Clause 20

Summary

Clause 20 deals with claims, disputes and arbitration.

Sub-Clause 20.1 deals with the Contractor's claims. The Contractor must give notice wherever it considers itself entitled to additional time and money within 28 days. The 28 day notice is a condition precedent to the Contractor's entitlement to time and money. Thereafter the Contractor must submit a fully detailed claim. The Engineer is then required to approve or disapprove the claim and thereafter make a Sub-Clause 3.5 determination. Each Payment Certificate must include such amounts for any claim as have been reasonably substantiated.

Sub-Clause 20.2 deals with the Appointment of the Dispute Adjudication Board. The Parties are required to jointly appoint a DAB by the date stated in the Appendix to Tender. The DAB can be one or three people. The DAB is required to incorporate the General Conditions of the Dispute Adjudication Agreement contained within the Appendix to the Conditions. The terms of payment need to be agreed and each Party is responsible for paying one-half of the remuneration.

Sub-Clause 20.3 deals with a failure to agree the DAB. In the event of a failure to appoint a DAB the decision is made by the appointing entity or official named in the Appendix to Tender.

A dispute of any kind arising out of the contract may be referred to the DAB. The reference must however refer to Sub-Clause 20.4. The decision of the DAB should be made within 84 days or within such period as approved by both Parties. The decision is stated to be binding on both Parties who shall promptly give effect to it unless and until it is revised in amicable settlement or an arbitral award. Sub-Clause 20.4 also requires that a person dissatisfied with the decision may give a notice of dissatisfaction and if that notice is not given the decision becomes final and binding upon both Parties.

Sub-Clause 20.5 imposes a requirement for amicable settlement following the DAB decision.

Sub-Clause 20.6 requires that disputes be settled by arbitration under the ICC Rules of Arbitration.

Sub-Clause 20.7 deals with the failure to comply with a DAB decision. The sub-clause provides that in the event that the DAB decision has become final and binding and a party fails to comply within it then that failure can be referred straight to arbitration.

Sub-Clause 20.8 deals with the situation where a dispute arises but there is no DAB in place.

Origin of clause

Clause 20 of FIDIC 1999 had its origins in the World Bank's Standard Bidding Documents of 1995. FIDIC's 1995 edition of the "Orange Book" included a clause that was similar to Clause 20 of the 1999 Red Book. A Supplement issued in 1996 for the 4th edn. Red and Yellow books then included a DAB provision.

Cross-references

Reference to Clause 20 is found in the following clauses:

Sub-Clause 1.1.2.9	Definitions "DAB"
Sub-Clause 1.9	Delayed Drawings or Instructions
Sub-Clause 2.1	Right of Access to the Site
Sub-Clause 4.7	Setting Out
Sub-Clause 4.12	Unforeseeable Physical Conditions
Sub-Clause 4.21	Progress Reports
Sub-Clause 4.24	Fossils
Sub-Clause 7.4	Testing
Sub-Clause 8.4	Extension of Time for Completion
Sub-Clause 8.9	Consequences of Suspension

Sub-Clause 10.2	Taking Over of Parts of the Works
Sub-Clause 10.3	Interference with Tests on Completion
Sub-Clause 13.7	Adjustments for Changes in Legislation
Sub-Clause 14.11	Application for Final Payment Certificate
Sub-Clause 16.1	Contractor's Entitlement to Suspend Work
Sub-Clause 17.4	Consequences of Employer's Risks
Sub-Clause 18.1	General Requirements for Insurances
Sub-Clause 19.4	Consequences of Force Majeure

Sub-Clause 20.1
Contractor's Claims

This Sub-Clause imposes an obligation on the Contractor to give notice of its entitlement to a claim "*as soon as practicable, and not later than 28 days after he became aware, or should have become aware, of the event or circumstance"* giving rise to the claim. If the Contractor fails to maintain this time limit the text of the Contract is explicit that "*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.*"

Despite this clarity it is common for Contractors to pursue claims of which no or late notice has been given and the Sub-Clause regularly comes under close analysis.

"*if the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment"*

An event or circumstance may occur which might give the Contractor the right to an extension of time or additional payment but, at the time the event occurs, the Contractor is either unaware of the event or does not realise that there is or may be an entitlement. Therefore, it may not always be clear when a Contractor would *"consider himself to be entitled".*

This failure may occur for a variety of reasons:

- The Contractor did not realise that the event or circumstance had occurred.
- Although the Contractor realised that it had occurred, it did not realise that it could give rise to an entitlement (because it did not understand the Contract or the underlying law or because it did not realise the true nature of the event or circumstance).
- Although the Contractor realised it could give rise to an entitlement, it did not realise that the particular circumstances would give rise to one.

If the Contractor has failed to "*consider himself to be entitled"* through negligence it is unlikely that the Engineer, a DAB or an Arbitrator will have sympathy, however if the failure is not the result of any negligence on its part the situation may be different.

In any event, the Sub-Clause is triggered when the Contractor considers itself to be entitled and is aware (or should be aware) of the event or circumstance. Arguably then, only if the Contractor has become aware or should have become aware, should the time bar be applied to prevent a Contractor from claiming.

"additional payment"

An entitlement for *additional* payment is clearly for money.[1] However, the word *additional* limits its scope. The question posed by some commentators is: what are these payments additional to?[2]

Bunni reminds us that "*a claim is generally taken in practice to be an assertion for additional monies due to a party*" (emphasis of the author).[3]Claims would therefore not include the Contractors' payment applications for the original scope of works.[4]

Jaeger & Hök have taken a more straightforward approach: additional payments comprise those that are "*over and above* [payments] *which are already included in the accepted contract amount*".[5] Accepted Contract Amount is a defined term in the Contract and means the sum agreed by the Parties in the Letter of Acceptance.[6] Anything other than that is additional. Therefore, payments made for works carried out under the Contract and payable from the Accepted Contract Amount are not additional.

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[1] A version of this section titled *"Additional payment*" was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 473–74.
[2] Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice* (Routledge 2009), para 6.189 at p 313.
[3] Nael G Bunni, *The FIDIC Forms of Contract* (3rd edn, 2005), pp 294–95.
[4] *Ibid at* p 294. See also Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell 2016), para 19-050 at p 669 ("*No exact meaning can be given to the term* [claims]*. It is used here to describe an application for payment by the contractor arising other than under the ordinary provisions for payment of the measured value of the work.*").
[5] Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC – A guide for Practitioners* (Springer 2010), p 365.
[6] In the Silver Book 2019, the relevant term is "*Contract Price"* which, as defined in Sub-Clause 1.1.4.1, does not change the analysis of additional payment in Clause 20 in any material way.

As Jaeger & Hök put it "*claims are nothing more than the crystallisation of an anticipated, not yet specified, part of the Contract Price"*.[7] This is consistent with the definition in Sub-Clause 14.1 [*The Contract Price*]. The Contract Price is the Accepted Contract Amount subject to additions and/or reductions. These additions include entitlements to additional payment subject to Clause 20 that may become due pending or resulting from a Sub-Clause 3.5 [*Determinations*] agreement or determination. In other words, additional payments are not part of the Contract Price from the moment the Contract is signed, only from the moment they become due which is, arguably, sometime during or after the event or circumstance giving rise to a claim.

Therefore, *additional payment* is any payment that is additional to the sum that the Parties originally agreed for the Works when the Contract was signed plus any sums that have been added or reduced by the time the claim arises. In other words, the payment is additional if it is not payable out of the Contract Price as adjusted by the time of the claim.

The word should also be interpreted in the context of the entire clause. An extension of time is an amount of time that is additional to the Time for Completion provided in the Appendix to Tender. Also, Sub-Clause 20.1 entitles the Employer to either additional payment or a reduction in the Contract Price. Therefore, the baseline for any change to the sums that pass between the Parties is the Contract Price at the time the claim arises.

"under any Clause of these Conditions or otherwise in connection with the Contract".

This is a very broad provision but not quite as broad as it appears at first glance. "*Conditions*" is defined in Sub-Clause 1.1 [*Definitions*] as including the Particular Conditions and the General Conditions. However, the provision also refers to entitlements which arise *"otherwise in connection with the Contract"*. Sub-Clause 1.1.1.1 defines "*Contract*" to include "*the Contract Agreement, the Letter of Acceptance, the Letter of Tender, these Conditions, the Specification, the Drawings, the Schedules and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance.*" The words "*out of*", are then taken to include claims arising out of the relationship constituted by the contract, and not necessarily out the contract itself.

[7] Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC – A guide for Practitioners* (Springer 2010), p 365.

However, such words are usually interpreted broadly: *Premium Nafta Products Ltd (20th Defendant) & Ors v. Fili Shipping Company Ltd & Ors*.[8]

Assuming the Contractor did consider itself entitled to any extension of time and/or additional payment it is then obliged to "*give notice to the Engineer describing the event or circumstance giving rise to the claim*" … "*as soon as practicable, and not later than 28 days after he became aware or should have become aware of the event or circumstance.*"

The date when this notice is to be given is "*as soon as practicable*" and this is further qualified by a time limit of 28 days. In other words, the notice must be given as soon as practicable and within the time limit of 28 days even if this is not practicable.

The requirement to give the notice as soon as practicable is in fact unenforceable because paragraph 2 of Sub-Clause 20.1 goes on to say:

"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."

The main purpose of a notice of claim is to alert the Engineer and the Employer that a claim exists that may result in an additional payment or an extension of time.[9] One arbitral tribunal interpreting the FIDIC 4th 1992 edition stated that the purpose of a notice "*is to put the Engineer (and the Respondent) on alert insofar as circumstances occurring on site could result in additional costs to the Respondent.*"[10] One English case held that the notice of claim must therefore allow the responding party to address the situation while the problem is still live by investigating it or withdrawing "*instructions when the financial consequences become apparent*".[11] This allows the Employer or the Engineer to stop

[8] [2007] UKHL 40.

