Commentary on Recent ICC Arbitral Awards dealing with Dispute Adjudication Boards under FIDIC Contracts

By Christopher R. Seppälä

International construction contracts typically provide for a multi-tiered dispute resolution process in which contested claims, i.e. disputes, are referred to a dispute board prior to arbitration. Such is the procedure adopted in FIDIC's principal conditions of contract, which are recognized as a standard and are widely used in the international construction industry. This article discusses the many issues relating to Dispute Adjudication Boards (generally known as DABs) that have been raised in several recent ICC arbitrations initiated pursuant to international construction contracts predominately based on FIDIC conditions. These issues cover (1) the claims procedure and the dispute resolution clause, including the requirement to submit claims to the Engineer, the time-bar under Sub-Clause 20.1 of the FIDIC conditions, the statute of limitations relating to claims, and the law applicable to the dispute resolution clause; (2) the DAB procedure, including whether it is always mandatory and a prerequisite to arbitration, whether the DAB has been validly constituted, and the consequences of not referring a dispute to the DAB; and (3) post-DAB issues such as the validity, timeliness and impact of a notice of dissatisfaction and the enforceability of a DAB decision by an arbitral award. The author, Christopher R. Seppälä, draws on his wide and long-standing experience in the field to analyse and assess the importance of the decisions reached on these and other relevant issues in the newly published awards.

Les contrats internationaux de construction prévoient le plus souvent un processus de règlement des différends en plusieurs étapes dans lequel les demandes contestées — les différends, donc — sont d'abord soumises à un dispute board*, puis à l'arbitrage. C'est notamment la procédure adoptée dans les principaux contrats types de la FIDIC, qui font référence en la matière et sont largement utilisées dans le secteur international de la construction. Cet article aborde les nombreuses questions liées aux* Dispute Adjudication Boards *(ou « DAB ») qui ont été soulevées dans plusieurs arbitrages récents de la CCI, engagés conformément à des contrats internationaux de construction intégrant, pour la plupart, les conditions de contrat de la FIDIC. Parmi elles figurent (1) la procédure de réclamation et la clause de règlement des différends, y compris la nécessité de soumettre les demandes à l'ingénieur, le délai prévu à la clause 20.1 des conditions de la FIDIC, la prescription des demandes et la loi applicable à la clause de règlement des différends, (2) la procédure devant le DAB, y compris les questions de savoir si celle-ci est toujours obligatoire et constitue un préalable de l'arbitrage, si le DAB a été valablement constitué, et quelles sont les conséquences de la non-soumission d'un différend au DAB, et (3) des questions relatives à la phase postérieure au DAB telles que la validité, l'échéance et l'effet d'une notification de désaccord et la possibilité d'ordonner par une sentence arbitrale l'exécution de décisions du DAB. L'auteur, Christopher R. Seppälä, s'appuie sur sa vaste et longue expérience en la matière pour analyser et évaluer l'importance des décisions rendues, dans les sentences nouvellement publiées, sur ces questions comme sur d'autres points significatifs.*

Los contratos internacionales de construcción generalmente prevén un proceso de resolución de controversias en varias etapas en el que las demandas impugnadas (es decir, controversias) se someten a un dispute board *antes del arbitraje. Tal es el caso del procedimiento adoptado en los principales tipos de contrato FIDIC, que se reconocen como un estándar y que se usan ampliamente en el sector internacional de la construcción. El presente artículo aborda las numerosas cuestiones relacionadas con los* Dispute Adjudication Boards *(comúnmente conocidos como DAB) planteadas en diversos arbitrajes recientes de la CCI iniciados con arreglo a contratos internacionales de construcción basados en su mayor parte en las condiciones contractuales FIDIC. Estas cuestiones cubren (1) el procedimiento de reclamación y la cláusula de resolución de controversias, incluyendo el requisito de someter las demandas al ingeniero, el límite de tiempo bajo la Subcláusula 20.1 de las condiciones contractuales FIDIC, el plazo de prescripción respecto de las demandas y la ley aplicable a la cláusula de resolución de controversias; (2) el procedimiento del DAB, incluyendo si siempre es obligatorio y un requisito previo al arbitraje, si el DAB se constituyó de forma válida y las consecuencias de no someter la controversia al DAB; y (3) los asuntos posteriores al DAB como la validez, el momento y el impacto de una notificación de descontento, así como la ejecutabilidad de una decisión del DAB a través de un laudo arbitral. El autor, Christopher R. Seppälä, saca partido de su amplia experiencia de muchos años en este ámbito para analizar y valorar la importancia de las decisiones alcanzadas sobre estas y otras cuestiones pertinentes en los laudos hoy publicados por vez primera.*

Christopher R. Seppälä

Chris Seppälä is a member of the New York and Paris Bars, a partner of White & Case resident in Paris, and Vice-President Emeritus of the International Court of Arbitration of the International Chamber of Commerce (ICC).

Mr Seppälä's main areas of practice are international commercial arbitration and international construction, although he has substantial experience of commercial and financial matters generally, in both common law and civil law jurisdictions. He specializes in international construction claims and disputes in relation to large, complex civil engineering, industrial (including nuclear) and building projects, as well as claims under contracts in the oil and gas industry.

For more than thirty-five years Mr Seppälä has represented and counselled parties in international commercial arbitrations under the rules of the ICC, ICSID, LCIA, the Japan Commercial Arbitration Association and the Cairo Regional Centre, as well as ad hoc arbitrations under the UNCITRAL and other arbitration rules. He has represented multinational corporations and banks, as well as sovereign States or their State-owned entities, in international arbitrations. As an arbitrator, he has served as both tribunal president and co-arbitrator, and is a member of arbitration institutes and professional arbitration associations worldwide.

Mr Seppälä chaired the International FIDIC Standard Conditions Subcommittee of the International Bar Association from 1985 to 1989 and advised FIDIC in the preparation of the fourth edition of its civil engineering conditions (Red Book) published in 1987. He was legal adviser to and a member of FIDIC's Update Task Group that prepared the three current FIDIC conditions of contract for major works (the Red, Yellow and Silver Books), published in 1999. He has been legal adviser to the FIDIC Contracts Committee continuously since 2000 and is a recipient of the Louis Prangey Award, FIDIC's highest accolade.

Mr Seppälä is the author of many authoritative articles, including four previous commentaries on awards relating to FIDIC contracts in the *ICC International Court of Arbitration Bulletin*. He writes regularly in *The International Construction Law Review* as correspondent for France and is a member of its Editorial Advisory Board.

cseppala@whitecase.com

I. Introduction[1]

The decision by the ICC to publish extracts from recent ICC awards[2] relating principally to Dispute Adjudication Boards (DAB(s)) under FIDIC contracts is an event of considerable importance, for two main reasons. First, DABs have become the preferred method for resolving international construction disputes under such contracts (rather than having them settled by the Engineer[3] or international arbitration). Second, the awards are relatively recent – they were all issued between 2008 and 2014 – and all but two[4] relate to the latest suite of FIDIC construction contracts for major works published in 1999, consisting of the 'Red' (for civil engineering construction), 'Yellow' (for plant and design-build) and 'Silver' (for EPC/turnkey projects) Books (the '1999 FIDIC Books'). The awards are therefore directly relevant to current construction contract practice.

