpreter of the 1958 New York Convention on the Enforcement of Arbitral Awards, believes that the obvious characteristics of ADR is that they are not like litigation, and their decision is made on the basis of decision maker's experience and professional idea. From his legal point of view, they are like a contract between the parties and the arbitration regulations of the countries where decisions are going to be enforced, are not applicable (Joneidi, 2003: 35). But as we discussed before, different kind of ADRs have not the same value. As we know, the FIDIC DAB members make decision on the basis of contract, and not on the basis of their own opinion. So, according to the above mentioned argument, we can assume that the value of DAB decision is not just as a contract, and even on finality, DAB decision, in case it is not dissatisfied by the parties within a determined period, is final and enforceable.

C) Legal Nature of DAB Decision as a Delocalized Arbitral Award

In order to make a comparison between DAB decision and delocalized arbitral award, especially on the enforcement of their decisions, it is necessary to first review what a delocalized arbitration is?

In non-national delocalized or supranational arbitration, which is also named as transnational, expatriate or floating arbitration (arbitration without using any national arbitration law) the parties, are free to organize the procedure of arbitration and determine the rules applicable for arbitration. The pioneer of the delocalized arbitral awards are those governed by international conventions such as Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 which is completely independent from USA national laws and cannot be appealed in any of the states that has signed the convention (Van den Berg, 1981: 214).

On the value of delocalized arbitration in international sphere, it can be said that Article 11 of the ICC arbitration regulation has not forced arbitrators to apply the national law of the place of arbitration, even when the parties have not determined the applicable law (Craig, et al, 1990: 271). According to Article 4 of the 1961 European Convention, parties are free to determine the procedural rules of Arbitration. This convention's viewpoint on the issue is wider than the 1927 Geneva Convention and the 1958 New York Convention (Bouchez, 1991: 95). New York Convention's viewpoint is not very clear in the case of delocalized arbitration. So, there are 2 opinions in this regard: First, those who believe the 1958 New York Convention does not apply to delocalized arbitration; because the initial

discussion of the drafters of this convention only includes foreign arbitral awards. Second, those who believe the applicable scope is the place where the award has been issued; so, the award is dependent on the country where it has been issued, and since the delocalized arbitral award does not belong to a specific country's law, thus the convention cannot be applied. This is because according to the convention, the recognition and enforcement is only possible on the awards which are binding based on national laws upon which it has been issued. They also argue that according to the convention, in order to recognize and enforce an award in a country it is necessary for the award not to be national in that country. So, this convention can be applied on non-national or delocalized arbitration, because this kind of arbitral awards are always foreign and de national to the countries (Toope, 1990: 29-31). Furthermore, none of the clauses of the convention limited its application to the awards which are issued under the special national law only.

The 1958 New York Convention has been adopted in order to amend the 1927 Geneva Convention which refers to local arbitral procedures and the parties' choice of law, and accepts the rule of place of arbitration as the procedural law on arbitration. Because of this, parties are free to select the arbitral procedural rule without refereeing to a special national law (Davide, 1982: 309-310). For example, in the case of SEEE v Yugoslavia[34] the award in which the procedural rule of Cantonal Court of Vaud was not respected, was finally recognized by the French Appeal Court and let it enforce on 13 November, 1984. "The rule of the place of arbitration will not be the applicable rule on arbitration. The applicable law can be either national law or what the agreement of the parties decides"[35] (Paulsson, 1987: 145). That is the only award in this case and after more than 30 years, there is no special practical issue. So, the delocalized arbitration has not been respected by most of national laws.

The following cases show some countries' legal viewpoint to delocalized arbitration. They demonstrate most of the countries do not intend to accept delocalized arbitration (Van den Berg, 1981: 28). The U.K is famous in rejecting in transnational or delocalized arbitration (Mann, 1984: 193). In the case of Mellat Bank v Helenixi Techniki [36]Judge Kerr declared that English legal system do not recognize floating arbitration. In the absence of determined applicable law, the rule of place of arbitration will be applicable, because this rule has the nearest relation to the arbitration (Toope, 1990: 28). Swiss and France agree on giving up the arbitration from the national procedural rule. Article 182 of the 1987 Swiss Private International Law and Article 1494 of French Civil Procedural Law of 1981 believe that arbitrators are free to choose a law governing on arbitration without referring to special national law, in the case of non-agreement of parties (Wetter, 1990: 3).