[9] Christopher R Seppälä, 'Contractor's Claims Under the FIDIC Contracts for Major Works', (2005) 21(4) Construction Law Journal 278, p 287.
[10] *ICC Interim Award 10847* [2003] (seat England) at [3.1.9].
[11] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 (TCC) at [103].

claims from stockpiling.[12] A Falkland Islands Supreme Court Judge observed that the "*whole* [FIDIC 4th] *contractual system is aimed at the early resolution of any queries at the time the claim arises"* when it is most likely that *"plant, manpower, experts and witnesses are still on site*" and that it "*is designed to avoid prolonged disputes.*"[13] Jaeger & Hök add that the purpose of the time bar provisions is to gather the necessary evidence and allow the Employer to make financial arrangements for claims.[14] The aim is therefore to warn of the possibility of a claim that may have time and money implications in order to give the Employer or the Engineer the opportunity (while the problem is still live) to find a solution or mitigate its effects (if possible), make financial arrangements and/or gather relevant contemporary information.[15]

However, the question still remains as to when the 28-day period commences and expires. The first sentence of Sub-Clause 20.1 establishes the date on which the 28 days starts to run. This is the date when the Contractor "*became aware or should have become aware of the event or circumstance*." There is both a subjective and an objective test.

The starting point for the time to run is the awareness of an *"event or circumstance giving rise to the claim"* which the Contractor considers leads to an entitlement. In *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[16] Mr Justice Akenhead, stated:

> *"…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 it 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."*

[12] Hamish Lal, 'The Rise and Rise of Time-Bar Clauses for Contractors' Claims: Issues for Construction Arbitrators', Society of Construction Law Paper 142 (September 2007), p 4.
[13] *Attorney General Falkland Islands v. Gordon Forbes Construction (Falklands) Ltd (No2)* [2003] F.I.S.Ct. at [11].
[14] Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC – A guide for Practitioners* (Springer 2010), p 365-366.
[15] A version of this paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 489–90.
[16] [2014] EWHC 1028 (TCC) at [312].

The word "*describing*" suggests that the notice requires something more than just a mere mention or reference to a fact.[17] The description should be a "*statement or account giving the characteristics"*[18] of the event or circumstance. An event is simply an "*occurrence*", i.e., "*something that happens*".[19] Circumstance is defined in many ways all suggesting that it refers to the conditions surrounding an event.[20] Simply put, an event is a main story and a circumstance is a series of details that may either constitute or surround the main story. The terms are not interchangeable, but they each trigger the Sub-Clause 20.1 procedure.

The description should be detailed enough to allow the Employer and the Engineer to understand the basic elements of the problem and address it or prepare for any time and/or financial repercussions.[21] On some occasions, it may be clear to the Parties what some of these elements are and, therefore, their omission may be forgiven. Seppälä states that the requirement is for a bare notice of claim and that one or two sentences will suffice; there is no need to specify the amount of time claimed or the basis of the claim nor provide additional documentation.[22]

In the *Obrascon* case*,* an English Court held that there was no particular form called for in the 1999 version of Sub-Clause 20.1 other than that it must be in writing, describe the event or circumstance, and be intended to notify a claim for extension of time and/or additional

[17] A version of this paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), p 491.
[18] "Description" (Merriam-Webster Online Dictionary, 28 February 2020), see www.merriam-webster.com/dictionary/description (accessed 6 March 2020).
[19] "Event" (Merriam-Webster Online Dictionary, 8 February 2020), see www.merriam-webster.com/dictionary/event (accessed 6 March 2020).
[20] "Circumstance" (Merriam-Webster Online Dictionary, 25 February 2020), see www.merriam-webster.com/dictionary/circumstance (accessed 6 March 2020) ("*a condition, fact, or event accompanying, conditioning, or determining another: an essential or inevitable concomitant*"; "*a subordinate or accessory… fact or detail*"; "*a piece of evidence that indicates the probability or improbability of an event*"; "*the sum of essential and environmental factors (as of an event or situation)*"; "*state of affairs: eventuality*"; and/or "*an event that constitutes a detail (as of a narrative or course of events)*").
[21] A version of this paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 491–92.
[22] Christopher R Seppälä, 'Contractor's Claims Under the FIDIC Contracts for Major Works', (2005) 21(4) Construction Law Journal 278, p 285.

payment under or in connection with the Contract.[23] The Court looked at two letters and one progress report on which a Contractor relied for its claims and held that:[24]

- a letter advising that rock was encountered on Site on a specific day at a precise point of excavation on a length of tunnel that stated that "*…the excavation of all rock will entitle* [the Contractor] *to an extension of time…*" was compliant despite the judge's finding that it was "*widely drawn*";
- a progress report that stated "[t]*he adverse weather condition (rain) have [sic] affected the works*" was clearly not a notice of claim; and
- a letter stating that rainfall in a particular month has flooded the site and thus "*come into contact with the contaminated ground…and we are unable to discharge this rainfall from site… In our opinion the foregoing will entitle us to an extension of time…* […] *is not a notice of claim about being delayed by weather actually whilst working"* in that particular month but would be "*good notice for any critical delay caused or to be caused by the contaminated ponded water*".

The *Obrascon* case also stated that a notice of claim must be recognisable as a "*claim*".[25] In other words, the notice should expressly request or assert an entitlement or relief that arises from the event or circumstance described. Seppälä also noted that "*the conclusion of the FIDIC drafting committee was that there must be a notice of claim within 28 days for there to be a valid claim so that all involved are aware that there is an event or circumstance where extra payment or time may be due to the Contractor.*" [emphasis of the author][26] Akenhead J., gave useful guidance by way of the examples above.[27] The notice should first describe the specific event or circumstances that caused the problem and then state that it will entitle the Contractor to one or both of the claimable entitlements.[28]

"*as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance*"

[23] [2014] EWHC 1028 (TCC) at [313]. A version of this paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 492–93.
[24] [2014] EWHC 1028 (TCC) at [315 (a)].
[25] *Ibid* at [313].
[26] Christopher R Seppälä, 'Contractor's Claims Under the FIDIC Contracts for Major Works', (2005) 21(4) Construction Law Journal 278, p 287.
[27] [2014] EWHC 1028 (TCC) at [315 (a)].
[28] A version of this paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 493–94.

An arbitral tribunal[29] dismissed claims for an extension of time and additional payment for failure to submit a notice of claim in time. The tribunal held that the 28-day time limit of Sub-Clause 20.1 does not start to run "*from the day the Contractor 'considers itself entitled to an extension of time and additional payment', but rather from the day the Claimant became or should have become aware of the event or circumstance giving rise to the claim.*" The Arbitral Tribunal found that Sub-Clause 20.1 does not allow for a subjective intention. In this regard the Arbitral Tribunal differed from the DAB member who had found that the Claimant should not be denied its rights to claim under a contract by reason of a limitation clause which was arguably ambiguous.[30] The Arbitral Tribunal found that there was no ambiguity in Sub-Clause 20.1[31] and therefore the question of how the Sub-Clause should be interpreted having regard to cannons of construction did not arise.

Akenhead J. in the *Obrascon* case held that an "*extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay).*"[32] This conclusion was based on a Yellow Book 1999 Sub-Clause 8.4 [*Extension of Time for Completion*] which states that the Contractor shall be entitled to an extension of time if completion of the Works "*is or will be delayed*" by the events or circumstances.[33] Akenhead J. explained that the wording of the provision did not include "*whichever is the earliest*".[34] As a result, in England and Wales, a notice of claim for an extension of time can be served as early as when the Contractor first becomes aware that the Works will be delayed in the future or as late as 28 days from the first day of the incurred delay.[35]

A Condition Precedent

The wording of the first 28-day notice is significantly different from the other periods in which the Contractor must carry out obligations; for example, the obligation to give a fully

[29] *ICC Final Award 16765* ICC Dispute Resolution Bulletin 2015 No 1, p.101. at [167].
[30] *Ibid* at [157].
[31] *Ibid* at [163].
[32] [2014] EWHC 1028 (TCC) at [312].
[33] *Ibid* at [312].
[34] *Ibid* at [312].
[35] A version of this paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), p 494.

detailed claim in 42 days. In *National Insurance Property Development v NH International (Caribbean) Limited*[36] the Court agreed with the arbitrator's conclusion that: *"…the 28 day notice requirement to bring the claim was a condition precedent to recovery. He was of the further opinion that the other requirements under the clause were not conditions precedent to recovery and therefore a failure to satisfy those requirements did not inevitably mean that the claim should fail.*" Likewise, in *ICC Interim Award 16155*[37] the arbitral tribunal agreed that the 42-day time period for providing further particulars was not a condition precedent. The tribunal stated that: "*there is nothing in the FIDIC General Conditions to the effect that if a party fails to provide information or evidence requested to support its claim to an Engineer, the claim will be null and void or treated as though it never existed*." Therefore, whereas the 28 days is generally considered to be a condition precedent, non-compliance with which may bar a Contractor from claiming time or money, the failure to meet the other claim procedure requirements may not necessarily be fatal.

It has sometimes been argued that where an Employer causes a delay it should not be relieved of its obligation to award an extension of time or pay costs, simply because the Contractor has failed to issue a timely notice. Equally the Employer should not be entitled to claim delay damages. In some civil law countries, there are overarching principles of good faith that may intervene to affect the contractual relationship between the parties and may override the time-bar clause, with the effect that the time bar clause may be struck down. In common law countries it has been argued that a party should not be able to take advantage of its own wrong to avoid a contractual obligation; this is referred to as the "*prevention principle*". [38]

However, a somewhat recent Court of Appeal decision appears to have now settled the position that the prevention principle is not a general rule of law and cannot be used to

[36] Claim Number CV2008-04881 in the High Court of Justice of Trinidad and Tobago (unreported) at [28], see http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/j_jones/2008/cv_08_04998DD21oct2009.pdf (accessed 15 March 2021).
[37] (2015) (seat Paris).
[38] *Rede v Farr* [1817] 6 M & S 121 at [124]-[125], 105 ER 1188 at [1189]-[1190]; *Alghussein Establishment v Eton College* [1991] 1 All ER 267; *Holme v Guppy* [1838] 3 M. & W. 548.

override clear contractual provisions. In *North Midland Building Ltd v Cyden Homes Ltd*[39] Coulson LJ set out five reasons why the prevention principle would not apply.[40]

> "*The first is that the prevention principle is not an overriding rule of public or legal policy. There is no authority for such a proposition: it is not expressed in those terms in Multiplex or any of the other authorities noted above. …*
>
> *The second is that the prevention principle is not engaged here because there is no contravention of either principle (i) or (ii) identified in Multiplex (paragraph 15 above). As I have said, pursuant to clause 2.25.5, "any impediment, prevention or default, whether by act or omission, by the Employer" gave rise to a prima facie entitlement on the part of the appellant to an extension of time. Those could be acts or omissions which were permitted by the contract but still gave rise to an entitlement to an extension of time (principle (i)). In this way, time was not set at large because the contract provided for an extension of time on the occurrence of those events (principle (ii)).*
>
> *…*
>
> *The final reason for my rejection of Ground 1 is perhaps the most important of all …. There is no suggestion in the authorities noted above that the parties cannot contract out of some or all of the effects of the prevention principle indeed, the contrary is plain. Salmon LJ's judgment in Peak v McKinney, set out at paragraph 33 above (and in particular the passage in bold), expressly envisaged that, although it had not happened in that case, the parties could have drafted an extension of time provision which would operate in the employer's favour, notwithstanding that the employer was to blame for the delay."*

"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."