This article will comment briefly on issues raised in these awards. Seven of the awards relate to contracts based on the Red Book, six to contracts based on the Yellow Book and one to a contract based on the Silver Book.

All three of the 1999 FIDIC Books contain similar, though not identical, clauses for dealing with claims of the Contractor or the Employer and for dispute resolution. As these clauses are complex, it is not possible to examine them in detail here.[5] However, it is possible to furnish a summary of what they provide.

1 The views expressed in this article are those of the author and do not represent necessarily those of any firm or organization with which he is associated.

2 These extracts can be found in the present issue of the Bulletin, immediately after this commentary.

3 Until a new suite of FIDIC contracts was published in 1999, they had provided for the pre-arbitral settlement of disputes by the Engineer for the works. Although the Engineer is hired and paid by the Employer, it has been long-standing practice in common law countries for the Engineer to perform this role and it is still recognized as an alternative to the DAB in FIDIC contracts.

4 The two exceptions are a case that relates to the FIDIC Multilateral Development Bank Harmonized Conditions of Contract for Construction and a case unrelated to a FIDIC contract but containing a dispute resolution clause somewhat similar to those contained in the 1999 FIDIC Books.

5 For an overall description of the DAB, see the author's 'The New FIDIC Provision for a Dispute Adjudication Board' [1997] ICLR 443. For a discussion of the claims procedure and the arbitration clause generally, see the author's 'Contractor's Claims under the FIDIC Contracts for Major Works' (2005) 21 Const. LJ 278 and 'The Arbitration Clause in FIDIC Contracts for Major Works' [2005] ICLR 4.

II. The DAB procedure

A. Claims

As regards claims of the Contractor for time and/or money, Sub-Clause 20.1 of each of the 1999 FIDIC Books provides that the Contractor must give a notice of claim within 28 days after it became aware, or should have become aware, of the event or circumstance giving rise to the claim.[6] If the Contractor fails to do so, the claim will be time-barred.

Thereafter, the Contractor is required to keep contemporary records as may be necessary to substantiate the claim and, within 42 days after it became aware or should have become aware of the event or circumstance giving rise to the claim, must send to the Engineer a fully detailed claim with full supporting particulars. Thereafter, the Engineer (in the case of the Red and Yellow Book) or the Employer (in the case of the Silver Book) must, pursuant to Sub-Clause 3.5 and unless an agreement with the parties is reached, make a 'fair determination' of any extension of time and/or any additional payment to which the Contractor is entitled under the contract.

Similarly, if the Employer considers itself entitled to any payment and/or extension of the Defects Notification Period (as defined) under the 1999 FIDIC Books, then the Employer or the Engineer is required to give notice and particulars to the Contractor, pursuant to Sub-Clause 2.5, and thereafter, as with the Contractor's claims, the Engineer or the Employer[7] is required (unless the parties can agree) to make a 'fair determination', pursuant to Sub-Clause 3.5, of the amount of any payment and/or any extension of the Defects Notification Period to which the Employer is entitled.

B. The DAB

If either the Contractor or the Employer is dissatisfied with any determination by the Engineer or the Employer under Sub-Clause 3.5, then this may constitute a 'dispute' between the parties (see section III(C)(ii) below). Disputes between the parties may also sometimes arise independently of Sub-Clause 3.5.[8]

6 See footnote 24 below where Sub-Clause 20.1 is reproduced.

7 Unlike the Red and Yellow Books, the Silver Book provides for no intermediary in the person of the Engineer. Accordingly, the Employer must itself make a fair determination of its own claims under Sub-Clause 3.5.

8 See ICC case 19581 discussed in section III(A)(1) below.

Sub-Clause 20.2 provides that disputes (not merely claims) shall be adjudicated by a DAB to be appointed jointly by the parties. The steps in the dispute resolution procedure are as follows: (1) either the Contractor or the Employer refers any dispute to the DAB for decision; (2) the DAB, acting as a panel of experts and not as arbitrators, must ordinarily give notice of its decision to the parties within 84 days, and such decision is binding on them and must be given effect unless and until revised pursuant to (4) or (5) below; (3) if either party is dissatisfied with the DAB's decision (or the DAB fails to give a decision within 84 days) then either may, within 28 days, notify the other of its dissatisfaction, otherwise the decision becomes final and binding on the parties; (4) where a party has given a notice of dissatisfaction, both parties have 56 days thereafter to attempt amicably to settle the dispute; (5) any dispute which has neither become final and binding nor been amicably settled under the preceding steps is to be finally settled by international arbitration under the Rules of Arbitration of the International Chamber of Commerce.

While the foregoing five steps are the same in all of the 1999 FIDIC Books, the DAB is not. The Yellow and Silver Books provide for an ad hoc DAB, i.e. constituted to decide a single dispute, after which its appointment will normally expire,[9] whereas the Red Book provides for a permanent DAB, i.e. constituted at the beginning of a project (FIDIC envisages within 28 days following the Commencement Date, as defined) to remain in place until the Contractor's discharge of the Employer at the end of the project has become effective.

The original reason for having two types of DABs was that it was considered that in contracts based on the Yellow and Silver Books the majority of the work would be done off-site (e.g. in a plant or a factory). Given that the dispute board procedure was developed for 'dispute resolution at the job-site level',[10] it was considered unjustified to require that a DAB be set up and maintained for the entire duration of the project. In contracts based on the Red Book, on the other hand, all or practically all of the work would be done at the job site, making a permanent DAB justified.

To constitute one or other of the two types of DAB, each of the 1999 FIDIC Books contemplates that the Employer, the Contractor and each member of the DAB will enter into a Dispute Adjudication Agreement ('DAA').

C. Some difficulties of interpretation

A frequent source of difficulty (in the awards discussed below and generally in practice) has been Sub-Clauses 20.7 and 20.8, which are part of the dispute resolution clause constituting Clause 20 of the 1999 FIDIC Books.

Sub-Clause 20.7 essentially provides[11] that where neither party has given a notice of dissatisfaction within 28 days and the DAB's related decision has become final and binding and a party fails to comply with the decision, then the other party, without prejudice to its rights, may refer the failure itself to arbitration directly. In other words, the other party need not refer the matter anew to the DAB or to amicable settlement. As Clause 20 does not state whether a party's failure to comply with a binding decision may similarly be referred directly to arbitration, some authors and tribunals have inferred that this may not be possible.