The Swiss Supreme Court in an award dated February 26, 1982 declared that the parties can determine the procedural rule applicable on arbitration, or they may

[34] Societe Europeenn d'Etuedes et d'Enterprises (SEEE) v Republique Socialiste Federale de Yugoslavie, June 1956, P: 1075.

[35] Court D'appeal de Rouen, 13 Nov 1984, Rev. Arb. 1985, P: 115.

[36] [1983] 3 All ER 428

choose the pre-existing rule or national law (Joseph Muller AG. v Bergesen Ix[37]. In 2 practical cases in France and United State of America the courts recognized and enforced the delocalized arbitral awards (Hilmarton Ltd. v Omnium de Traitment et de valorization[38]). These two cases influenced French view point about delocalized arbitration. In the case of Gotaverken Arbitration (Paulsson, 1981:371), the French court did not accept its jurisdiction to proceed with the request of one of the parties to declare the award nullified simply because it was delocalized (G.N.M.T.C v Gotaverken)[39]. So, in general, it cannot be said that the invalidity of delocalized arbitration is accepted in all national laws.

Dispute boards taste like arbitration and look like arbitration. Nevertheless, just as Canada Dry is not alcohol, dispute boards are not arbitral tribunals. However, still when we see them operate, we can hardly refrain from feeling that they are in fact better than arbitration. Not only they work well, but also they indeed work faster, cheaper and in much less contentious manner than arbitration tribunals (Mourre, Alexis, 2006: 422). Nonetheless, the issue which immediately arises is whether and how it should be distinguished from arbitration? The answer depends on the qualification given to their agreement by the parties, though it is true that the parties' consent given to the third party does not necessarily mean that they intended to give him jurisdictional mission. In other words, the engineer is not independent from the employer, but his situation is incompatible with that of an arbitrator. However, the same reasoning cannot be applied to DAB member, given the requirement that the board is independent from the parties. Arbitrator's mission is judicial and DAB's member technical.

The reasoning above implies that despite of what the nature of their decisions, the decision of DAB is binding upon parties and they are generally final if neither party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 of FIDIC contracts.

Arbitral Award and DAB Decision in the case of no Dissatisfaction, are both Binding and Final?

What does being binding and final of an arbitrator decision exactly mean? Although there are so many opinions about a binding decision, but many of them believe it depends on the satisfaction of the parties, however, many others believe the parties must comply an arbitration award immediately after issuing. There are many international conventions and jurisdictional principles that adhere to this opinion that arbitration proceeding is as same as judicial procedure and the award can be enforced as a judicial award. This is of such value that if the parties agreed on referring disputes to arbitration, but then refers it to the court without referring to arbitration; they face lack of competency by the court and their refusal to proceed with the dispute. For instance, in the award 7910 (1996) made by the arbitral tribunal of International Chamber of Commerce, the request of the contractor about direct referral of the dispute to arbitration without respecting

[37] Yearbook, 1984: 437-439

[38] Hilmarton Ltd. v Omnium de Traitment et de valorization, Court of Appeal, Paris, 19 Dec 1991, Yearbook, 1994; Chromalloy Aero services v Arab Republic of Egypt, U.S. District Court, 94-2339, 1996

[39] Yearbook, 1981: 221

article 67 of the contract and referring it to consulting engineer was refused[40].

In Article 20 of the FIDIC contracts 1999, the matter of DAB decision being binding and final is discussed clearly. But this article has a creative idea in planning these two features. The superiority of such an article is defensible; this is because of the special nature of construction contracts and the necessity of immediate solution for disputes. Article 20 binds the board's decision upon the parties, but the concept of a binding DAB decision differs from that of an arbitration award or judicial court judgment. According to article 20, the FIDIC DAB members have an authority to make decision; which is binding for the parties, whether either party has given notice of dissatisfaction within determined period or not. So, until it has not been reviewed in other amicable manner, the parties shall enforce the decision. But in the cases that none of the parties has given dissatisfaction, the decision becomes final and cannot be reviewed again through other resolution ways, while, for example, a judicial court award is not enforceable immediately once issued, until its appealing deadline has not expired and any objections has not presented. In other words, it cannot be enforced until it becomes final.