[39] [2018] EWCA Civ 1744.

[40] The *North Midland v Cyden Homes* case dealt with concurrent causes of delay. However, some of the principles set out by Coulson LJ appear to apply equally to the situation where the parties stipulated that a notice was required.

Much has been discussed on whether this provision has the teeth it intends to have. This depends on two issues: (1) whether the provision is in fact a condition precedent; and (2) whether the condition precedent is enforceable.[41] Commentators have argued that the wording of Sub-Clause 20.1 is a condition precedent that bars claims if not complied with within the 28-day period.[42] In England and Wales, for a notice to be considered a condition precedent, the *Bremer* test requires that: (1) the clause specify a time limit for service of the notice; and (2) the clause or contract as a whole state that non-compliance with such time limit will result in a loss of rights.[43] Sub-Clause 20.1 seems to pass this test.[44] Even though the question was not in dispute, Akenhead J., stated that "[i]*t is clear and indeed was unequivocally and properly accepted by* [counsel] *for* [the contractor] *in closing that Clause 20.1 imposes a condition precedent*".[45] In any case, whether the provision is a condition precedent will depend on the applicable law.

On the question of whether the provision is enforceable, each jurisdiction has its own set of issues to consider.[46] As a result, there is no consensus as to whether the time bar has teeth.

An arbitral tribunal of the Bulgarian Chamber of Commerce and Industry held in 2012[47] that the FIDIC time bar did not constitute a waiver of rights. Such a waiver would have

[41] A version of this paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 495–96.
[42] Hamish Lal, 'The Rise and Rise of Time-Bar Clauses for Contractors' Claims: Issues for Construction Arbitrators', Society of Construction Law Paper 142 (September 2007), p 7; Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice* (Routledge 2009), para 6.224 at p 321.
[43] *Bremer Handels GmBH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109 (HL).
[44] Hamish Lal, 'The Rise and Rise of Time-Bar Clauses for Contractors' Claims: Issues for Construction Arbitrators', Society of Construction Law Paper 142 (September 2007), p 7; Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice* (Routledge 2009), para 6.224 at p 321.
[45] *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) at [311].
[46] A version of this and the subsequent three paragraphs was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 496–97.
[47] See Martin Zahariev and Boyana Milcheva, "FIDIC Multi-Tier Dispute Resolution Clauses in the Light of Bulgarian Law" (Kluwer Arbitration Blog, 22 March 2017), http://arbitrationblog.kluwerarbitration.com/2017/03/22/fidic-multi-tier-dispute-resolution-clauses-in-the-light-of-bulgarian-law (accessed 6 March 2020).

voided the provision under Bulgarian law. Likewise, the Appellate Court of Sofia[48] rejected the argument that the Red Book 1992 notice provision was void on the basis that it contradicted Bulgarian mandatory procedural rules and public order. The decision was confirmed on appeal.[49]

In Northern Territory, Australia, where the Contractor failed to serve the notice on time, the Supreme Court held that the prevention principle precluded the Employer's right to claim liquidated damages if the delay was caused by it.[50] An England and Wales Court held that this Australian judgement did not align with English law because notice time bars "*serve a valuable purpose*", that is, notices allow contemporaneous investigation of matters and provide an opportunity to retract instructions that result in unintended costs.[51] Another England and Wales Court stated in obiter dictum, in the context of a standard FIDIC form, that "*contractors on building projects generally know when a contractor is in delay or whether the work has been disrupted and so giving notice of the relevant event within 28 days should not be unduly onerous*".[52]

In Germany, some courts have found that notices may be conditions precedent to a claim.[53] However, commentators have argued that the unequal treatment of the parties in respect of the time bar provision in FIDIC 1999 puts into question its applicability under German law.[54] In France, a time bar provision must be "*reasonable under the circumstances*" for it

[48] *Decision No. 1966 of 13.10.2015 in the commercial case No. 4069/2014, Appellate Court – Sofia, Commercial Division;* see Martin Zahariev and Boyana Milcheva, "FIDIC Multi-Tier Dispute Resolution Clauses in the Light of Bulgarian Law" (Kluwer Arbitration Blog, 22 March 2017), http://arbitrationblog.kluwerarbitration.com/2017/03/22/fidic-multi-tier-dispute-resolution-clauses-in-the-light-of-bulgarian-law (accessed 6 March 2020).
[49] *Court Ruling No. 59 of 03.02.2017* under case No. 788/2016 of the Supreme Court of Cassation, I Commercial Division; see Martin Zahariev and Boyana Milcheva, "FIDIC Multi-Tier Dispute Resolution Clauses in the Light of Bulgarian Law" (Kluwer Arbitration Blog, 22 March 2017), see http://arbitrationblog.kluwerarbitration.com/2017/03/22/fidic-multi-tier-dispute-resolution-clauses-in-the-light-of-bulgarian-law (accessed 6 March 2020).
[50] *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143.
[51] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 (TCC) at [103].
[52] *Commercial Management (Investments) Ltd v Mitchell Design and Construct Ltd & Another* [2016] EWHC 76 (TCC) at [83].
[53] Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC – A guide for Practitioners* (Springer 2010), p 359.
[54] Dr Alexander Kus, Dr Jochen Markus and Dr Ralph Steding, 'FIDIC's New "Silver Book" under the German Standard Form Contracts Act' [1999] ICLR 533, 547–49.

to be valid[55] and in Peru[56] and some Arab jurisdictions such as Saudi Arabia and Egypt, the FIDIC notice of claim time bar may be considered unenforceable on the basis that statutory limitation provisions of those states may not be modified.[57]

"The Contractor shall keep such contemporary records as may be necessary to substantiate any claim…"

The Contractor has an obligation to maintain contemporary records that are "*necessary to substantiate any claim.*"[58] These include documents and other records on which the Contractor will seek to rely in order to prove the elements of its claim. A record could be made in physical or electronic form and could be anything that may be permanent such as a document, a photograph, a sound or video recording, etc. Records must be kept either on Site or somewhere else acceptable to the Engineer.[59] Contemporaneous records are important because they have a higher evidentiary weight because they were generated when the memory of the recorder was fresh.

Definition of "*contemporary records*"

In *H v Schering Chemicals*[60] Justice Bingham referred to records, under the Civil Evidence Act 1968, as: *"records which a historian would regard as original or primary sources, that is documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts.*" In *Attorney General Falkland Islands v. Gordon Forbes Construction (Falklands)*

[55] Marc Frilet, "France", in Robert Knutson (ed), *FIDIC: An Analysis of International Construction Contracts* (Kluwer Law International 2005), p 84.
[56] Jaime Gray Chicchón and Jonnathan Bravo Venegas, "La Fatalidad de los Reclamos en los Contratos de Construcción FIDIC: A propósito de los Dispute Boards" in Roberto Hernández García (ed), *Dispute Boards en Latinoamérica: Experiencias y Retos* (2014), pp 41-48 (the question appears to be still in debate in Peru; however, one argument is that the 28-day period in Sub-Clause 20.1 may be considered an attempt to amend the limitation provision for expiry of rights ("*caducidad*") by way of agreement, which Article 2004 of the Civil Code prohibits).
[57] Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice* (Routledge 2009), para 6.223 at p 321.
[58] A version of this and the subsequent two paragraphs was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 499-500 & 502.
[59] "Employer" in the Silver Book 1999.
[60] [1983] 1 WLR 143 at [146].

Ltd (No2), Judge Sanders applied this definition to conclude that a witness statement produced for the purpose of litigation would rarely be considered a record for the purposes of proving a fact in the absence of other records.

In *A.G. Falkland Islands,* Judge Sanders described contemporary records as:[61] "*original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to the claim, whether by or for the Contractor or Employer*". Judge Sanders also provided a very useful guide of what *contemporary* should mean in the context of FIDIC 4th Edition, in summary, it "*does not have to be instant*" and it may even be months later but it "*would depend on the facts surrounding the making of that record*", that is, "*the custom and practice of the industry and* […] *the circumstances in which the record came into being in making that finding*".[62]

"*as may be necessary*"

Each claim will require its own collection of records each aimed at proving its different elements.[63] For example, correspondence, minutes of meetings and monthly reports recording that the Contractor is unable to enter the Site due to delays of the Employer in acquiring land or interference by other Contractors on Site may be useful in a Sub-Clause 2.1 claim to prove cause of lack of access.

Records may also be useful in demonstrating effects on time and money. Records such as properly kept daily work sheets may be useful to show that a Contractor has not had access to Site or has worked on an activity for a particular amount of time. For an extension of time claim the Contractor would also have to show that Time for Completion was delayed, i.e., that there was critical delay and records may be useful to determine criticality. Such records may include programmes, daily record sheets and progress reports. For claims for additional payment, information about costs incurred may be necessary such as equipment purchase or rental invoices, labour time sheets and salary records, accounting schedules, etc.

[61] *Attorney General Falkland Islands v Gordon Forbes Construction (Falklands) Ltd (No 2)* [2003] FISCt at [11].
[62] *Ibid* at [24].
[63] A version of this and the subsequent two paragraphs was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 504–05.