As will be explained below, this is a misinterpretation of Sub-Clause 20.7. There is a historical explanation for why final and binding decisions (but not binding decisions) were the subject of a special provision and this has recently and properly been judicially recognized.[12] In fact, all decisions of the DAB should be enforceable by an arbitral award, as all are binding. The only difference with non-final decisions is that their enforceability, like their binding nature, is provisional.[13]

9 Unless other disputes have been referred to it in the meantime, in which case its appointment expires when it has given its decision on those disputes.

10 R.M. Matyas, A.A. Mathews, R.J. Smith & P.E. Sperry, *Construction Dispute Review Board Manual* (New York: McGraw-Hill, 1996) 27.

11 Sub-Clause 20.7 provides: 'In the event that: (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [*Obtaining Adjudication Board's Decision*], (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 [*Arbitration*]. Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference.'

12 See section III(B)(3) below.

13 See section III(B)(3) below.

Sub-Clause 20.8 essentially provides[14] that if a dispute between the parties arises and there is no DAB 'in place', whether by reason of the expiry of the DAB's appointment 'or otherwise', the dispute may be referred directly to arbitration. In other words, it need not be referred to the DAB or to amicable settlement. The wording of this Sub-Clause has led some tribunals to suggest that whenever a DAB is not 'in place', for whatever reason, a party is entitled to bypass the DAB and proceed directly to arbitration.

As will be explained below, this again is an erroneous interpretation of Sub-Clause 20.8 and inconsistent with the intent of Clause 20 that disputes be referred to the DAB in the first instance. Again, this has recently and properly been judicially recognized.[15]

III. Commentary on awards

The awards address interesting issues in three areas: (A) the claims procedure and the dispute resolution clause generally, (B) the DAB procedure, and (C) the post-DAB but pre-arbitral phase. How they do so is discussed below.

A. The claims procedure and the dispute resolution clause

1. Must a claim be referred to the Engineer?

Four awards consider the question of whether a claim under a Red or Yellow Book contract, as a dispute (given that only disputes may be referred to the DAB, see Section II(B) above), may be submitted directly to the DAB or, if for some reason the dispute is not referable to the DAB, to international arbitration, without first having been the subject of a notice of claim and claim under Sub-Clause 20.1 or having been referred to the Engineer or the Employer for a decision under Sub-Clause 3.5. As will be seen below, tribunals have not taken consistent positions on this question.

In **ICC Case 16155** the Contractor had given written notice to the Engineer under a Red Book contract, claiming the right to a price increase and time extension, but then failed to substantiate its claim.[16] The issue arose as to whether this would prevent the Contractor from proceeding to the next step of the dispute resolution procedure (which, in this case, as the Employer had refused to cooperate in the constitution of a DAB, was found to be international arbitration). The tribunal concluded by a majority that there was no contractual support for the position that the Contractor's failure to provide substantiating materials to the Engineer should prevent the Contractor from proceeding to the next step of the dispute resolution procedure.[17] The Contractor was therefore authorized to do so.[18]

In **ICC Case 16765**, the issue was whether the tribunal had jurisdiction under a Yellow Book contract to rule on the Employer's counterclaim for delay damages. The tribunal found that the Employer was legally entitled to bring a claim to arbitration only if it first complied with Sub-Clauses 2.5, 3.5 and 20.4, paragraph 6. As the Employer had failed to comply with these 'mandatory and exclusive provisions of the Contract regarding its claim for delay damages', the Employer was contractually barred from bringing its counterclaim, which was declared inadmissible.[19]

On the other hand, **ICC Case 18505**, arising from a Yellow Book contract, took a different approach to the Contractor's claims. The Contractor had notified its claims (a claim that the Contractor (claimant) was the leader of the consortium with the power to bind it and a claim that the termination notice given by the Employer (respondent) was unlawful and in breach of contract) directly to the Employer, which had rejected them, thereby giving rise to a dispute. The tribunal found that the Contractor was not required to submit its claims to the Engineer under Sub-Clause 20.1 prior to arbitration as the Employer had refused to sign the DAA, with the result that no DAB was in place and Sub-Clause 20.8 applied, thereby relieving the Contractor (according to the tribunal) of the requirement to submit its claims to the Engineer.[20]

14 Sub-Clause 20.8 provides: 'If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise: (a) Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply, and (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [*Arbitration*].'

15 See section III(B)(1) below.

16 ICC Case 16155, 43 et seq.

17 Ibid. 58.

18 Ibid. 81.

19 ICC Case 16765, 128, 129.

20 ICC Case 18505, 109–111.

In **ICC Case 19581**, arising from a Red Book contract, the Contractor was seeking the release of a retention money guarantee and based its claim on Sub-Clauses 4.2, 11.9 and 14.9. The tribunal found that the Contractor was not required to refer its claim to the Engineer under Sub-Clause 3.5 as that Sub-Clause means that 'disputes only have to be referred to the Engineer where this is explicitly provided for in the [general conditions]', which was not the case here.[21] Moreover, the tribunal found that Sub-Clause 20.1 applies only where the Contractor is seeking an extension of time and/or additional payment and therefore did not apply to the Contractor's claim here.[22] The tribunal went even further by saying – more questionably – that the fact that the Contractor also sought compensation for damages as well as reimbursement of expenses was not sufficient to trigger the application of Sub-Clause 20.1 as '[d]amages and expenses do not constitute a consideration given in exchange for works performed by' the Contractor.[23]

2. The time-bar in Sub-Clause 20.1

An issue that frequently arises in practice is how to interpret Sub-Clause 20.1, which requires a notice of claim to be given within 28 days after awareness of the event or circumstance giving rise to the claim has been or should have been acquired. Failing such notice the claim will be time-barred.[24] In **ICC Case 16765**, the Contractor had asserted a claim for an extension of time and compensation on account of the Engineer's delay in giving an approval (in this case, of the process design). The issue was whether the notices of claim relied upon by the Contractor qualified as being within the Sub-Clause 20.1 time limit.