In arbitral proceeding, the arbitrator's decision is binding immediately after issuance and is not reviewable, like the DAB decision. But if determined period for giving notice of dissatisfaction is assigned for the parties in DAB's decision, that is not material, since declaring any dissatisfaction has no effect on enforcement of the decision, and it only prevents decision to become final. This is the unique feature of amicable dispute adjudication outside the court. Also, objecting to the arbitrator's decision does not prevent its enforcement. In FIDIC regulations, because of the binding feature and immediate effect of the DAB decision, a solution is offered to prevent spoiling rights, it is given in a way that the unsatisfied party declares his dissatisfaction to the other party and prevents the decision to become final and requires the matter to be referred to arbitration. Declaring dissatisfaction beyond the deadline, or not declaring any dissatisfactions, makes DAB decision final. If the board decision is not objected in the determined time, it must be enforced until reviewed through arbitration. So we can suppose the next referral to arbitration is the appeal one that has no effect on its performance.

There is no doubt that the binding feature of the arbitrator's decision in addition to being final, gives it a special value. Being final, means the decision cannot be reviewed by any other common resolution ways. In FIDIC regulations if the objection has been done in the determined deadline, the decision becomes final. So, if a matter which is not objected in the assigned time by the parties is referred to arbitration, the arbitrator would not accept the dispute because of the lack of competency. Perhaps the reason for lack of knowledge on how the DAB decision is binding is the lack of a familiar legal establishment in different legal systems. In Italy, judicial arbitration enforcement, in which the arbitrator must consider applicable law, needs paying huge taxes. To avoid the difficult conditions for enforcing such awards, the non-judicial or contractual arbitration has been formed beside the judicial arbitration, which is the same as arbitration in nature, but because

[40] The ICC International Court of Arbitration Bulletin 46, 2000

they do not have the title of judicial arbitration, and their decisions are issued according to non-legal matters, there are no assigned taxes for enforcing their decisions (Mourre, 2006: 428). So, for the countries in which the non-judicial arbitration is unknown, perceiving the nature of FIDIC DAB is a bit difficult and unfamiliar.

Apart from common bases of arbitration and DAB, is it not true to say that in referring to arbitration or to DAB, the parties' main purpose is to solve the issue by a non-judicial body and out of the courts? In addition, common principles in these two approaches require considering main guidelines such as independence, impartiality, and fairness. It might be said that the FIDIC DAB is as an expert panel that investigates the matter by his technical knowledge, and his adjudication does not require applying the law, so it is not equal to national or legal arbitration. It also can be said that the FIDIC DAB members are experts in the contract related matters, but they shall make decision on the basis of FIDIC contractual regulations. So, according to Rene David, the well-known French Jurist, when a third person is given the ability to make a binding decision, the third neutral person, is not only an expert, but also an arbitrator who shall be given the authority of an arbitrator. In contrast, those who believe the FIDIC DAB investigation is not as arbitration, refer to article 20 in which the DAB decision is seen as reviewable by the arbitration tribunal of International Chamber of Commerce (Mourre, 2006: 427).

In Singapore courts, take a pro-arbitration stance and will not easily exercise their discretion to set aside an arbitral award. However, where valid grounds exist for setting aside an award and real prejudice is suffered by one of the parties in arbitration, the courts will not hesitate to exercise their discretion to set aside such an award. In CRW Joint Operation (CRW) v PT Perusahaan Gas Negara (Persero) TBK (PGN)[41], the Court of Appeal exercised its discretion to set aside an award where the arbitral tribunal had acted in excess of its jurisdiction, and where there was a breach of the rules of natural justice.

The case was about PT Perusahaan Gas Negara (Persero) TBK ("PGN") which engaged CRW Joint Operation ("CRW") to construct a pipeline and an optical fiber cable in Indonesia. A dispute subsequently arose between the parties. In accordance with the 1999 FIDIC Conditions of Contract, the parties referred the dispute to the Dispute Adjudication Board ("DAB") for adjudication. The DAB ordered PGN to pay CRW the sum of US$ 17,298,834.57 ("DAB Decision"). Dissatisfied with the DAB Decision, PGN filed a Notice of Dissatisfaction ("NOD"). On 13 February 2009, CRW filed a request for arbitration with the ICC International Court of Arbitration pursuant to sub-clause 20.6 of the 1999 FIDIC Conditions of Contract, for the sole purpose of "giving prompt effect" to the DAB Decision ("Arbitration"). Sub-clause 20.6 provides the arbitrator with full powers to open up, review and revise any decision of the DAB. On 24 November 2009, the arbitral tribunal ("Tribunal") issued a final award in favor of CRW ("Final Award") and ordered PGN to make immediate payment to CRW. The Tribunal further held that PGN was not entitled to request the Tribunal to open up, review and revise the DAB Decision as it had not filed a

