Insight: Construction

October 2011

Sub-Clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a 'binding' DAB decision*

Some arbitral tribunals and courts have inferred from Sub-Clause 20.7 of the FIDIC Red Book's expressly providing for the enforcement by arbitration of 'final and binding' decisions of a Dispute Adjudication Board ('DAB') that 'binding' decisions of a DAB (that is, those that have been the subject of a notice of dissatisfaction) should not be enforced by arbitration. This paper by a long-time (since the mid-1980s) legal advisor to the FIDIC Contracts Committee submits that this was not FIDIC's intention.

The perceived 'gap'

Arbitral tribunals and state courts have – unfortunately – been somewhat divided over whether a decision of a DAB under Clause 20 of the FIDIC Conditions of Contract for Construction, 1999 ('Red Book') which is 'binding' but not 'final' (as it has been the subject of a notice of dissatisfaction) may be enforced by an arbitral award.[1]

The tribunals and courts that have denied enforcement have often relied on Sub-Clause 20.7 to support the conclusion that arbitrator(s) were only empowered to enforce 'final and binding' DAB decisions and not 'binding' ones.[2] Sub-Clause 20.7 provides that:

'In the event that:

a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4…,

b) **the DAB's related decision (if any) has become final and binding**, and

c) a Party fails to comply with this decision

then **the other Party may**, without prejudice to any other rights it may have, **refer the failure itself to arbitration** under Sub-Clause 20.6…' [Emphasis added]

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This article was first published in the October, 2011 issue of *Construction Law International* 6(3) CLInt

* Based on a presentation entitled 'Developments and Challenges of DAB Procedures Enforcement of a DAB's Decision' given by the author at the FIDIC International Contract Users' Conference, London, December 1 – 2, 2010.

1 See, e.g., the Judgment of the Singapore High Court in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 and the Judgment of the Court of Appeal of Singapore dismissing an appeal from that Judgment [2011] SGCA 33 ('Singapore Case') which set aside a final ICC award directing enforcement. Compare with (i) the interim award in ICC case no. 10619 published in (2009) 19 *ICC International Court of Arbitration Bulletin*, No. 2, 85-90 and (ii) the 'final partial award' in another ICC case published in the September 2010 issue of *The Dispute Board Federation Newsletter* (*see* http://www.dbfederation.org/downloads/newsletter-sep10.pdf), both of which granted enforcement. It should be noted that the Court of Appeal in the Singapore case sought to distinguish these awards from the final award involved in the Singapore case on the ground that they were interim or partial awards. See also the author's 'Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's Decision Under the FIDIC Conditions' [2009] *ICLR* 414 commenting on the interim award in ICC case no. 10619.

2 See, e.g., the Singapore Case.

As Sub-Clause 20.7 only provides for the referral of a 'final and binding' decision to arbitration, some tribunals and courts have reasoned that a 'binding' decision cannot be enforced by an arbitral award. It has been said that there is a *lacuna* or gap in Sub-Clause 20.7 in so far as it does not confer an express right on the winning party to refer to arbitration a failure of the losing party to comply with a DAB decision that is 'binding' but not 'final' in nature [citing often an article of Dr. Nael G. Bunni on the subject[3]].

This conclusion – like that of Dr. Bunni – is understandable: Clause 20 has proven to be unclear in this respect. However, as I believe that I was probably responsible for the inclusion of Clause 20.7 (Sub-Clause 67.4 in the fourth edition, 1987) in the Red Book, I wish to point out that this provision was not intended to be interpreted in this way.

Sub-Clause 20.7's history

As older readers may recall, the predecessor to Clause 20 in earlier editions (that is, pre 1999) of the Red Book was Clause 67. Clause 67 required that all disputes between the Employer and the Contractor be referred to the Engineer for decision before they could be referred to arbitration.

As regards arbitration, Clause 67 of the third edition (issued in 1977) had provided that disputes or differences in respect of which the decision of the Engineer had not become 'final and binding' – because a party had expressed dissatisfaction with the decision – could be referred to arbitration. Clause 67 of the third edition had provided:

> 'All disputes or differences in respect of which the decision (if any) of the Engineer has not become final and binding as aforesaid shall be finally settled under the Rules of Conciliation of Arbitration of the International Chamber of Commerce…'

It was thus clear that, where a dispute was the subject of a decision of the Engineer that had 'not become final and binding' (because a party had expressed dissatisfaction with it in the appropriate way), this dispute and the related decision could be referred to arbitration.