In a well drafted award, the tribunal found that the DAB had interpreted Sub-Clause 20.1 as meaning that a Contractor 'must have reached the view that it is entitled to time and payment before notice need be served'. According to the DAB, Sub-Clause 20.1 'is very subjective'. The DAB also found that, in construing Sub-Clause 20.1, the benefit of any doubt must be given to the claimant, as the clause was 'arguably ambiguous' and therefore it would be contrary to justice to do otherwise. After reviewing various letters of the Contractor (although apparently without distinguishing between them) referring to different events relied upon as notices of claim, the DAB had found that the Contractor was in time.[25]

A majority of the tribunal disagreed on basically three grounds. First, analysing Sub-Clause 20.1, it noted that the DAB had failed to distinguish between the different claims the Contractor was making despite the fact that, with regard to the content of the notice, Sub-Clause 20.1 requires a description of 'the event or circumstance giving rise to the claim'.[26] Second, unlike the DAB, the tribunal did not find Sub-Clause 20.1 ambiguous.[27] The tribunal observed that Sub-Clause 20.1 was drafted specifically to avoid any subjective interpretation of the relevant date as it provides that the 28-day time limit does not run from when the Contractor considers itself entitled to an extension of time and additional payment but rather from the day the Contractor became or should have become aware of the event or circumstance giving rise to its claim.[28] Third, the tribunal explained that compliance with Sub-Clause 20.1 is not limited to the timing of the notice but extends to the content of the notice. The tribunal found that the letter of the Contractor relied upon by the DAB as constituting a valid notice of claim was not a notice of delay in relation to the alleged event (failure to approve the process design) and that the DAB's decision had failed to address the content of the alleged notice despite the terms of Sub-Clause 20.1.

21 ICC Case 19581, 266–269.

22 Ibid. 271.

23 Ibid. 273.

24 Sub-Clause 20.1 provides, in relevant part, as follows:

> 'If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.'

25 ICC Case 16765, 157

26 Ibid. 159.

27 Ibid. 163.

28 Ibid. 167.

Consequently, the majority concluded that the Contractor's claim was time-barred under Sub-Clause 20.1.[29]

3. When does the statute of limitations in relation to claims begin to run?

In **ICC Case 16570**, the Employer had given the Contractor 14 days' notice of termination under a Yellow Book contract pursuant to Sub-Clause 15.2. The Contractor disputed the termination. The contract was governed by the law of a country belonging to the civil law system, where statutes of limitations are treated as a substantive matter. The place of arbitration was also in a civil law country. The Employer maintained that the Contractor's claims were time-barred by a three-year statute of limitation.

The Employer distinguished between two types of claims of the Contractor: those which occurred during the lifetime of the contract, for which time started to run each time any of the events underlying those claims occurred before the termination of the contract (these represented the bulk of the Contractor's claims); and the Contractor's claim for loss of future profit, for which time started to run when the right to such profit was denied by the Employer's notice of termination. The Employer maintained that the first group of claims had been time-barred long before the arbitration started.

When addressing this issue, the arbitral tribunal cited the decision of a local commercial court which held that '[a]ccording to the legal provisions, in the sector of constructions the contractual relationships are performed by successive services and shall terminate only after the final taking over of works, the taking over document being the final discharge … between the parties'.[30] The arbitral tribunal considered the reasoning of this decision to be applicable here and stated that '[s]ince there is no taking over document, indicating finalization of the works, the reference moment that has to be considered in the present case is the Notice of Termination, plus the period of 14 days, because it is from that date that the services of the Claimant are terminated'.[31]

While the starting date for a statute of limitations will depend upon applicable law, the solution in this case, where a Yellow Book contract was prematurely terminated, may nevertheless be relevant to a Contractor's claims, at least under the law of other countries in the civil law system.

4. What law governs the dispute resolution clause (Clause 20)?

The autonomy of the arbitration clause within a contract is a principle familiar to arbitration practitioners. It implies that the law that governs the contract may not necessarily govern the arbitration clause. So, what law governs the provisions of the contract relating to pre-arbitral procedures such as the requirement to refer disputes to a DAB and the DAB procedure? This question can be of great practical importance when it comes to interpreting these provisions and to determining, for example, whether or not they constitute a precondition to arbitration and, if so, whether they have been satisfied in any given case.

The prevailing view seems to be that the pre-arbitral procedures in a dispute resolution clause are to be considered part of the arbitration clause and therefore governed by the same law. The Swiss Federal Court (the country's highest court) recently held, in relation to an award made in Switzerland involving a Red Book contract, that the pre-arbitral procedures should be interpreted

29 Ibid. 172. A recent English court case has interpreted Sub-Clause 20.1 in the following terms: 'there must have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. I see no reason why this clause should be construed strictly against the Contractor and can see reason why [this clause] should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer.' (para. 312)

While the court agrees with the arbitral tribunal that the notice of claim requirement is to be looked at objectively, one may counter the court's suggestion that it be interpreted 'reasonably broadly', given its serious effect on otherwise good claims, by noting its undoubtedly salutary effect in screening out frivolous claims. Which of these two is the worthier objective may depend upon one's perspective.

The same English court went on to note correctly that 'there is no particular form [for a notice] called for in Clause 20.1' and that one should construe it 'as permitting any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the Contract or in connection with it. It must be recognisable as a "claim" … The onus of proof is on the Employer … to establish that the notice was given too late.' (para. 313)

This all seems reasonable, except that 'recognisable as a "claim"' should read 'recognisable as a "notice of claim"'. In this case the Contractor's reliance for an extension of time on a progress report stating 'The adverse weather condition (rain) have (sic) affected the works' was held as being 'nowhere near a notice under Clause 20.1'. *Obrascon Huarte Lain SA* v. *Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC), paras. 311–315.

30 ICC Case 16570, 185.

31 Ibid. 186.

under the same law – Swiss law – as the arbitration agreement, although this law was different from the law governing the rest of the contract.[32]

This was also the position taken by the tribunal in **ICC Case 16083**, relating to a Silver Book contract, where the place of arbitration was in France. Here, the Employer had argued that the Contractor had failed to comply with what the tribunal described as the three-step dispute resolution procedure set out in Clause 20, which included the requirement to refer disputes to a DAB, so the Contractor's claims were premature and the tribunal had no jurisdiction.[33] The Contractor, on the other hand, contended that Clause 15 of the Special Conditions required it to follow just a two-step dispute resolution procedure, which it had done.

While the Employer maintained that the substantive law of the contract should apply to the question of whether the Contractor's claims were premature, the tribunal held that this was an issue relating to the proper interpretation and effect of what it considered to be different arbitration agreements contained in the contract, which meant that it was necessary to determine the law governing those agreements.[34] Although the parties had not chosen a law applicable to the arbitration agreements, they had agreed on Paris as the place of arbitration. Accordingly, the tribunal found that the arbitration agreements were governed by the French law of international arbitration.[35]

Interpreting not just the arbitration clause in this way, but also the pre-arbitral procedure, the tribunal concluded that the two-step procedure in Clause 15 of the Special Conditions applied and that it therefore had jurisdiction over the Contractor's claims.[36]

The above case is a further example of the pre-arbitral (including the DAB) procedure being treated as an integral part of the arbitration clause, governed by the same law as applies to the arbitration clause.