[41] [2010] SGHC 202, Originally Published in Mealey's International Arbitration Report, Vol. 26

counterclaim seeking for the same. However, the Tribunal reserved PGN's right to "commence an arbitration to seek to revise the DAB Decision". On January 7 2010, CRW obtained a court order from the Singapore High Court to enforce the Final Award in Singapore ("Enforcement Order"). PGN then filed separate applications to set aside the Enforcement Order and the Final Award pursuant to Art 34(2)(a) (iii)–(iv) of Section 24(b) of the IAA on grounds that the Tribunal had exceeded their jurisdiction and that the Final Award was made in breach of natural justice. The High Court granted PGN's application to set aside the Final Award largely on the basis that the majority of the Tribunal ("Majority Members") exceeded their jurisdiction in converting the DAB Decision into a final award without first reviewing the DAB Decision.

CRW appealed. The Court of Appeal dismissed CRW's appeal and set aside the Final Award on the grounds that the Majority Members had exceeded their jurisdiction and that there had been a breach of natural justice. The Court of Appeal affirmed the High Court's decision that the Final Award was made in contravention of sub-clause 20.6 of the 1999 FIDIC Conditions of Contract and clarified that where an NOD has been filed against a DAB Decision, the DAB Decision, while binding between the parties, is not a final award, because sub-clause 20.6 allows a reopening and review of the merits and correctness of the DAB Decision. Also held that sub-clause 20.6 required all disputes between parties to be consolidated in a single arbitration. As such, PGN was entitled to raise any issue(s) it required the Tribunal to consider, even if it had not filed a counterclaim in the Arbitration. The Court of Appeal found the Majority Members' issuance of a final award while concurrently reserving PGN's right to commence a separate arbitration for a review of the merits of the DAB Decision "questionable". The Majority Members were therefore wrong in rejecting PGN's request for a reopening and review of the DAB Decision in the same arbitration proceedings. In order to enforce immediate compliance with the DAB Decision under the terms of the 1999 FIDIC Conditions of Contract, PGN should have commenced arbitration under sub-clause 20.6 for the Tribunal to review and affirm the binding DAB Decision, while also requesting that the Tribunal issue an interim award in the terms of the DAB Decision pending the Tribunal's final award. This would allow the Tribunal to ensure immediate compliance with the DAB Decision, without contravening the 1999 FIDIC Conditions of Contract or exceeding its jurisdiction.

The Court of Appeal also found that there had been a breach of natural justice as PGN was not given an opportunity to defend its position at the hearing as to why the quantum of payment under the DAB Decision was excessive. Instead, the Final Award was made summarily, without a review of the merits of the substantive dispute between the parties. In view of the Court of Appeal's findings that the elements necessary to set aside the Final Award under both Article 34(2)(a)(iii) of the Model Law and Section 24(b) of the IAA had clearly been established, the Court of Appeal had to consider whether it ought to exercise its residual discretion to refuse to set aside the Final Award. The Court of Appeal took the view that the court's discretion to decline to set aside an arbitration award should only be exercised if no prejudice has been sustained by the aggrieved party. On the facts, PGN had suffered "real prejudice". There was

therefore no basis for the Court of Appeal to invoke its residual discretion to refuse to set aside the Final Award.

As conclusion, an arbitral tribunal does not have the power under sub-clause 20.6 of the 1999 FIDIC Conditions of Contract to issue a final award without assessing the merits of a party's defense and of the DAB's decision. The Singapore case of PGN v CRW demonstrate that there are pitfalls for the unwary in the distinction between the commencement of arbitration under clause 20.6 and clause 20.7, although a request for interim payment may provide the tribunal with the jurisdiction to order immediate payment of an amount representing the DAB's decision. Nonetheless, what is really required is a move towards immediate enforcement subject to some limited safeguards by adopting the policy based on "pay now argue later" approach. This case serves as a reminder that where a valid Notice of Dissatisfaction has been filed against a DAB decision, the DAB decision is not final, as it is open to review and amendment by the arbitral tribunal. Therefore, a party seeking to enforce compliance with the terms of the DAB decision should request the arbitral tribunal to review and confirm the correctness of the DAB decision, while concurrently asking for an interim award in the terms of the DAB decision pending the arbitral tribunal's final and binding decision. So, in author view in a case of no notice of dissatisfaction, the decision will be final and cannot be reviewed again by arbitral tribunal.[42]