However, nothing was said about what happened if: (1) neither party had expressed dissatisfaction with an Engineer's decision, with the result that it became final and binding, and (2) a party refused to comply with it. For example, what recourse would the Contractor have if the Employer had failed to comply with a final and binding decision of the Engineer in the Contractor's favour?

In the early 1980s, I had the experience of a case where the Employer, a sovereign state, faced with a number of decisions of the Engineer under Clause 67 ordering the payment of money to the Contractor, neither expressed dissatisfaction, nor complied, with them. It just seemed to ignore them. Under Clause 67 as it was then worded, it was therefore very doubtful whether the Contractor could submit such decisions, or the disputes underlying them, to arbitration as, literally, only disputes in respect of which the decision (if any) of the Engineer had '**not** become final and binding' [emphasis added] could be referred to arbitration under Clause 67.

The problem had, doubtless, arisen because, as is well known, the first edition of the FIDIC Red Book published in 1957 had been based closely on a UK domestic form of contract (the ICE Conditions) and, under English law (at least at that time), where a debt was 'indisputably due' from a debtor in England, relatively speedy summary judgment was available from the English courts. There would be no need for, or advantage in, submitting the matter to arbitration. Therefore, apparently for that reason, arbitration was not provided for in that case in the Red Book, just as it had not been provided for in that case in the relevant UK form of contract.[4]

Evidently, when the Red Book had originally been prepared, the draftsmen had failed to note that, in the case of an international construction project, the Contractor would almost certainly not want to go into a local court, which would typically be in a developing country, because the local court often could not, or would not, grant the desired relief. As a result, no satisfactory remedy was available in the Red Book where, in the case of such a project, a party, typically the Employer, had failed to comply with a final and binding decision of the Engineer under Clause 67.[5]

Therefore, in an article published in the *International Construction Law Review* ('ICLR') in 1986, I raised the following question:

> 'Why are disputes which are the subject of… "final and binding" decisions of the Engineer not also arbitrable, at least to the extent necessary to permit such decisions to be confirmed by an arbitral award, if necessary?'[6]

After discussing the problem at some length, I recommended as follows:

> 'Clause 67 should be amended to make clear that a dispute which is the subject of a… "final and binding" decision of the Engineer may, nevertheless, be submitted to arbitration for certain purposes, such as to obtain an arbitral award confirming a party's entitlement to the amount of the "final and binding" decision.'[7]

3 Dr. Bunni's article is 'The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works' [2005] *ICLR* 272.

4 See, *e.g.* Clause 66 of the ICE Conditions of Contract, 4th and 5th editions, published in 1955 and 1973, respectively.

5 For a concrete example of the problem to which this gave rise, see the final award in ICC case no. 7910 (1996) in *ICC International Court of Arbitration Bulletin*, Vol. 9/no. 2, November 1998, 46, where the tribunal declared it was without jurisdiction under Clause 67 in the case of a final and binding decision of the Engineer under the Red Book, third edition (1977).

6 'The Pre Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contract' [1986] *ICLR* pp. 315, 334.

7 *Ibid.*, p. 336.

Thereafter, FIDIC addressed this precise problem in the next edition of the FIDIC Red Book, the fourth published in 1987, by the introduction, with my assistance, of a new Sub-Clause 67.4 into Clause 67.[8] Sub-Clause 67.4 provided as follows:

> '**Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may**, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, **refer the failure to arbitration** in accordance with Sub-Clause 67.3. The provisions of Sub-Clauses 67.1 and 67.2 shall not apply to any such reference.' [Emphasis added]

As a result of the introduction of Sub-Clause 67.4, the failure of a party to comply with the Engineer's 'final and binding' decision was now, for the first time, expressly referable to arbitration. Neither the decision, nor the underlying dispute, had first to be referred back either to the decision of the Engineer under Sub-Clause 67.1, or to the amicable settlement procedure provided for in Sub-Clause 67.2, as a condition to being submitted to arbitration.