In **ICC Case 16570**, on the other hand, relating to a Yellow Book contract, the Employer had argued that the principle of severability does not apply to the DAB procedure, and therefore once the contract is terminated it is not possible to appoint a DAB as the provisions for doing so are no longer in force.[37] Although in that case the issue was ultimately not decided by the tribunal, the present author would note that the principle will always yield to what the contract itself provides on the subject, if anything. While the Red Book provides that the appointment of the (permanent) DAB will expire when the Contractor's discharge of the Employer becomes effective (see Sub-Clauses 20.2 and 14.2), it does not deal with what happens to the DAB in the case of premature termination.

B. The DAB procedure

1. Is the referral of a dispute to the DAB a mandatory precondition to arbitration?

Those tribunals that address the subject generally conclude that it is mandatory to refer disputes to a DAB prior to arbitration, e.g. **ICC Case 14431,**[38] **ICC Case 16155,**[39] **ICC Case 16262**[40] and **ICC Case**

32 Decision 4A_124/2014 of 7 July 2014, ASA Bull. 4/2014, 826. This is consistent with the decision of the English House of Lords in *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] AC 334, 358, where the court (per Lord Mustill) treated a DAB procedure as being part of the arbitration agreement for purposes of a request to stay litigation. This result was later embodied in s. 9(2) of the English Arbitration Act 1996 (stay of litigation available 'notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures').

33 ICC Case 16083, 45, 46, 56.

34 Ibid. 71.

35 Ibid. 73. According to the tribunal, French law provides that the arbitration agreement is 'autonomous of any national law' and 'is to be assessed exclusively in accordance with French substantive rules of international arbitration' and 'interpreted and applied based on the parties' common intention, subject only to mandatory rules of French law and international public policy' (ibid. 74).

36 Ibid. 112.

37 ICC Case 16570, 193.

38 The tribunal in this case noted that the words 'shall' in the first paragraph of Sub-Clause 20.2 and 'may' in the first paragraph of Sub-Clause 20.4 are contradictory, as the former seems to point to the mandatory nature of the DAB while the latter presents it as an option (ICC Case 14431, 177, 183). However, there is no contradiction. Use of the word 'shall' in Sub-Clause 20.2 establishes a rule as to how disputes are to be pursued: they are to be adjudicated by a DAB in accordance with Sub-Clause 20.4. Use of the word 'may' in Sub-Clause 20.4 does not denote an option entitling a party to depart from the rule in Sub-Clause 20.1, but rather the option any party has of either referring the dispute to dispute resolution in accordance with the contract (a DAB in this case) or not pursuing the dispute at all under the contract.

39 The tribunal in this case qualified its statement with the phrase 'under normal circumstances' (ICC Case 16155, 61).

40 ICC Case 16262, 47.

16765.[41] Those rulings are consistent with decisions of the English and Swiss courts[42] in relation to the 1999 FIDIC Books.

The major exception in the 1999 FIDIC Books to the rule that it is mandatory to refer disputes to a DAB is Sub-Clause 20.8, which provides that where there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise, the requirement to refer a dispute to the DAB under Sub-Clause 20.4 or to amicable settlement under Sub-Clause 20.5 shall not apply and the dispute may be referred directly to arbitration under Sub-Clause 20.6. However, as indicated above, Sub-Clause 20.8 has also given rise to difficulties of interpretation. In an article published in 2005, the present author highlighted that, due to excessive harmonization of the 1999 FIDIC Books[43] (though this reason was not referred to in that article), there could be a risk of misinterpretation of this clause:

> While the author believes the language of sub-clause 20.8 is satisfactory in the new Red Book, he believes that under the Yellow and Silver Books, which provide for an ad hoc DAB (and not a permanent DAB, as under the new Red Book), the language is unsatisfactory as it could be interpreted as entitling a party to go directly to arbitration and bypass the DAB, which was certainly not the intention (see, e.g., sub-clause 20.2: 'Disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4' (emphasis added). Accordingly, to eliminate any uncertainty in this regard, he believes that this point should be clarified when new editions of the FIDIC books are issued.[44]

Thankfully, any further risk of misinterpreting Sub-Clause 20.8 to suggest that the words 'or otherwise' in that Sub-Clause might entitle a party freely to bypass the DAB procedure should have been put to rest by the two recent English and Swiss court decisions mentioned above.

The *Peterborough City Council* case notes, with considerable insight, that 'Sub-Clause 20.8, which is the same in all three of the FIDIC Books, probably applies only in cases where the contract provides for a standing DAB' (para. 33). It was indeed mainly intended to apply in this situation and its introduction into all three 1999 FIDIC Books, without change, was the result of over-harmonization, as mentioned above.

What examples can be found of situations in which Sub-Clause 20.8 applies, other than the situation (expiry of the DAB's appointment) expressly mentioned in that Sub-Clause?

The FIDIC Contracts Guide recognized that Sub-Clause 20.8 should be considered to apply where a party had been intransigent or uncooperative in constituting a DAB.[45] Consistent with this position, in several of the awards a party was relieved of the obligation to refer a dispute to a DAB where the other party had failed to cooperate in constituting the DAB or in signing the DAA. In **ICC Case 16155**, relating to a Red Book contract, the tribunal held by a majority that the Employer had foregone its right to insist on the appointment of the DAB because it had ignored the Contractors' attempt to appoint a DAB during the performance of the contract.[46] As a result, the Contractors were entitled to resort directly to arbitration pursuant to Sub-Clause 20.8.[47] In **ICC Case 18505**, relating to a Yellow Book contract, the Contractor had repeatedly invited the Employer to sign the DAA but the Employer had repeatedly declined to do so. For this reason, among others, the sole arbitrator concluded that the Contractor was allowed to refer its disputes directly to arbitration under Sub-Clause 20.8.[48]

Similarly, in the Swiss case referred to above, where, among other things, a DAB was not operational after 15 months and the Employer had dragged its feet in constituting it and the parties had never signed a DAA, the Federal Court found the DAB was not 'in place' within the meaning of Sub-Clause 20.8. Consequently, the Contractor was found to be justified in commencing arbitration without resorting to the DAB.

41 ICC case 16765, 128.

42 The English Technology Court in *Peterborough City Council* v. *Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC) and the Swiss Federal Court's Decision 4A_124/2014 of July 7, 2014, ASA Bull. 4/2014, 826.

43 Harmonization across FIDIC's contracts for major works was a goal of the 1999 FIDIC Books. Christopher Wade, who chaired the FIDIC Task Group that prepared the 1999 FIDIC Books, stated: 'These Red and Yellow Books [there was no Silver Book before 1999] … are considerably different in actual structure, wording and layout. There is the wish that the updated documents should be as similar as possible.' (C. Wade, 'FIDIC's Standard Forms of Contract – Principles and Scope of the Four New Books' [2000] ICLR 5, 6). Similarly, the chief draftsman of the 1999 FIDIC Books, the late Peter Booen, remarked that 'wherever possible, similar wording is used in all three new Books in the equivalent sub-clauses' (P. Booen, 'The Three Major New FIDIC Books' [2000] ICLR 24, 29).