Today, in fact, there is a difference between national or legal arbitration and equitable or delocalized arbitration. In national arbitration, the arbitrator has to respect natural principles and make decision according to the applicable law which is determined by the parties or arbitrator. But in the equitable or delocalized arbitration, the arbitrator is not forced to observe the law, and whenever recognizes it inequitable, can refuse to enforce it. This kind of arbitration is named arbitration on the basis of non-legal considerations. But it differs from the mediation, which is not binding for the parties. In these cases the arbitrator makes decision on the basis of equity, which is binding for parties and has not an absolute and unlimited authority in making decision, but shall respect basic rules of arbitration, such as equitable behavior and giving the right of defense to claimant, and also the rules related to public policy and to the nature of dispute. However, FIDIC DAB is not obliged to respect the applicable law of the contract, but shall make decision according to the terms of the contract, equitably. So, the board can make the more equitable decision according to the situation applicable to the contract and according to the periodical reports that have been collected when reviewing the site.

The words '*amiable*' and '*compositeur*' suggest a process of amicable settlement; this, however, does not in fact reflect either the nature of the process or the mission of the person or persons appointed to serve as *amiable compositeur(s).* Notwithstanding these differences, the essence of the concept is the same as; resolving a dispute on the basis of equity and fairness. The notion and practice of *amiable compositeur* originated and evolved in France and other civil law countries, and tends to be less well-established in common law jurisdictions. Nevertheless, *amiable compositeur* is generally accepted as a valid means of arbitrating disputes under the arbitration

[42] [2010] SGHC(Singapore High Court), 202

laws of virtually all jurisdictions (Hilgard and Bruder, 2014: 51). This principle is accepted in Sub-Clause 3 of Article 28 of the UNCITRAL Model Law on International Commercial Arbitration.[43]

Applying 1958 New York Convention to DAB Decisions

One of the most important legal issues in relation to international construction contracts in recent years has been how to enforce decisions of engineer made under Clause 67 of the FIDIC Conditions of Contract for works of civil engineering construction (the FIDIC Conditions or Red Book, 4th Edition 1987), and since the engineer decision procedure was replaced by dispute adjudication board (DAB) in 1999 edition of FIDIC conditions (the 1999 Red book), how to enforce decisions of DAB made under clause 20 of the 1999 Red Book (Seppala, 2009: 406)?

One can suppose that the DAB decision is enforced without referring to arbitration tribunal as an independent decision according to the 1958 New York Convention in the contracting countries. This convention is, no doubt, the most important international document about the recognition and enforcement of international commercial arbitration awards. The convention is more advanced than other conventions, such as the 1937 Geneva Convention, and many countries consider it in enforcing the decisions which are not internal in the country where it is going to be enforced (Article 1). The New York Convention is applicable on awards issued in the assigned countries. Article 1 of the Convention declares that:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

In other words, it will apply if the award has not been issued in the country in which its enforcement has been asked. Article 3 of this convention declares that:

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

This clause means that, there is no need to investigate the natural matters in assigned countries for enforcing the arbitrator's decision, and external procedural control is sufficient. So, if we put the DAB decision in the framework of an enforceable decision of this convention, the problem in enforcing it will be solved without the need to any arbitration in order to make a declared decision.

[43] The arbitral tribunal shall decide *ex aequo et bono* (according to the right and good) or as *amiable compositeur* only if the parties have expressly authorized it to do so.

Famous arbitration organizations in the world have tried to release arbitration from procedural and legal formalities and restraints, since in some regulations the authority of parties, and in their silence the authority of arbitrators, in selecting the applicable principles is accepted without referring to any national system. For example, Article 11 of the Rules of Arbitration in International Chamber of Commerce, even in the silence of the parties, does not force the arbitrators to enforce national judicial rules (Craig, Park, Paulsson, 1990: 271). So, we can suppose the non-national or delocalized arbitral decisions, which are not issued according to any national laws of a particular country, and are known beside legal arbitrations, as equity based, free arbitration, or over judicial principles that are not acceptable generally, and as a challenge in this field.