The Engineer[64] may monitor the record keeping, instruct the Contractor to keep further contemporary records, inspect the records or instruct the submission of copies by the Contractor. However, this does not necessarily imply accuracy or completeness of the records. It remains the obligation of the Contractor to prove its claim and therefore it must keep sufficient records to prove entitlement once a claim arises.

"Within 42 days … the Contractor shall send to the Engineer a fully detailed claim …"

The Contractor must submit to the Engineer[65] a *fully detailed claim* within 42 days after the Contractor becomes aware (or should have become aware) of the event or circumstance giving rise to the claim.[66] Alternatively, the time period may be amended by agreement between the Contractor and the Engineer.[67]

The notice of claim should have already described the event or circumstance giving rise to the claim. The *fully detailed claim* that follows is the main submission where the Contractor sets out its case in detail. It includes "*full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed*."

Not only must the Contractor prove an entitlement to its claim, but it must also prove the loss and/or extension of time. Particulars, therefore, need to be provided which include calculations sufficiently detailed to justify the amounts of the relief(s) claimed. If attaching the records physically or electronically would be too onerous, making express reference to the records and inviting the Engineer to inspect them should suffice unless the Engineer instructs copies to be made.

"*continuing effect*"

If the event or circumstance has continuing effect, the first and subsequent fully detailed claims up to the penultimate one shall be considered interim and the last one final. Each interim one shall be sent at monthly intervals and give the accumulated delay and/or amount claimed in addition to any other particulars as may be reasonably required by the

[64] "*Employer*" in the Silver Book 1999.
[65] *Ibid*.
[66] A version of this and the subsequent two paragraphs was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), pp 505–07.
[67] By proposal of the Contractor.

Engineer. The final fully detailed claim shall be sent within 28 days after the end of the continuing effects that result from the event or circumstance.

"*the Engineer shall respond with approval, or with disapproval and detailed comments … The Engineer shall proceed in accordance with Sub-Clause 3.5 …*"

At paragraph 6 of Sub-Clause 20.1, The Engineer is then required to consider the evidence and within a further 42 days give its approval or disapproval of the claim with detailed comments. Then, at paragraph 8 of Sub-Clause 20.1, the Engineer is also required to proceed in accordance with Sub-Clause 3.5 to attempt to achieve agreement or otherwise determine the claim. Therefore, the FIDIC 1999 forms appear to provide a two-step claim examination process.[68] The Engineer[69] has to respond to the fully detailed claim within 42 days of its receipt, either approving or disapproving the claim even if further particulars have been requested (in which case the response would cover the "*principles of the claim*"). In addition, the Engineer[70] has to proceed with the Sub-Clause 3.5 procedure in order to agree or determine the extension of time and/or additional payment.

The two-step process creates unnecessary procedural confusion on the nature of each step, the effects they have on the rights and obligations of the Parties and the Engineer and the relationship between them.[71] For example, it is unclear whether both steps may occur concurrently or sequentially and, it is suggested, any preliminary decision made by the Engineer runs the risk of vitiating and derailing the agreement part of the Sub-Clause 3.5 procedure. Further, the FIDIC 1999 forms appear to allow flexibility in complying with the 42-day period and the Sub-Clause 3.5 agreement or determination procedure while expressly affording none whatsoever in respect of the notice of claim time bar.

Burden and Standard of Proof

The Contractor has the burden of proof in making and substantiating its claim. However, Engineers often ask to what standard of proof the Contractor is required to prove its claim.

[68] A version of this and the subsequent paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), p 511.
[69] "*Employer*" in the Silver Book 1999.
[70] *Ibid*.
[71] Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice* (Routledge 2009), paras 6.258–6.275 at pp 328–32.

There is no single answer because it will depend on the substantive law. For example, the following statement by Baroness Hale is often cited as indicative of what is required to be proved in England and Wales:

> "*In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."*[72]

Certain civil law jurisdictions such as Germany and France apply a different standard called *intime conviction*.[73] In the words of Christoph Engel:[74]

> *"In the leading case, the German Supreme Court has made it clear that the judge may not content herself with a mere assessment of probabilities. Even a very high probability would not be enough. Initial doubt is acceptable, but the judge must have overcome this doubt. This is not meant to defer to judicial discretion, but to judicial intuition. The standard is an empirical one. The crucial feature is 'the psychological state of taking a fact for true.' The test is predominantly built on 'ethos, experience and intuition.'"*

[72] *B (Children), Re* [2008] UKHL 35 at [32].
[73] See Section 286(1) of the German Code of Civil Procedure ("*(1) The court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue. The judgment is to set out the reasons informing the conviction of the judges.*"), translated in https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (accessed 23 February 2021); see also Article 353 of the French Code of Criminal Procedure.
[74] Christoph Engel, 'Preponderance of the Evidence Versus *Intime Conviction*: A Behavioral Perspective on a Conflict between American and Continental European Law', (2009) 33 Vermont Law Review 435, p 441.

General Provisions

The Engineer has an obligation to include in each Payment Certificate[75] "*such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract.*" In other words, the Engineer must certify for payment those claim amounts that the Contractor has reasonably substantiated as due in its claim. It is notable that this provision does not expressly specify the period to which it applies but that it sits between the provision about the Engineer's initial response and the provision about the Engineer proceeding with Sub-Clause 3.5. Therefore, it may be arguable that it should at least apply to the period of time that starts with the Engineer's initial response. However, this is not clearly stated in the forms. It is suggested that an interpretation that allows the provision to apply to the period of time between the Engineer's initial response and the conclusion of an agreement in a Sub-Clause 3.5 procedure, runs the risk of vitiating and derailing the agreement process.

According to paragraphs 3 and 9 of Sub-Clause 20.1, the requirements in this Sub-Clause may be complemented by specific requirements under other provisions of the Contract, such as other required notices.[76] For example, in a Sub-Clause 4.12 [*Unforeseeable Physical Conditions*] claim, the Contractor is required to serve a notice describing the Unforeseeable physical conditions it has encountered. This notice is in addition to a notice of claim, it must be served as soon as practicable and it is intended to allow the Engineer to inspect the physical conditions in question. Paragraphs 3 and 9 of Sub-Clause 20.1 provide that both notices need to be complied with.

Also, paragraph 9 of Sub-Clause 20.1 contains a catch-all provision that incentivises the Contractor's proper compliance with any of the claims procedure requirements in Sub-Clause 20.1 and elsewhere in the Contract. This is additional to the time bar for the notice of claim, i.e., if the claim is time barred, this provision would not need to come into play. Paragraph 9 of Sub-Clause 20.1 provides that determinations, DAB decisions and awards shall take into account the extent to which failure to comply "*prevented or prejudiced proper investigation of the claim*". This may include, for example, failure to serve monthly interim fully detailed claims or failure to serve the notice of Unforeseeable physical

[75] In the Silver Book 1999 it is the Employer who has the obligation "*in each interim payment*".
[76] A version of this and the subsequent paragraph was originally published in Gabriel Mulero Clas, 'Clause 20 Employer's and Contractor's Claims', *FIDIC 2017 A Practical Legal Guide* (2020), p 523.

conditions pursuant to Sub-Clause 4.12. However, this provision does not specify how non-compliance shall be considered nor what measures may be implemented. It is suggested that they should follow considerations of reasonableness and proportionality.

Sub-Clause 20.2
Appointment of the Dispute Adjudication Board

"Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]"

The word "*shall*" is intended to make this a mandatory obligation. In many countries the parties will be required to carry out any pre-arbitration/litigation procedures prior to commencing arbitral proceedings (or litigation). The case of *Midroc Water Drilling Co Ltd v Cabinet Secretary, Ministry of Environment, Water & Natural Resources & 2 others* (Civil Suit No 267 of 2013) was a Kenyan case which concerned the FIDC 4th edition. The Defendant argued that a lawsuit was premature. The Court made an order to stay the proceedings so that the Parties could comply with the settlement procedure in the Contract. Judge J Kamu stated:

> *"The issue between the parties is not a legal issue that should be decided by this court but rather by the Engineer in the first instance as parties are bound by the terms of their contract. The dispute is technical in nature as the same deals with issuance of certificates by the Engineer. The court therefore agrees with the 2nd and 3rd Defendants' submissions that the suit herein is premature …".*

However, the parties may vary or waive the requirement for a DAB. In *Interim Award in ICC Case 16083* (2010), an arbitral tribunal found that the Parties' conduct confirmed that neither Party considered a DAB to be an essential step prior to referring disputes to arbitration and the arbitral tribunal's jurisdiction in the arbitration was affirmed. This was a case under FIDIC's Silver Book 1999.

"The Parties shall jointly appoint a DAB".

The DAB agreement foresees a standing DAB of one or three members.[77] It is of course possible for the Parties to agree only an ad-hoc DAB who shall only act as and when disputes arise. It goes without saying that extreme caution must be exercised when amending the Contract to allow for an ad-hoc dispute board. Poor drafting will lead to disputes. In the *Final Award in ICC Case 18096* (2012)[78], concerning an amended Red Book 1999, poor drafting of the Dispute Adjudication Agreement led to questions as to whether the DAB was standing (as usual in FIDIC Red Book 1999) or ad-hoc. This led to a dispute in relation to the termination of the Dispute Adjudication Agreement. The Claimant argued that as the sole DAB member was appointed on an ad-hoc basis, its mandate was terminated with the issuance of the first DAB decision. By contrast, the Respondent argued that the DAB was standing and, therefore, its mandate could be terminated only by the mutual consent of the Claimant and the Respondent pursuant to Clause 7 of the General Conditions of Dispute Adjudication Agreement. The Respondent further asserted that even if the sole arbitrator had been appointed on an ad-hoc basis, the rule on termination under Clause 7 would still apply. The sole arbitrator found that as the Parties did not modify the pertinent provisions of the FIDIC Red Book 1999, the Dispute Adjudication Agreement could only be terminated by mutual consent of Claimant and Respondent pursuant to Clause 7. As such consent was not reached, the Dispute Adjudication Agreement was not terminated by issuance of the first DAB decision.