44 'The Arbitration Clause in FIDIC Contracts for Major Works' [2005] ICLR.4, 13.

45 Published by FIDIC in 2000, page 317.

46 ICC Case 16155, 70.

47 Ibid. 81.

48 ICC Case 18505, 107–108.

Sub-Clause 20.8 has also been held to apply where a DAB has been constituted but the sole DAB member is found not to be impartial and independent as required by FIDIC's standard DAA (Clause 3 of the General Conditions). In **ICC Case 19581**, Mr X, the sole DAB member, had failed to disclose that his wife (or former wife, recently divorced) was a decision-maker and head of the claims and disputes unit in the Employer's organization.[49] The sole arbitrator found that, due to Mr X's violation of his disclosure obligations under the DAA and lack of impartiality and independence, there was no DAB in place under Sub-Clause 20.8 when the dispute arose[50] and held that the Contractor was entitled to refer the dispute directly to arbitration pursuant to Sub-Clause 20.8.[51]

Apart from Sub-Clause 20.8, there may be other situations where the obligation to refer a dispute to a DAB will not apply. In a previous article the present author suggested that where the Contractor had followed the pre-arbitral steps in Clause 20 in relation to a dispute or disputes, the Employer must follow the same procedure in relation to any disputes that it wishes to submit to arbitration 'unless the employer can demonstrate that [its] counterclaim was effectively included in a dispute which had already been referred to the DAB for decision under Clause 20 and which is already in arbitration'.[52] This suggestion was adopted in **ICC Case 15956** where the tribunal held that the Employer was entitled to submit directly to arbitration a claim for the extra costs of completing the work after termination of the contract by the Employer as the DAB had already considered and ruled on the appropriateness of such termination.[53]

Finally, in **ICC Case 16083** relating to a Silver Book contract, the Employer was held to have waived the right to require the Contractor to submit its claims to a DAB as the Employer had itself submitted its counterclaims directly to arbitration without submitting them to the DAB.[54]

49 ICC Case 19581, 301.

50 Ibid. 313.

51 Ibid. 321.

52 'The Arbitration Clause in FIDIC Contracts for Major Works' [2005] ICLR 4, 7.

53 ICC Case 15956, 4.1.6.

54 ICC Case 16083, 97–100. When doing so, the tribunal referred to a French court decision to similar effect: *Société British Leyland International Services* v. *Société d'exploitation des Etablissements Richard*, Cass. Civ. 1re, 6 June 1978, Rev. arb. 1979, 230.

2. Certain DAB procedural issues

The awards address various procedural issues relating to DABs.

(i) Validity of constitution after time limits

One of these issues is whether a DAB that is appointed after the time limit fixed in the contract for doing so has been validly constituted. The Red Book requires the (permanent) DAB normally to be constituted within 28 days after the Commencement Date (as defined), while the Yellow and Silver Book provide that the (ad hoc) DAB shall be constituted within 28 days of a party's giving notice of its intention to refer a dispute to a DAB.

In **ICC Case 15956**, the Red Book contract that gave rise to the dispute provided that the DAB was to be constituted within 42 days (instead of the normal 28 days) following the Commencement Date. The DAB was constituted on the sole initiative of the Contractor (the Employer refused to cooperate) but not until after the 42-day time limit had passed. Although the Employer had refused to sign the DAA, the tribunal found that the DAB had been validly constituted in compliance with the contract.[55]

Similarly, in **ICC Case 16570**, relating to a Yellow Book contract and again involving an Employer that had refused to cooperate with the Contractor in the constitution of the DAB, the tribunal found that a DAB could be validly appointed by the Contractor alone, without the Employer signing the DAA, after the 42-day time limit laid down in the contract.[56]

(ii) Meaning of 'due consultation' of the parties

The 1999 FIDIC Books provide that if a party fails to nominate a DAB member or the parties fail to agree on a DAB appointment, the DAB will be appointed by an appointing entity, upon the request of either or both of the parties and 'after due consultation with both Parties' (Sub-Clause 20.3). In **ICC Case 16262,** which arose under a Yellow Book contract, the Contractor had alleged that the appointment of a sole DAB member was void, as (among other reasons) the appointing authority had not informed the parties of the person it was considering appointing or invited comments before deciding whether or not to

55 ICC Case 15956, 4.2.7.

56 ICC Case 16570, 217, 222.

confirm the appointment. Based on its reading of Sub-Clause 20.3, the tribunal found that the appointing authority was not expected to discuss with the parties the identity of possible appointees and concluded that there had been sufficient consultation with the parties prior to the appointment, without such identification.[57]

(iii) Failure of parties to cooperate in constituting the DAB

Another issue that arises quite frequently is whether a DAB can be validly constituted and render valid decisions even though one of the parties has not participated in the constitution of the DAB or signed the DAA. In **ICC Case 15956,** relating to a Red Book contract, the tribunal found that the DAB had been validly constituted and could render valid decisions even though the Employer never signed the DAA.[58] The same issue also arose in **ICC Case 16570**[59] relating to a Yellow Book contract. Here, the tribunal seemed to accept that a DAB could be constituted by the Contractor alone.[60] However, the issue was not finally resolved by the tribunal as it found that an ad hoc DAB had been constituted erroneously instead of the permanent DAB foreseen in that contract[61] and, consequently, it had no jurisdiction to decide the disputes referred to it.[62]

(iv) Meaning of 'in place' in Sub-Clause 20.8

Two of the awards take different positions on the issue of whether a DAB is 'in place' within the meaning of Sub-Clause 20.8. In **ICC Case 16262**, relating to a Yellow Book contract, the tribunal found that those words mean 'validly appointed' and that they do not mean that it is necessary for a DAA between the parties and the DAB to have been executed.[63] Consequently, the tribunal found that it had no jurisdiction since the Contractor had failed to refer its disputes to the DAB before commencing arbitration. On the other hand, in **ICC Case 18505**, also relating to a Yellow Book contract, the sole arbitrator found that a DAB could not be 'in place' where the DAA had not been signed and, consequently, the Contractor was allowed to go directly to arbitration pursuant to Sub-Clause 20.8.[64]

(v) Consequence of non-compliance with the DAB procedure

Another issue upon which the awards take different positions is to how the tribunal should act where it concludes that a party has not complied with the requirement to refer a dispute to the DAB. In some cases, where the claimant had failed to refer its claims as disputes to a DAB (or the Engineer under the earlier editions of the Red Book) before commencing arbitration, the tribunal issued an award declining jurisdiction entirely. This was the case in **ICC Case 6535**, reported in an earlier issue of the Bulletin,[65] and in **ICC Case 16262**.