So long as it related to legal opinions, the researchers are divided into two groups about the possibility or impossibility of enforcing the non-national arbitral decision on the basis of the 1958 New York Convention: Those who believe that the convention is not applicable on enforcing the non-national decisions. Their idea is based on the reason upon which the rules of place of award must be applicable, which is the strongest criteria in determining the convention territory. In other words, they believe because of this convention, the decision is dependent on the laws of the issuing country, but they do not accept the involvement of the convention on foreign decision that has not special legal relation to any legal system. On the contrary, there are those who believe delocalized or non-national arbitral decisions are enforceable via the 1958 New York Convention, because this convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. So, this convention can involve the non-national decisions.

According to what was said on the way of issuing the FIDIC DAB decisions, it is clear that a DAB makes decision independently and on the basis of terms of the contract regarding impartiality and fairness. So, we can see DAB decision as non-national or delocalized arbitral decision that is not issued in the outline of any national law of a particular country, and even has no dependence to the place where it has been issued. Because of this, and because most of these decisions have technical nature and are issued on the basis of a technical matter that is acceptable for the parties, so, it is not incorrect to suppose the DAB decision as a non-national arbitral decision. At this time there is no international convention about enforcing DAB decisions, but regarding the changes on welcoming these boards, it is hoped to compile such convention in international level soon.

Conclusion

The International Chamber of Commerce (ICC) as an institute regulating traders' worldwide commercial relations, compiled detailed about Dispute Boards regulations in 2004, which works as the main criterion for recognition and adaptation of related regulations in different countries, similar to the ICC international arbitration regulations which at first was regulated and recommended by the ICC and then penetrated into arbitral rules of many countries. Referring to arbitration, instead of using national courts, despite its benefits, is not always easy and desirable, due to the

long process of using arbitration clauses in international contracts. This is especially true for long term international technical contracts such as construction contracts and cannot meet related requirements.

FIDIC as an international federation of consulting engineers, perceiving this need in 1999, forecasted a professional body of resolving disputes, named Dispute Adjudication Board (DAB) which shall make decisions independently and on the basis of equity of the contract, and not necessarily in the framework of a special national law. At present there are no common views about the legal nature of DAB decision, but finding an appropriate legal nature for the decision can directly affect its enforcement. One solution is to regard DAB and delocalized arbitration and their decisions of the same nature and character. Both DAB decision and delocalized arbitration award are issued on the basis of equity and not according to a special national law. So, if we consider the 1958 New York Convention as applicable on delocalized arbitration, it can also be applied on DAB decision in case of no dissatisfaction of the parties within a determined period of time and when it becomes final.

Generally, what has made arbitration as a well-known apparatus for resolving disputes is its legal framework which is backed by international conventions as well as national laws. DAB is to resolve disputes that are arisen out of or related to international longtime contracts. So, it can also be supported by national and international legal documents through conventions and domestic legislations. However, due to the lack of such a support for DAB, it is necessary to find a way for quick enforcement of DAB's decisions, if one of the parties refuses to enforce DAB's final decision. Although FIDIC regulations in Article 20 forecasted referring to arbitration and adopted a procedure for enforcing the board's decision, but because of the time consuming process of enforcement of those decisions, it contradicts a fast solution for the project in question. On the contrary, because of technical nature of DAB decision, which is not required to be issued on the basis of a particular country's law, we can see it as a non-national or delocalized arbitration award and enforce it through the New York convention 1958 recommendations.

On the nature of DAB decision no strong consensus exists. Whether it simulates an arbitration award or it resembles a technical decision, is a matter of dispute. However, it is accepted that DAB decision has an independent nature and could be enforced through non-judicial mechanism, similar to binding enforceable documents which can be enforced in some national laws without referring to judicial courts. Supporting such an idea requires national laws of different countries to support those decisions as binding and provide them with a legal background and sanction. Because of this legal requirement, we suggest countries enact regulations in order to recognize DAB decisions as a binding document in their laws and enforce them through related non-judicial bodies, such as the Consulting Engineers Associations which are the FIDIC members affiliate. In this way we can guarantee the validity and enforceability of DAB decisions without referring to governmental or judicial agencies, in case one of the parties fails to comply with the DAB's final and binding decision.

References

[1] Bouchez, L. J. (1991), "*The Prospect for International Arbitration: Dispute between States and Private Enterprises*", Journal of International Arbitration, Vol. 8.

[2] Collins, Lawrence (1987), *"The Law Governing the Agreement and Procedure in International Arbitration in England"*, Contemporary Problems in International Arbitration, Martinuse Nijhoff Publishers.