In the *Swiss Supreme Court Decision 4A 124/2014* concerning the FIDIC Red Book 1999 the Court stated:

> *"It must be noted finally that paragraph 5 of Sub-Clause 20.2 of the General Conditions requires the parties to enter into a DAA incorporating by reference the General Conditions of Dispute Adjudication Agreement contained in the annex to the aforesaid General Conditions with the three members of the DAB individually. According to clause 2, paragraph 1 of the General Conditions, the DAA comes into force when the principal, the contractor, and all members of the DAB have signed it. Failing this, legal writing considers that there is no validly constituted DAB and that the only remedy a party has when faced with the others refusal to sign the DAA*

[77] This is different to Yellow and Silver Books
[78] ICC Dispute Resolution Bulletin 2015 No 1, at p 126.

> *is to go to arbitration directly pursuant to Sub-Clause 20.8 (Baker, Mellors, Chalmers and Lavers, op. cit., p. 520, n. 9.71). This means that, in the case at hand, the majority arbitrators were right to find that the DAB was not "in place" when the arbitration request was filed, due to the parties having failed to sign a DAA with all of its appointed members.".*

The Court found that there was no clause to compel the Respondent to sign the DAA and no evidence that the Respondent had been acting in bad faith. The Court said: *"Pursuant to these rules and considering the process of constitution of the DAB, it is indeed impossible to blame the Respondent for losing patience and finally skipping the DAB phase despite its mandatory nature in order to submit the matter to arbitration."* However, it will not always be the case that a party can simply skip the DAB phase and go directly to arbitration. In *Divine Inspiration Trading 130 (Pty) Ltd v Aveng Greenaker & Ors*[79] an arbitral tribunal held that it did not have jurisdiction to hear a dispute where the DAB process had not been put into operation. Similarly, the High Court in *Peterborough City Council v Enterprise Managed Services Ltd*[80] stayed litigation for the parties to adjudicate under a FIDIC Silver Book 1999 contract.[81]

In countries where the Courts will not enforce DAB decisions, for example Romania, it may be asked whether any DAB is sensible. Of course, the dispute avoidance provisions may still have some value and there are contractual sanctions for non-compliance with DAB decisions.

"The agreement between the Parties …. shall incorporate by reference the General Conditions of Dispute Adjudication Agreement."

The Dispute Adjudication Agreement is bound into the Red Book at pages 63 to 66. This contains the details and obligations of the DAB Member. It also sets out the obligations of the Employer and Contractor to the DAB Member. The Dispute Adjudication Agreement has its own disputes procedure.

[79] [2016] ZAGPJHC 99.
[80] [2014] EWHC 3193.
[81] See also *Partial Award in Case 16262* ICC Dispute Resolution Bulletin 2015, No 1 at p 75.

Each party is responsible for paying one-half of the DAB's remuneration. The payment of the DAB Member is dealt with in more detail at Clause 6 of the General Conditions of Dispute Adjudication Agreement in the currency named in the Dispute Adjudication Agreement. This comprises:

a. a monthly fee/retainer;
b. a daily fee;
c. all reasonable expenses; and
d. any taxes properly levied in the Country.

The monthly fee/retainer pays the DAB for:

a. being available on 28-days' notice for all meetings, site visits and hearings under the DAB Procedural Rules;
b. becoming and remaining conversant about the progress of the Works and maintaining a current working file of documents;
c. all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with its duties; and
d. all other services performed except for those covered by the daily fee and reasonable expenses.

The daily fee, is payment in full for each day:

a. or part of a day, up to a maximum of two days' travel time in each direction, for the journey between the DAB Member's home and the site, or another location of a meeting with the other members (if any);
b. spent on attending site visits, hearings or preparing decisions; and
c. spent in preparation for a hearing and studying written documentation and arguments from the Parties submitted.

All reasonable expenses include necessary travel expenses, hotel and subsistence and other direct travel expenses, including visa charges incurred in connection with the DAB Member's duties, as well as the cost of telephone calls (and video conference calls, if any, and internet access), courier charges and faxes. The DAB Member must provide the Parties with a receipt for each item of expense in excess of 5% of the daily fee.

The Contractor initially pays the invoices within 56 days and then applies for payment of half of the costs in the next Statement to the Employer.

Under Clause 3 the General Conditions of the Dispute Adjudication Agreement each DAB Member must warrant and agree to remain independent and impartial during the term of the DAB, and Clause 4 of the General Conditions of the Dispute Adjudication Agreement sets out the obligations of the DAB Member, including requirements of independence and impartiality.

Sub-Clause 20.3
Failure to Agree Dispute Adjudication Board

The Sub-Clause provides the circumstances where the parties fail to agree on the DAB. The circumstances include:

- where the Parties fail to agree on a sole member by the date specified in the first paragraph of Sub-Clause 20.2;
- where either Party fails to nominate a member of a DAB of three persons;
- where the Parties fail to agree upon the appointment of a third member of the DAB; or
- where the Parties fail to agree upon a replacement member within 42 days.

If one of these events occurs then the appointing entity named in the Appendix to Tender, shall, upon a request by either or both parties, appoint this member of the DAB. The appointment by the appointing entity shall be final and conclusive and each party is responsible for paying one-half of the remuneration of the appointing entity.

The *Partial Award in ICC Case 15956* (June 2010) illustrates the problems and delays which can occur with the appointing process. This case concerned an amended FIDIC Red Book 1999. The arbitration proceedings were held in a city in Eastern Europe. The Parties failed to agree on a standing DAB within the prescribed time period of 42 days after the Commencement Date. The Contractor requested on several occasions that the Employer agree to the appointment of a DAB. The Employer considered the requests but never responded to the Contractor despite the Engineer's recommendation to do so. Ultimately,

the Contractor applied to the President of FIDIC and a sole DAB was appointed. Two DAB decisions were issued. The Contractor sought the enforcement of the two DAB decisions. The Employer argued that the DAB was not properly appointed. In this case, the arbitral tribunal found that the DAB had been properly appointed and ordered the Employer to comply with the DAB decisions, the merits of the case being reserved.

Partial Award in ICC Case 16570 (March 2012) concerned a FIDIC Yellow Book 1999. The arbitration proceedings were held in a city in Eastern Europe. The Parties had agreed on a standing DAB but failed to constitute it. The Contractor requested that the Employer agree to the appointment of a DAB to decide upon the validity of the termination of the Contract. The Employer did not respond. Therefore, the Contractor applied to the President of FIDIC and a sole DAB was appointed. Two DAB decisions were issued. The Employer did not participate in the DAB proceedings but did serve a notice of dissatisfaction with the DAB decisions. The Contractor sought the enforcement of the two DAB decisions. The Employer argued that the DAB had not been properly constituted as the DAB agreement had not been entered into within the prescribed time period and that once a Contract is terminated it is not possible to appoint a DAB. The Employer also argued that the DAB decisions (which were binding but not final) could not be summarily enforced. The Arbitral Tribunal found that once a Contract is terminated with no DAB in place, Sub-Clause 20.8 requires the Parties to go directly to arbitration to solve any dispute. The DAB constituted by the Contractor unilaterally after the termination had no jurisdiction to solve the disputes referred to it and its decisions were not binding on the Employer.

Sub-Clause 20.4
Obtaining Dispute Adjudication Board's Decision

"If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract ... either Party may refer the dispute in writing to the DAB for its decision....".

In contradistinction to the use of the word "*shall*" in Sub-Clause 20.2, the word "*may*", is used in Sub-Clause 20.4. This ambiguity resulted in questions as to whether the obligation to refer a dispute to a DAB was in fact mandatory, especially where an *ad hoc* DAB had

been constituted. In *Interim Award in Case 14431*[82] the Arbitral Tribunal addressed this issue and stated at paragraph 177 that the word "*may*" in Sub-Clause 20.4 was contradictory to the word "*shall*" in Sub-Clause 20.2. The Arbitral Tribunal suggested that the wording of Sub-Clause 20.4 describes the obligation as an option. However, the Tribunal concluded that the intention was that there was a mandatory requirement to refer disputes initially to the DAB. The Tribunal then went onto consider whether the submission of a draft document complied with the requirement that the dispute is in writing. The Tribunal concluded that it was not because the other Party had to clearly know when the process had been commenced.

The reference to the DAB is deemed to be received on the date that it is received by the chairperson (if a three-person DAB). The reference does not specify any requirements but states that both Parties must make available to the DAB all such further information, further access to Site, and appropriate facilities, to allow the DAB to make a decision on the dispute.

"The DAB shall be deemed to be not acting as arbitrator(s)."

Most arbitration legislation, including the Arbitration Act 1996, does not attempt an answer to the basic question of: "what is an arbitration?". The editors of the 2001 Companion Volume to the 2nd edition of Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (1989) suggest at paragraph 30-52 that, "*In the absence of guidance, the question must in the end be answered intuitively.*" In *O'Callaghan v Coral Racing*[83] Hirst LJ stated that:

> *"To my mind the hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of the civil court of law."*

[82] ICC Dispute Resolution Bulletin 2015 No 1 at p 35.
[83] The Times 26 November 2008, CA.

Tweeddale & Tweeddale[84] list the fundamental characteristics of an arbitration. There are several similarities between what constitutes an arbitration and what constitutes an adjudication. There must be a dispute which is referred to a third party, there is then a process by an independent and impartial third party and a decision. It is, however, the finality of an arbitration award which makes it different to a DAB decision. While it is possible for the DAB decision to be final and binding either party may, by issuing a notice of dissatisfaction, make the decision have only interim binding effect.

The starting point, however, for identifying whether a form of dispute resolution is arbitration or something different is the wording of the agreement. The language used by the parties will provide an indication of the nature of the process that they intend.[85] In *Barclays Bank PLC v Nylon Capital LLP*[86] the dispute resolver was required to "*act as an expert and not as an arbitrator.*" This wording put the issue beyond doubt as to the process which had been agreed. Without such wording there can be room for arguments about the precise form of dispute resolution process required.[87] FIDIC have therefore made it quite clear that the DAB process is not an arbitration process.