Sub-Clause 67.4 expressly provided for the referral of the 'failure' to comply with a final and binding decision to arbitration, so as to try to convey the idea that, unlike in the case of a decision of the Engineer with which one party had expressed dissatisfaction, a final and binding decision should not ordinarily be opened up by the arbitrators.[9]

There was no need to provide that a failure of a party to comply with a decision of the Engineer which had not become final and binding should be referred to arbitration as, in that case, even under the third edition of the Red Book (published in 1977), both the underlying dispute and the Engineer's decision could (and, as a notice of dissatisfaction with the decision had been given by one party, most probably would) be referred to arbitration. Hence, any failure by a party to comply promptly with such Engineer's decision under Clause 67 could be dealt with in that arbitration.

Sub-Clause 20.7 of the 1999 FIDIC Red Book is the successor to Sub-Clause 67.4 of the FIDIC Red Book, fourth edition, 1987, and is expressed in similar terms, except that, as in the case of the other 1999 FIDIC contracts for major works, the DAB has replaced the Engineer in his pre-arbitral role of deciding disputes, and Sub-Clause 20.7 refers to a decision of the DAB rather than a decision of the Engineer.

Sub-Clause 20.7 provides that, when a party has failed to comply with a final and binding decision of the DAB, the other party may 'refer the failure itself to arbitration' under Sub-Clause 20.6, without the need to refer the matter under Sub-Clauses 20.4 (to obtain another decision of the DAB) and 20.5 (to allow 56 days for amicable settlement). Thus, Sub-Clause 20.7, like the former Sub-Clause 67.4, ensures that, where a party has not complied with a final and binding decision, the matter can be referred to arbitration directly.

From this brief excursion into the history of the disputes clause in the FIDIC Red Book, it can be seen that Sub-Clause 67.4, of which Sub-Clause 20.7 is the successor, was simply put into the FIDIC Red Book, fourth edition, 1987, to ensure that, where a party had failed to comply with a final and binding decision, such failure could be referred to arbitration. Nothing was intended to be implied about merely a 'binding' decision as it was obvious – or so it was thought at the time – that such a decision, together with the dispute underlying it, could be referred to arbitration.

Against this background, tribunals and courts are, therefore, with respect, going too far to suggest that, because Sub-Clause 20.7 does not refer to binding decisions of a DAB, a failure to comply with a binding decision may not be referred to arbitration. It was unnecessary to deal with binding decisions, as it was clear – or so it was thought – that, as these had been the subject of a notice of dissatisfaction, these could, by definition, be referred to arbitration under Sub-Clause 20.6 (and its predecessor, Sub-Clause 67.3).

Thus, if account is taken of the following three factors:

1) the fact that 'final and binding' decisions were not expressly arbitrable in the first (1957), second (1969) and third (1977) editions of the FIDIC Red Book,
2) the difficulty that this situation had created, as described in the article published in the *ICLR* in 1986 which I have referred to, and
3) FIDIC's response to that difficulty by its inclusion of a new Sub-Clause 67.4 into the fourth edition of the Red Book published in 1987 (the predecessor of Sub-Clause 20.7 in the 1999 Red Book).

Sub-Clause 20.7 should not be interpreted as implying that a failure to comply with a binding decision cannot be referred to arbitration directly. The same applies to Sub-Clause 20.7 of the FIDIC Conditions of Contract for Plant and Design-Build, 1999 ('Yellow Book'), and for EPC/Turnkey Projects, 1999 ('Silver Book'), as that Sub-Clause is worded in identical terms in them.

8 See the author's article 'The Principal Changes in the Procedure for the Settlement of Disputes (Clause 67)' [1989] *ICLR* pp. 177, 183-84.

9 Certain exceptions to the finality of the decision of the Engineer were described in the author's 'The Pre Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contract' [1986] *ICLR* pp. 332-333.

The future

In any event, this issue under the Red Book has been clarified in the FIDIC Conditions of Contract for Design, Build and Operate Projects, 2008 ('Gold Book') by Sub-Clause 20.9 providing as follows:

> 'In the event that a Party fails to comply with any decision of the DAB, **whether binding or final and binding**, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.8 [*Arbitration*]… Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.7 [*Amicable Settlement*] shall not apply to this reference.' [Emphasis added.]

When FIDIC's 1999 Books are updated, a task which is now underway, they can be expected to contain a similar provision, putting the issue finally to rest.