[3] Craig, W. L., Park, W. W., Paulsson, J. (1990), "*International Chamber of Commerce Arbitration*", Oceana Publication, London.

[4] David, R. (1982), "*l'arbitrage dans le commerce international*", Economica, Paris.

[5] Dorgan, C. S. (2005), "*The ICC's New Dispute Board Rules*", The International Construction Law Review (ICLR).

[6] Gaillard, Emmanuel, (2004) Pinsolle, Philippe, "*The ICG Pre-Arbitral Referee: First Practical Experiences*", Arbitration International, Vol. 20, No. 1.

[7] Gidwani, Karen (2006), *"Is the Enforcement of an Adjudicator's Decision a Foregone Conclusion?"*, paper given at 12th Fenwick Elliott Adjudication Update Seminar, available at: http://www.fenwickelliott.com/files/Adjudication%2015%20-%20Is%20Enforcement%20a%20Foregone%20Conclusion.pdf.

[8] Gould, Nicholas (2010), *"Enforcing a Dispute Board's Decision, Issues and Considerations"*, paper given at Introduction to International Adjudication Conference, 13-14 October, available at: http://www.fenwickelliott.com/files/paper_-_nick_gould_-_july_2011.pdf.

[9] Harmon, K. M. J.(2011)"*To Be or Not to Be, That is the Question: Is a DRB Right for Your Project?*", Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, ASCE, Vol. 3, Issue 1.

[10] Hilgard, Mark, Bruder, Ana Elisa (2014), *"Unauthorised Amiable Compositeur?"*, Dispute Resolution International, Vol. 8, No. 1, May.

[11] International Chamber of Commerce (ICC) Rules of Arbitration, 1998.

[12] Jaynes, Gordon L. (2000), "*FIDIC' 1999 Edition of Conditions of Contract for "Plant and Design-Build" and "EPC Turnkey Contract": Is the "DAB" Still a Star?*", The International Construction Law Review (ICLR).

[13] Jaynes, Gordon L. (2002), "*Note and Records: The Development and Expansion in the Use of DAB Internationally*", The International Construction Law Review (ICLR).

[14] Joneydi, Laya (2002), "*Enforcement of Foreign Commercial Arbitral Awards*", Shahr-e-Danesh Publication, Tehran.

[15] Mann, F. A. (1984), "*England Rejects Delocalized Contracts and Arbitration*", International and Comparative Law Quarterly.

[16] Mourre, Alexis (2006), "*Canada Dry Arbitrations?*", The International Construction Law Review (ICLR).

[17] Owen, Gwyn, (1999) "*Introduction to FIDIC Dispute Adjudication Board Provisions: Conditions of Contract for Construction,* FIDIC 1999, available at: http://fidic.org/sites/default/files/11%20DAB.pdf.

[18] Paulsson, Jan (1981), "*Arbitration Unbound: Award Detached from the Law of its Country of Origin",* International and Comparative Law Quarterly, Vol. 30, Issue 2, April.

[19] Paulsson, J. (1985), "*Independence of International Arbitration from the Law of the Situs"*, Contemporary Problems in International Arbitration, London, 1987, also court d appeal de Rouen, 13 Nov 1984, Rev. Arb.

[20] Poudret, Jean-François, Besson, Sébastien (2007), *"Comparative Law of International Arbitration"*, Sweet & Maxwell, London.

[21] Sampliner, G. (1997), "*Enforcement of Nullified Foreign Arbitral Awards*", Chromalloy Revisited, Journal of International Arbitration, Vol. 14.

[22] Seppala, C. (1997), "*The New FIDIC Provision for a Dispute Adjudication Board*",

The International Construction Law Review (ICLR), Vol. 14.

[23] Seppala, Christopher R. (2009), "*Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's Decision under the FIDIC Conditions*", The International Construction Law Review (ICLR).

[24] Toope, S. J. (1990), "*Mixed International Arbitration: Studies in Arbitration between States and Private Persons*", Grotius.

[25] Van den Berg, A. J. (1981), *"The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation"*, Kluwer Law International.

[26] Wetter, J. Gillis (1990), "*The Proper Scope of National Arbitration Act*", Mealey's International Arbitration Report, Vol. 5, Issue 11.

[27] David, R., (1982) "l'arbitrage dans le Commerce International", Economica, Paris.