"Within 84 days after receiving such reference… the DAB shall give its decision"

The DAB must give a decision within 84 days of the reference (or such other period as proposed by the DAB and agreed by the Parties). The time period is the same in the FIDIC Yellow Book 1999. If the DAB fails to give a decision within the 84 days, either Party may give a notice of dissatisfaction, within 28 days after this period has expired.

The FIDIC suite of contracts gives no answer to the question of "What is the status of the DAB's decision if it is given after the 84-day period?" The question has been addressed in the context of statutory adjudications in Australia and in the United Kingdom. In both these countries there is a public policy position on supporting ADR clauses generally, including statutory adjudication. The case law on statutory adjudications is considered below, however, its relevance is questionable. In these cases the courts were primarily

[84] *Arbitration of Commercial Disputes, International and English Law and Practice* (2007) para 2.01 to 2.13.
[85] See *Palacath Ltd v Flanagan* [1985] 2 All ER 161 at 165f-g.
[86] [2011] EWCA Civ 826.
[87] See *A. Cameron Ltd v John Mowlem & Co. Plc* [1990] 52 BLR 24; and *David Wilson Homes Ltd v Survey Services Ltd* [2001] 1 All ER (Comm) 449.

concerned with interpreting the statute and regulations. However, a different test is required when interpreting a contract to the interpretation of a statute.

The Australian Adjudication Cases

Each Australian state has drafted its own statute for adjudication, each differently drafted. The decisions of the state courts, while appearing inconsistent with each other, must be read having regard to the wording of the relevant statutes.

In *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd & Ors*[88] the Supreme Court of Queensland considered this issue and at first instance held that the mandatory or imperative language used in s.85(1) of the statute, which provided for adjudication, resulted in a decision being invalid if it was not issued within the relevant time period prescribed by the statute. On appeal McMurdo JA agreed with the first instance decision. The reasoning of McMurdo JA was based on an interpretation of the relevant statute. McMurdo JA referred to the case of *Project Blue Sky Inc v Australian Broadcasting Authority*[89] where consideration was given to the issue of a breach of condition within a statute:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition."

While McMurdo JA found that the statute was silent on the question of whether a late adjudicator's decision was invalid, there were provisions which indicated that it would be invalid.

The Supreme Court of Victoria also considered the late provision of an adjudicator's decision in *Ian Street Developer Pty Ltd v Arrow International Pty Ltd & Anor* ("*Ian Street*").[90] The facts were that an adjudicator's decision on the payment of a sum was given after the statutory period. The court also referred to the *Project Blue Sky case* (see above)

[88] [2021] QCA 10.
[89] (1998) 194 CLR 355 at 388-9 [91].
[90] [2018] VSCA 294.

and looked at the purpose of the relevant legislation. At first instance the judge held that on the proper construction of the Act, non-compliance with the time limit was not intended to render the adjudication decision invalid. Maxwell P in the Court of Appeal agreed with the first instance decision. The court referred to other judgements which had held that an out of time determination was not invalid and such a decision would be inconsistent with the legislative intent.[91]

English and Scottish Adjudication Cases

In *Paice & Anor v Harding (t/a MJ Harding Contractors)*[92] the issue of a late decision was considered. O'Farrell J. held that if the adjudicator had requested an extension of time, then it was incumbent on the parties to respond to this and a failure to do so may give rise to an estoppel precluding a party from subsequently disputing that the extension of time was agreed.[93] O'Farrell J., stated that in the absence of an estoppel:[94]

> "If the adjudicator fails to reach his decision within the prescribed time, or as agreed by the parties, it is invalid and unenforceable: *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC) per Coulson J at para.76."

The approach adopted by O'Farrell J follows a recent trend of cases.[95] In *Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd*[96] the adjudicator's decision was made in time but issued late. Judge Humphrey Lloyd QC thought that an error of a day or two in delivery would be acceptable. He stated that this was within the tolerance in commercial practice that one must afford to the Act and to the contract.[97] Judge Lloyd QC also stated that a delay of a day or two could not be extended any longer unless the parties had agreed a very long duration for the adjudication. Judge Lloyd QC also made it clear that a delay in delivery of the decision does not entitle an adjudicator not to complete the decision within the time allowed. In *Lee v Chartered Properties (Building) Ltd*[98] the court considered the

[91] See *MPM Constructions v Trepacha Constructions* [2004] NSWSC 103; and *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430.
[92] [2016] EWHC 2945 (TCC).
[93] *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360 (TCC) per Coulson J at paras.15-20.
[94] [2016] EWHC 2945 (TCC) at [16].
[95] See for example *Baldwin & Anor v Pickstock Ltd* [2017] EWHC 2456 (TCC) at [26] where the court held that "In short, the appointment lapsed or expired by effluxion of time." See also *Hart Investments Ltd v Fidler & Anor* [2006] EWHC 2857 at [43] to [46].
[96] [2003] EWHC 3100 TCC.
[97] *Ibid* at para 26.
[98] [2010] EWHC 1540 (TCC).

same issue as in *Barnes & Elliott,* where a decision was delivered 72 hours late. In this case Akenhead J held that the provision would be strictly enforced, absent good cause and explanation.[99]

However, one case has suggested that a short delay in making a decision might be permissible. In *Simons Construction Ltd v Aardvark Developments Ltd*[100] Judge Seymour held that a decision was not void if given late so long as one of the parties had not issued a fresh notice of referral. This approach was criticized in the subsequent case of *Cubitt Building & Interiors Ltd v Fleetglade Ltd.*[101] In this case Coulson J. stated that in interpreting the statutory regulations, it was difficult to see how Judge Seymour arrived at his decision. Coulson J. stated:

> "Adjudicators do not have the jurisdiction to grant themselves extensions of time without the express consent of both parties. If their time management is so poor that they fail to provide a decision in the relevant period and they have not sought an extension, their decision may well be a nullity."

In *Epping Electrical Company Limited v Briggs and Forrester (Plumbing Services)*[102]the High Court refused to enforce an adjudicator's decision which was issued 7 days late. In the Scottish case of *Ritchie Brothers Ltd v David Philp (Commercials) Ltd*[103] the Inner House held that the language used in the statutory regulation: "shall reach his decision" was mandatory and that the adjudicator's jurisdiction ceased on the expiry of that period. The court considered the English case of *Simon Construction Ltd v Aardvark Developments Ltd*[104] but found that the interpretation adopted by Judge Seymour was "contrived". There was one dissenting judgment from Abernethy L., who thought some latitude was needed as it would seriously undermine the speedy resolution of disputes if the parties had to recommence the adjudication procedure again.

[99] See also *Baldwin & Anor v Pickstock Ltd* [2017] EWHC 2456 (TCC) at [10].
[100] [2003] EWHC 2474 (TCC).
[101] [2006] EWHC 3413 (TCC).
[102] [2007] EWHC 4 (TCC). See also *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd*, [2007] WL 2187002 (TCC).
[103] [2005] ScotsCS CSIH 32.
[104] [2004] BLR 117.

The South African Cases on NEC

There is no statutory adjudication scheme in South Africa and therefore the requirement for adjudication is a contractual mechanism.

In *Freeman NO and Anor v Eskom Holdings Ltd*[105] the respondent argued that it was relieved from paying an adjudicator's decision because the decision was delivered out of the agreed time period. The contract was an NEC Engineering and Construction Contract. It contained a time provision in which the adjudicator was to make its decision. This in the NEC case was four weeks from the end of the period for providing information. The respondent asserted that the adjudicator's contract had lapsed by the time the decision was issued and was therefore invalid and a nullity. The judge, however, held that "*nowhere in the contract is it stated that a late adjudicator's decision would be invalid.*"[106] The Court therefore found that the decision, albeit late, would be enforceable until it was revised by an arbitral tribunal.

In *Group Five Construction (Pty) Ltd v Transnet SOC Ltd*[107] a contract was entered into under the NEC terms of contract which contained an adjudication provision. The decision was given late, and the respondent had refused consent to an extension of time. The respondent therefore issued a notice to refer the dispute to arbitration, which in the submission of the respondent's counsel "put the adjudication process to a stop and disempowered the adjudicator from continuing with the adjudication."[108] Twala J in his judgment deals with both a late decision and the notice to refer the lack of a decision to arbitration. Twala J stated in regard to a late decision:

> "I am therefore unable to disagree with counsel for the respondent that, from the plain wording of these clauses, the adjudicator is not competent to proceed and act beyond the time period set by the agreement if he is unable to secure the necessary consent from both parties. No other meaning can be ascribed to these provisions for they are not at all ambiguous."

[105] (43346/09) [2010] ZAGPJHC 29.
[106] *Freeman NO and Anor v Eskom Holdings Ltd* (43346/09) [2010] ZAGPJHC 29 [22].
[107] (45879/2018) [2019] ZAGPJHC 328 (28 June 2019).
[108] (45879/2018) [2019] ZAGPJHC 328 at 14.

However, Twala J then considered the provision which allowed a party, where the adjudicator had not issued a decision in the relevant time period, to issue a notice of intention to commence arbitration. He said that this was an escape provision for the parties and that: "Once notice has been given to the other party within the specified period, then there is compliance with the requirements of clause W1.4.3 and the adjudicator cannot, in my view, be competent to continue with the adjudication."[109] However, if the notice of intention to commence arbitration is intended by the parties to be an escape provision, an argument can be advanced that the adjudicator's mandate does not come to an end until that notice is issued.

The case of *Group Five Construction*[110] case was subsequently considered in *Sasol SA (Pty) Ltd v Murray & Roberts Ltd*.[111] The Supreme Court of Appeal in *Sasol* distinguished the *Group Five* Case on the facts, as the adjudicator's appointment contained provisions which allowed it to ask for further information. The court stated:[112] "The adjudicator's contract allows an entitlement to more information and more time than that provided for in the '*contract between the parties*' and to the extent that there is a conflict between the adjudicator's contract and the construction contract, the adjudicator's contract must prevail."