On the other hand, in **ICC Case 14431**, relating to a Red Book contract, where the Contractor had not referred its dispute to a DAB before beginning arbitration, the tribunal decided, at the request of the Contractor[66] (the position of the respondent was not stated), to stay the proceedings to allow the Contractor time to refer its disputes to a DAB.[67] In doing so, the tribunal, which was seated in Zurich, referred mainly to the writings of Swiss commentators, inferring that it had discretion to decide whether to dismiss such a case for lack of jurisdiction or stay the proceedings,[68] and also to its belief that there was considerable chance that one of the parties would not accept the decision of the DAB, with the consequence that the dispute must ultimately be resolved by arbitration.[69]

(vi) Effect of a final and binding decision

While not involving a FIDIC form of contract, the dispute resolution clause in **ICC Case 16435** is somewhat similar to the equivalent clause in

57 ICC Case 16262, 52–57.

58 ICC Case 15956, 4.2.7, 4.2.8.

59 ICC Case 16570, 187.

60 Ibid. 222.

61 Ibid. 217.

62 Ibid. 223, 225

63 ICC Case 16262, 50. See, to similar effect, the judgment of the English court in *Peterborough City Council* mentioned in section III(B)(1) above: 'the process of appointment is complete once the nominating body has "appointed" the adjudicator' (para. 34).

64 ICC Case 18505, 107–108. The Swiss Federal Court decision mentioned in section III(B)(1) above held, in para. 3.5, that, as the parties had never signed a DAA, the DAB was not 'in place' within the meaning of Sub-Clause 20.8.

65 Final Award in Case No. 6535 (1992), (1998) 9:2 ICC ICArb. Bull 60; see also, in the same issue, the author's article 'International Construction Contract Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contract', 32 at 34, 35.

66 ICC Case 14431, para 205.

67 Ibid. 210.

68 Ibid. 208, 209.

69 Ibid. 210, 216.

FIDIC's contracts for major works inasmuch as it provided that the decision of the adjudicator would become 'final and binding' if it was not referred to arbitration within 28 days of the adjudicator's decision. In that case, the Contractor had filed for arbitration after the expiry of the 28-day period, with the consequence that the adjudicator's decision was 'final and binding'. The tribunal found that it did not have jurisdiction to decide the Contractor's claims except insofar as there might be a dispute about whether the Employer had complied with the adjudicator's decision.[70]

3. Enforcement of DAB decisions

As explained above in section II(C), as Sub-Clause 20.7 provides that a final and binding DAB decision with which a party fails to comply may be referred directly to arbitration, some authors and tribunals have inferred that this may not be possible in the case of a binding decision with which a party fails to comply.

The matter has been the subject of much debate,[71] which it is not possible to review here. Accordingly, the present discussion will be limited, first, to reviewing the four ICC awards that address this issue and, second, to noting the latest and, in the author's view, soundest judicial decision on the subject, namely the 27 May 2015 decision of the majority of the Singapore Court of Appeal (that country's highest court) in *PT Perusahaan Gas Negara (Persero) TBK* v. *CRW Joint Operation* ('*Persero II*').[72]

While all the awards that addressed the issue appear to recognize that a DAB's decisions are binding when made (and remain so unless and until revised by an amicable settlement or arbitration award[73]) and all appear to recognize that such a decision can be enforced by an interim or partial award, they were not all in agreement that such a decision could also be enforced by a final award. While refraining from issuing an award in respect of the Employer's failure to pay certain binding but not final decisions of the DAB, the tribunal in **ICC Case 16119** recognized that it could issue an interim award ordering payment subject to possible revision in the final award.[74] Similarly, in **ICC Case 18320** the sole arbitrator had refused to enforce the DAB decision by way of a final award[75] but acknowledged that such a decision may be enforced on a provisional basis by way of an interim award or interim measure.[76] On the other hand, in **ICC Case 16948**, after the Contractor had referred the dispute arising from the Employer's failure to pay certain DAB decisions back to the DAB for a decision before beginning arbitration (the new decision of the DAB confirmed that the Employer was in breach of contract in failing to comply with the earlier decisions of the DAB), the tribunal enforced the latter decision by way of a final arbitral award.[77]

The decision of the majority of the Singapore Court of Appeal in *Persero II* demonstrates a proper and full understanding of how Clause 20 should operate. In that decision, the court recognized that Sub-Clause 20.7 'was never intended to exclude a receiving party's [that is, the beneficiary of a DAB decision] right to seek an arbitral award in relation to a paying party's failure to comply with a binding but non-final DAB decision'[78] (emphasis in the original). The court rightly added that 'a paying party's failure to comply with a binding but non-final DAB decision is itself capable of being directly referred to a separate arbitration under cl. 20.6'[79] (emphasis in the original). In other words, contrary to **ICC Case 18320** referred to above, as well as an earlier decision of the Singapore Court of Appeal in relation to the same DAB decision as in *Persero II*,[80] a non-final DAB decision can be enforced either by way of an interim award or a final award.[81]

Finally, the Court of Appeal correctly rejected (as had the lower Singapore High Court) the position taken by the Contractor in **ICC Case 16948** and by certain authors,[82] namely that it is necessary to

70 ICC Case 16435, 159–162.

71 The author has previously expressed his views on this debate in, among other things, 'How Not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in the Persero Case' [2012] ICLR 4 and 'Singapore Contributes to a Better Understanding of the FIDIC Disputes Clause: the Second *Persero* Case' [2015] ICLR 4.

72 [2015] SGCA 30.

73 See e.g. ICC Case 16119, 71.

74 Ibid. 107.

75 ICC Case 18320, 200.

76 Ibid. 197.

77 ICC Case 16948, 135 and the dispositive provision.

78 *Persero II* 82.

79 Ibid. 83.

80 Ibid. 14.

81 Ibid. 88.

82 See the author's 'Singapore Contributes to a Better Understanding of the FIDIC Disputes Clause: the Second *Persero* Case' [2015] ICLR 4, n. 13.

refer a dispute over non-compliance with a binding but non-final DAB decision back to the DAB under Sub-Clause 20.4 and to amicable settlement under Sub-Clause 20.5 before referring it to arbitration under Sub-Clause 20.6. It finds this unnecessary: the non-final DAB decision can be enforced directly.