[28] Sampliner, G. (1997), *"Enforcement of Nullified Foreign Arbitral Awards"*, Chromalloy Revisited, Journal of International Arbitration, Vol. 14.

[29] Paulsson, Jan, (1980) *"Arbitration Unbound: Award Detached from the Law of its Country of Origin",* International and Comparative Law Quarterly, Vol. 30, Issue 2, April 1981: 371-372- Court of Appeal, Paris, Rev. ARB 524.

[30] The ICC International Court of Arbitration Bulletin 46, Vol. 9, No. 2, 2000.

[31] Dispute Review Board Foundation (DRBF) Database of Projects, 2005 and 2010, available at: http://www.drb.org/manual/database.

[32] The ICC International Court of Arbitration Bulletin 15, Vol. 2, No. 1, June 1991.

[33] The ICC International Court of Arbitration Bulletin 46, Vol. 9, No. 2, 2000.

[34] The ICC International Court of Arbitration Bulletin 74, Vol. 9, No. 1, May 1998.

هیئت‌های حل اختلاف، رویکردی جدید در حل اختلاف

مرتضی عادل[1]، الهام انیسی[2]

تاریخ دریافت: ۱۳۹۶/۲/۲۲ تاریخ پذیرش: ۱۳۹۷/۴/۲

چکیده

در قراردادهای بین‌المللی ساخت که مستلزم صرف هزینه‌های مالی و نیازمند منابع فنی و انسانی است، در جلوگیری از بروز ضرر، مسئله ضروری حل و فصل فوری اختلافات در محل پروژه است. هیئت حل اختلاف (DAB)، ابداعی فدراسیون بین‌لمللی مهندسان مشاور(فیدیک)، سال‌هاست در عرصه بین‌المللی مورد استفاده قرار می‌گیرد، به‌ویژه در ایالات متحده امریکا که نتایج چشم‌گیری در به‌کارگیری این هیئت‌ها برای کاهش بار مراجعه به داوری و دادگاه را تجربه کرده است. اعضای این هیئت‌ها با اتفاق نظر طرف‌های قرارداد و هنگام انعقاد قرارداد انتخاب می‌شوند. اعضا مستقل و دارای تخصص فنی ویژه و متناسب با موضوع قرارداد هستند. ساختار هیئت حل اختلاف کاملاً متفاوت از نقش مهندس مشاور در نمونه قراردادهای قدیمی فیدیک است و ساختاری نزدیک به داوری دارد و اجرای تصمیمات آنها بی شباهت با داوری نیست. به همین دلیل است که ارزیابی حقوقی تصمیمات هیئت‌های حل اختلاف بسیار اهمیت دارد.

در عرصه بین‌الملل تا کنون هیچ کنوانسیونی برای اجرای تصمیمات هیئت‌های حل اختلاف تنظیم نشده است. به همین منظور یافتن راه حل‌هایی برای اجرای این تصمیمات می‌تواند به توسعه بیشتر هیات‌های حل اختلاف در قراردادها سرعت بخشد. کنوانسیون نیویورک مصوب ۱۹۵۸ نیز، که مشهورترین و مناسب‌ترین کنوانسیون جهت شناسایی و اجرای آرای داوری خارجی است، می تواند ما را در فرآیند ارزیابی حقوقی و قابلیت اجرای تصمیمات هیئت‌های حل اختلاف در چارچوب آن کنواسیون یاری کند.

این مقاله در مقدمه، توسعه نهاد هیئت حل اختلاف را مطالعه نموده و سپس در سه بخش اصلی به بررسی ماهیت و انواع هیئت حل اختلاف فیدیک، اجرای تصمیمات هیئت‌های حل اختلاف، و درنهایت امکان اعمال مقررات کنوانسیون نیویورک ۱۹۵۸ بر تصمیمات هیئت حل اختلاف می‌پردازد.

واژه‌های کلیدی: فیدیک، هیئت حل اختلاف، اجرای تصمیم، تصمیم نهایی و لازم الاجرا، داوری، مهندس مشاور.

---

۱. دانشیار حقوق دانشکده حقوق و علوم سیاسی، دانشگاه تهران، تهران، ایران. madel@ut.ac.ir.

۲. دانشجوی دکتری حقوق نفت و گاز، دانشکده حقوق، دانشگاه شهید بهشتی، تهران، ایران. Elham_Anisi@yahoo.com (نویسندهٔ مسئول).