ICC Case Law

In *Interim and Final Awards in ICC Case 10619* the arbitral tribunal had to consider the enforcement of an Engineer's Decision which was given late under the contract. The contract was FIDIC 4th Red Book and therefore did not contain a DAB clause. The Tribunal concluded that two of the Engineer's decisions had not been given within 84 days and therefore they were not binding on the Employer. The Tribunal looked at the fact that if a notice of dissatisfaction was not given timeously to the Engineer's decision, the decision would become binding and concluded that if this provision were to work, the dates for both the Engineer's decision and the notice of dissatisfaction had to be strictly observed.

[109] (45879/2018) [2019] ZAGPJHC 328 at 22.
[110] (45879/2018) [2019] ZAGPJHC 328 (28 June 2019).
[111] (425/2020) [2021] ZASCA 94.
[112] (425/2020) [2021] ZASCZ 94 at [39].

Contractual Interpretation

The basis on which a court will interpret a contract will vary from country to country. Under English law the starting point where there is an ambiguity or gap in the language is to focus on commercial common-sense. Would parties, who have been in an adjudication process for 84 days, want a DAB's decision to be invalid if it is served a day, or an hour, or a minute late? However, would the parties want ambiguity in a clause where a party might lose its entitlement to refer the matter to arbitration. If commercial common-sense, does not provide an answer, the English courts would focus on the factual matrix.

A contractual term should not be interpretated in isolation but by the company it keeps. It is therefore important to look at the other terms of the contract in order to ascertain whether there is an indication of what the parties intended. Other relevant terms form an essential part of the factual matrix.

Sub-Clause 20.4 §5 contains an escape clause if the DAB fails to give a decision within 84 days. Either party may, within 28 days after the period when the decision should have been given, give notice to the other Party of its dissatisfaction. It may be argued, as in *Simons Construction Ltd v Aardvark Developments Ltd,*[113] that until the notice of dissatisfaction is given, the DAB retains jurisdiction to issue a decision.

Regard must also be had to the Dispute Adjudication Agreement under which the DAB is appointed, and the procedural rules annexed to them. The Dispute Adjudication Agreement in FIDIC's Red Book requires a DAB to comply with the procedural rules which are annexed to the Contract[114]. These state that the DAB is to "make and give its decision in accordance with Sub-Clause 20.4, or as otherwise agreed as between the Employer and Contractor in writing."[115] If, however, the DAB has entered into a bespoke agreement then the clauses of that agreement must be considered. In the *Sasol case* it was stated that the adjudicator's agreement would, if consistent with the terms of the Contract between the parties, override those terms.

[113] [2003] EWHC 2474 (TCC).
[114]Dispute Adjudication Agreement, Clause 4(e).
[115] Annex, Procedural Rules Clause 9.

The Dispute Adjudication Agreement and Procedural Rules within the FIDIC contract infer that the parties intend that the time scales are mandatory and that a variation to them can only occur by an agreement in writing between the parties. In addition, the FIDIC Guide uses the phrase "the DAB is required to give its decision." This suggests to this author that at the end of the 84-day period, the jurisdiction of the DAB to make a valid decision regarding the dispute ceases. A decision issued after the 84-day period might therefore be invalid. However, the point remains unsettled.

"which shall be reasoned and shall state that it is given under this Sub-Clause."

The DAB is required to provide a reasoned decision. Similar to arbitration, this does not require that the DAB give reasons for every part of its decision.[116] It should set out what happened, having regard to the evidence, and should explain succinctly why, in the light of what happened, the DAB reached its decision and what that decision is. [117]

"the decision shall be binding on both Parties."

The Contract describes the decision of the DAB as binding upon the Parties and this is irrespective of whether a notice of dissatisfaction is given. Many parties who are dissatisfied with the DAB's decision and have issued a notice of dissatisfaction have sought to argue that they are not bound by the decision once the notice of dissatisfaction has been issued. The issue came before the Singapore courts in the case of *CRW Joint Operation ("CRW") v PT Perusahaan Gas Negara (Persero) TBK ("PGN")*.[118]

The facts were that a DAB in November 2008 made a decision ordering PGN to pay CRW the adjudicated sum. PGN served a notice of dissatisfaction. In 2009, CRW sought to enforce the decision without referring the merits to arbitration. The arbitral tribunal, by a majority, issued a final award enforcing the decision. The High Court set aside the award and the Court of Appeal upheld that judgement with an endorsement that it would be permissible to enforce provided the merits were also referred in the same arbitration. In 2011, pursuant to the Court of Appeal's guidance in Persero 1, CRW started arbitral

[116] *Smith v Molyneaux (British Virgin Islands)* [2016] UKPC 35.
[117] See further Tweeddale A., The need for reasons – o, reason not the need, *Arbitration*, Vol 85(2) at p 153.
[118] [2015] SGCA 30; [2011] 4 SLR.

proceedings again, this time seeking to enforce the DAB's decision in an interim award as well as referring the merits to arbitration. Again, there was a majority award enforcing the DAB's decision. This time, both the High Court and the Court of Appeal agreed with the arbitrators.

The 64-page judgement of Chief Justice Sundaresh Menon (with whom Justice Quentin Loh agreed) forms the majority judgement. Justice Chan Sek Keong delivered a 96-page dissenting judgement. The Court of Appeal upheld: (1) the interim award ordering PGN to pay CRW c.US$17m; and (2) the lower court's order granting CRW leave to enforce the interim award in the same manner as a court judgement.

The Court of Appeal emphasised that "*it may be vital that parties promptly comply with a DAB decision*" and that "*it is of general importance that contractors are paid promptly where the contract so provides…*" It summarised its interpretation of the effect of a notice of dissatisfaction on a DAB decision by holding that:

a. a DAB decision is immediately binding once it is made;
b. the parties are obliged to give effect to it promptly until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award; and
c. a notice of dissatisfaction does not and cannot displace the binding nature of a DAB decision or the parties' concomitant obligation to promptly give effect to and implement it.

These conclusions were also reached by the South Gauteng High Court in South Africa in *Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd*,[119] which is discussed below.

In Persero 1, the Court of Appeal held that the 1999 Red Book:

> *"requires the parties to finally settle their differences in the same arbitration, both in respect of the non-compliance with the DAB's decision and in respect of the merits of that decision…consistent with the plain phraseology of Sub-Clause 20.6 which requires the parties' disputes in respect of any binding DAB decision which*

[119] (12/7442) [2013] ZAGPJHC 407.

has yet to become final to be "finally settled by international arbitration". Sub-Clause 20.6 clearly does not provide for separate proceedings to be brought by the parties before different arbitral panels even if each party is dissatisfied with the same DAB decision for different reasons."

The Court of Appeal in Persero 2, disagreeing with the Court of Appeal in Persero 1, found that a paying party's failure to comply with a binding but not final DAB decision is itself capable of being directly referred to a separate arbitration under Sub-Clause 20.6. The Court of Appeal reasoned that *"*[t]*he dispute over the paying party's failure to promptly comply with its obligation to pay the sum that the DAB finds it is liable to pay is a dispute in its own right which is capable of being 'finally settled by international arbitration'".* In order to resolve this issue, it is necessary in the first place to resolve the issue of whether enforcement of a binding but non-final decision can be "*finally settled*" by arbitration. In Taner Dedezade's 2012 paper "*Mind the Gap*"[120] it was argued that following a notice of dissatisfaction, a DAB decision will amount only to interim relief because the decision must be referred to arbitration to finally resolve the dispute. It was further argued that it follows that an arbitral tribunal should not issue a final award in relation to interim relief. Accordingly, Mr Dedezade disagreed with the judgement of the Court of Appeal that it is appropriate for a final award to be given (for the purposes of enforcement only) in a separate arbitration. In *Partial Award in Case 16119*[121] an arbitral tribunal agreed that the correct approach was to issue a provisional or temporary decision and that it should not issue an award which would "*definitively determine payment issues*".

"who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below."

This wording has received much academic analysis, especially within numerous articles written by Taner Dedezade on the subject.[122]

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[120] [2012] Int ALR 4 153.
[121] ICC Dispute Resolution Bulletin 2015 No 1 at p 67 and see also *Final Award in Case 18320* ICC Dispute Resolution Bulletin 2015 No 1 at p 132.
[122] Mind The Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions Under the 1999 FIDIC Conditions of Contract; Taner Dedezade 01/01/2014; Enforcement of DAB decisions – The legal justification for the 'enforcement' of a 'binding' DAB decision under the FIDIC 1999 Red Book; Taner Dedezade, 01/03/2012; Are 'binding' DAB decisions enforceable? Taner Dedezade, 01/10/2011 – see Corbett & Co knowledge hub.

In *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*[123] the relevant disputes turned on the interpretation of Sub-Clauses 20.4 and 20.6 of the FIDIC Red Book 1999. In particular, the Court considered the above wording. Similar to the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*[124] the South African Court found that a binding but not final decision of the DAB must be complied with and ordered DBT Technologies to give effect to the DAB decision until such time when the decision is revised in amicable settlement or an arbitral award. Du Plessis AJ said:

> *"8. The effect of these provisions is that the decision shall be binding unless and until it has been revised as provided. There can be no doubt that the binding effect of the decision endures, at least, until it has been so revised. It is clear from the wording of clause 20.4 that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised. The moment the decision is made the parties are required to "promptly" give effect to it. Given that a dissatisfied party has 28 days within which to give his notice of dissatisfaction it follows that the requirement to give prompt effect will precede any notice of dissatisfaction.*
>
> *9. The final sentence of clause 20.4 (4), requiring the contractor to continue to proceed with the works, underscores the intention of the parties to the effect that life goes on and is not interrupted by a notice of dissatisfaction.*
>
> *10. A dissatisfied party may elect to wait 28 days before giving his notice of dissatisfaction. However, this will have no effect on his obligation to give effect to the decision which has to happen promptly on the giving of that decision. In the event where no notice of dissatisfaction has been given within the prescribed time, the decision becomes final and binding on both parties.*
>
> *11. The distinction between the situation in clause 20.4 (4), where the decision shall be binding on both parties and clause 20.4 (7), where it becomes final and binding upon both parties is significant: in the first instance it is binding but of an interim nature (but the obligation to perform in terms of this decision is final); in the second it is binding but now finally so.*

[123] (06757/2013) [2013] ZAGPJHC 155 (3 May 2013).
[124] [2015] SGCA 30; [2011] 4 SLR.