In support of its decision, the Court of Appeal recalled the drafting history of Sub-Clause 20.7, the express requirement in Sub-Clause 20.4 that the parties 'shall promptly give effect' (emphasis added) to that decision and finally that:

> it would not be commercially sensible to interpret cl 20 as requiring the receiving party to satisfy the conditions precedent in cll 20.4 and 20.5 before it can refer a dispute over the paying party's non-compliance with a binding but non-final decision to arbitration.[83]

C. The post-DAB but pre-arbitral phase

1. Adequacy of a notice of dissatisfaction

As mentioned above, if a party is dissatisfied with the decision of the DAB it must give a notice of dissatisfaction if it wishes to prevent that decision from becoming final and binding. In **ICC Case 18320** the Contractors had contended that the Employer's notice of dissatisfaction was invalid as it listed only the matters in dispute and did not set out the reasons for dissatisfaction, as required by Sub-Clause 20.4.[84]

The sole arbitrator, while acknowledging that the Employer had not set out the reasons for dissatisfaction in its notice, observed that 'the practical relevance of such reasons is not fundamental' as the claims subsequently brought to arbitration may well be based on reasons other than those set out in the notice of dissatisfaction.[85] Accordingly, the tribunal concluded that the notice was valid as it was unambiguously intended to constitute a notice of dissatisfaction and the Contractor could reasonably have concluded 'that the reasons for the [Employer's] dissatisfaction must have consisted of, or included, the arguments that the [Employer] had unsuccessfully submitted to the DAB'.[86]

2. The importance of 'dispute'

ICC Case 19346 is an excellent illustration of the care that must be taken, when invoking Clause 20, to define the dispute and the critical role the concept of dispute has in that Clause. In this case, the Employer had claimed delay damages from the Contractor and the Engineer had determined that the Employer's claim was valid and that the Employer was entitled to delay damages. The Contractor objected to the Engineer's determination and referred the dispute to the DAB. The DAB decided as follows on four individually numbered issues:[87] (1) the Contractor had failed to submit all detailed designs by the stipulated deadline (giving rise to the alleged delay); (2) the Employer's claim for liquidated damages for delay was valid; (3) the Employer's claim for delay damages had been dealt with in a separate settlement agreement between the parties; and (4) the Engineer's determination of the Employer's claim was invalid and the Contractor had no liability for delay damages.

The Employer submitted a notice of dissatisfaction with the DAB's decisions on issues (3) and (4) within 28 days and the Contractor submitted a notice of dissatisfaction with the DAB's decisions on issues (1) and (2) after the 28 days allowed for giving notice of dissatisfaction.[88]

The Employer contended that the tribunal lacked jurisdiction to examine the DAB's decisions on issues (1) and (2), namely that the Contractor had failed to submit all detailed designs by the stipulated deadline and that the Employer's claim for delay damages was valid. The Employer argued that because the Contractor had failed to issue its notice of dissatisfaction in time, the DAB's decisions on those issues were final and the tribunal therefore lacked jurisdiction to examine them under both the contract (specifically Sub-Clause 20.4) and applicable law dealing with *res judicata*.[89]

However, the tribunal found that although the Contractor had failed to give timely notice of dissatisfaction in respect of the DAB's decisions on issues (1) and (2), '[s]ince the [Employer] had successfully challenged the DAB's Decision on the dispute that has arisen between the two Parties,

83 *Persero II*, 66.

84 ICC Case 18320, 173.

85 Ibid. 183.

86 Ibid. 185.

87 It is unclear from the award whether the Contractor had submitted these same four individually numbered issues to the DAB for decision but it is certainly possible.

88 ICC Case 19346, 142.

89 Ibid. 143–145.

the Tribunal has jurisdiction to examine and finally decide on all issues that are relevant to the dispute between the Parties'.[90]

The tribunal correctly stated that '[t]he main concept underpinning Clause 20 of the GCC, and Sub-Clauses 20.4, 20.5 and 20.6 in particular, is the concept of a "dispute" between the two Parties'.[91] The tribunal then found that the dispute between the parties was essentially whether the Employer was entitled to delay damages for the alleged failure of the respondent to submit certain detailed design documents within the contractually stipulated deadline.[92] The tribunal arrived at this conclusion based on the Employer's Request for Arbitration where it had described the dispute by reference to the Engineer's determination that the Employer's claim was valid and that the Employer was entitled to the delay damages claimed.[93] Similarly, in its request for relief the Employer had requested acceptance that its claim was valid and that the Contractor had to pay delay damages.[94] The tribunal found that the DAB's decisions on issues (1) and (2) were 'integral parts of the dispute between the Parties, which has now been submitted to this Tribunal'.[95] Consequently, those issues had not been finally decided by the DAB and, pursuant to Sub-Clause 20.6, the tribunal therefore had power to open up, review and revise them as they were 'relevant to the dispute' between the parties.[96]

3. Miscellaneous

Finally, the awards illustrate some additional practical problems that are arising from use of DABs and FIDIC contracts generally. In two of the cases the parties were in dispute about whether they had provided for an ad hoc or a permanent DAB. In **ICC Case 16570**, the parties had attempted to establish a permanent DAB in a contract based on the Yellow Book, whereas in **ICC Case 18096** the parties had attempted to establish an ad hoc DAB in a Red Book contract. In both cases, poor drafting led to a dispute over what type of DAB the parties had in fact established. These cases may therefore provide guidance on how to resolve a dispute of this kind if it arises.

ICC Case 19346 illustrates the importance of following the terminology and definitions contained in FIDIC forms when drafting an amendment or addendum to a contract based on one of those FIDIC forms. In this case, the tribunal was required to consider whether the Employer's claim for delay damages in the arbitration had previously been settled by an agreement between the parties (called 'Addendum No. 3'), which in turn depended upon whether the Employer's claim was encompassed by the following language in the agreement: 'All claims formulated until the date of this Addendum are deemed by the Parties as fully settled.' The Employer argued that the expression 'formulation of a claim' was intended to mean 'substantiation of a claim' so as to exclude the Employer's claim from the scope of the settlement agreement. The Contractor, on the other hand, argued that 'formulation of a claim' had to mean 'notification of a claim' and that the parties' settlement agreement was intended to close all outstanding matters between them, including the Employer's claim for delay damages, which had been notified before that agreement.

As 'formulation of a claim' is not an expression used in FIDIC contracts, the tribunal had to engage in a lengthy analysis to arrive at the conclusion that the Employer's claim was formulated before the parties' settlement agreement and was therefore settled by that agreement. This dispute could have been avoided if the parties had used the terminology and definitions in the FIDIC main contract.

IV. Conclusion

The ICC is to be commended for publishing in this issue of the Bulletin extracts from recent ICC awards dealing with or relevant to the current forms of construction contract conditions published by FIDIC. These extracts will be useful not only to users of such forms and to tribunals called upon to interpret contracts based upon them, but also to FIDIC in its ongoing effort to update and improve its forms so that they continue to represent, and help to promote, good practice in the international construction industry.

90 Ibid. 146.

91 Ibid. 147. For a discussion of 'dispute' see the author's 'The Arbitration Clause in FIDIC Contracts for Major Works' [2005] ICLR 4, 5.

92 Ibid. 156.

93 Ibid. 156–158.

94 Ibid. 159.

95 Ibid. 160.

96 Ibid. 161.