12. Where no notice of dissatisfaction had been given the decision becomes final and binding. Clause 20.6 (1) is concerned only with a decision in respect of which a notice of dissatisfaction has in fact been given. In other words, this is a situation envisaged in clause 20.4 (4): the decision is binding on both parties who must promptly give effect to it unless and until it has been revised in an arbitral award as referred to in clause 20.6 (1). Clause 20.6(1) obviously only arises if there had indeed been a notice of dissatisfaction.

13. Thus the notice of dissatisfaction does not in any way detract from the obligation of the parties to give prompt effect to the decision until such time, if at all, it is revised in arbitration. The notice of dissatisfaction does, for these reasons, not suspend the obligation to give effect to the decision. The party must give prompt effect to the decision once it is given.

14. The scheme of these provisions is as follows: the parties must give prompt effect to a decision. If a party is dissatisfied he must nonetheless live with it but must deliver his notice of dissatisfaction within 28 days failing which it will become final and binding. If he has given his notice of dissatisfaction he can have the decision reviewed in arbitration. If he is successful the decision will be set aside. But until that has happened the decision stands and he has to comply with it."

Du Plessis AJ then made reference to the case of *Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd*,[125] and continued:

"8. In the unreported decision of Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd, SGHC case no. 12/7442, the parties had referred a dispute to the DAB in terms of clause 20.4 of the FIDIC Conditions of Contract. The DAB gave its decision which was in favour of the contractor. The employer refused to make payment in terms of the decision relying, inter alia, on the fact that it had given a notice of dissatisfaction and the contractor approached the Court for an order compelling compliance with the decision.

[125] South Gauteng High Court, Johannesburg case no. 12/7442, [2013] ZAGPJHC 407.

9. The matter came before Spilg J who commented that he found the wording of the relevant contractual provisions to be clear and that their effect is that whilst the DAB decision is not final 'the obligation to make payment or otherwise perform under it is…'[126]

10. The court found the key to comprehending the intention and purpose of the DAB process to be the fact that neither payment nor performance can be withheld when the parties are in dispute:[127]

> *'the DAB process ensures that the quid pro quo for continued performance of the contractor's obligations even if dissatisfied with the DAB decision which it is required to give effect to is the employer's obligation to make payment in terms of a DAB decision and that there will be a final reconciliation should either party be dissatisfied with the DAB decision…'*

11. The court further held that the respondent was not entitled to withhold payment of the amount determined by the adjudicator and that he

> *'is precluded by the terms of the provisions of clause 20 (and in particular clauses 20.4 and 20.6) from doing so pending the outcome of the Arbitration.'*[128]"

In the Namibian case of *Salz-Gossow (Pty) Ltd v. Zillion Investment Holdings (Pty) Ltd*[129], concerning the FIDIC 1999 conditions of contract, Zillion Investment (the Employer) refused to comply with a DAB decision. It argued that by giving a notice of dissatisfaction it had suspended the enforcement of the DAB decision. The Court held that the Parties should promptly give effect to the decision of the DAB. The Court found that in exceptional circumstances it has a discretionary right not to order specific performance but, in this case, Zillion Investment had failed to prove any such special circumstances. Zillion Investment envisaged future undue hardship if the DAB decision were reversed in

126 At paragraph 11 of the *Esor Africa* judgment.
127 At paragraph 12 of the *Esor Africa* judgment.
128 At paragraph 14 of the *Esor Africa* judgment.
129 (A44/2016) [2017] NAHCMD 72 (9 March 2017).

arbitration on the basis that Salz-Gossow (the Contractor) would be unable to reimburse Zillion Investments due to its *"current negative liquidity position"*. Angula, DJP stated:

> *"The court cannot make its decision based on speculation and accordingly declines to be drawn into a morass of speculation and surmises"*. He continued: *"This court cannot make a determination of the applicant's inability to reimburse the respondent based on negative cash flow. In my view negative liquidity does not constitute an exceptional circumstance in the present matter. I think it is fair to say that it is common knowledge that operating companies experience cash flow problems from time to time but that is not a static financial position; it fluctuates through the life span of most operating companies. Negative liquidity can be cyclical depending on the industry in which the company operates. For instance during in the slumped period in the construction industry most companies in that industry will experience cash flow problems due to lack of construction contracts on offer"*.

Sub-Clause 20.5
Amicable Settlement

This Sub-Clause requires that the Parties attempt amicable settlement following the giving of a notice of dissatisfaction. The use of the word "*shall*" appears to impose a mandatory requirement but the Sub-Clause then proceeds to state that arbitration may be commenced on or after 56 days of the notice of dissatisfaction even if no attempt at amicable settlement has been made.

The Guidance Section of the FIDIC Red Book 1999 does not assist in dealing with the apparent contradiction. It merely states:

> *"Sub-Clause 20.5 Amicable Settlement*
> *The provisions of this Sub-Clause are intended to encourage the parties to settle a dispute amicably, without the need for arbitration: for example, by direct negotiation, conciliation, mediation, or other forms of alternative dispute*

> *resolution.*[130] *Amicable settlement procedures often depend, for their success, on confidentiality and on both Parties' acceptance of the procedure. Therefore neither Party should seek to impose the procedure on the other Party."*

FIDIC, however, recognised that there was an apparent contradiction in the drafting of this Sub-Clause. The FIDIC Guide states as follows:

> *"Although the first sentence of the Sub-Clause imposes an obligation to attempt amicable settlement, the second sentence specifies that, if a Party fails to make any attempt, the other Party cannot insist on it. This apparent contradiction is unavoidable, because of the impossibility of providing any meaningful method of imposing a requirement for the Parties to reach a consensual agreement of their differences."*

The drafting of Sub-Clause 20.5 does not suggest that the need to go through amicable settlement was intended to be a condition precedent to the commencement of the arbitration. Sub-Clause 20.5 creates two distinct obligations; the first is to attempt to settle the dispute amicably and the second is to wait 56 days from the date of the notice of dissatisfaction before commencing the arbitration. The amicable settlement provision was based on Sub-Clause 67.2 [*Amicable Settlement*] of the FIDIC 4th edition (1987). At the time it was noted that the Sub-Clause could be criticised as it gave no guidance as to how the 56 days should be spent and therefore it was thought that this provision will "*often merely represent an eight-week delay to the resolution of the dispute.*"[131] Edward Corbett explains that a failure by a party to attempt to settle the dispute amicably would appear not to be a breach of contract. However, as to the 56-day amicable settlement period, Mr. Corbett states that the right to commence arbitration: "*…must be subject to clause 67.2 and the 56-day amicable settlement period provided for there.*" [132]

Glover and Hughes state that Sub-Clause 20.5 is a condition precedent and that: "*An attempt to obtain an amiable settlement for a prescribed time of 56 days is also a condition precedent to a referral to arbitration.*"[133] The authors thereafter note that a party does not

[130] For a thorough discourse of the various types of ADR procedure see *The FIDIC Forms of Contract* (3rd edn) Bunni N., Blackwell publishing (2005) at pp 439–460.
[131] *FIDIC 4th A Practical Legal Guide,* Corbett E., Sweet and Maxwell (1991) at p 450.
[132] *Ibid* at p 449.
[133] *Understanding the New FIDIC Red Book*: Glover J and Hughes S, Sweet and Maxwell (2006) at p 391.

need to make an attempt at amicable settlement but do not explain how this is consistent with a condition precedent that an attempt must take place. It is therefore assumed that their reference to a condition precedent is to the need to wait for a 56-day period.

Baker, Mellors, Chalmers, Lavers[134] expressly disagree with the above view of Glover and Hughes[135] and state that "*depending on the governing law, the mandatory language of the first sentence* [of Sub-Clause 20.5] *may mean that there is a legal obligation to attempt to achieve a settlement before commencement of arbitration.*"

In the case of *Ohpen Operations v Invesco*[136] the Technology and Construction Court stated that:[137]

> *"There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement."*

O'Farrell J considered what was required for a valid dispute resolution clause. She concluded that there was no need to use the words "condition precedent" as long as the words used were clear that the right to commence arbitration or litigation is subject to the failure of the dispute resolution procedure.[138] The modern trend is therefore to enforce clauses such as Sub-Clause 20.5 and require the claimant to go through the amicable settlement process or, as a minimum, require them to wait 56 days before commencing the arbitration.

In the Australian case of *United Group Rail Services v Rail Corporation New South Wales*[139] the Court considered a contract for the design and build of rolling stock which contained a dispute resolution clause that provided that the parties should "*meet and*

[134] *FIDIC Contracts: Law and Practice*, Baker, Mellors, Chalmers, Lavers, Informa (2009) at p 542.
[135] *Ibid.*
[136] [2019] EWHC 2246 (TCC)
[137] *Ibid* at [58]
[138] *Ibid* at [53]
[139] (2009) 127 Con LR 202.

undertake genuine and good faith negotiation with a view to resolving the dispute". Alsopp P. stated:[140]

> *"a promise to negotiate (that is to treat and discuss) genuinely and in good faith with a view to resolving claims to entitlement by reference to a known body of rights and obligations, in a manner that respects the respective contractual rights of the parties, giving due allowance for honest and genuinely held views about those pre-existing rights is not vague, illusory or uncertain."*

Alsopp P. further held that such an approach met with public policy requirements, which promoted efficient dispute resolution and encouraged approaches by, and attitudes of, parties conducive to the resolution of disputes without expensive litigation or arbitration.[141]

In *International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd*[142] the High Court of Singapore had to consider whether a clause which referred to arbitration disputes "*which cannot be settled by mediation*" provided a condition precedent to arbitration that was too uncertain to be enforceable. The Singapore High Court found the agreement was not too uncertain and was binding on the parties.

In *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* [143] the English Technology and Construction Court had to consider the requirement in a contract of a 4-week period in which the negotiations were to take place. The claimant's counsel argued that the 4-week period created a condition precedent to be satisfied before the arbitrators would have jurisdiction to hear and determine the claim. The condition precedent was "*a requirement to engage in time limited negotiations*" and that requirement was not fulfilled because there had not been "*a continuous period of 4 weeks of consultations to resolve the claims*" which were the subject of the notice of termination.[144] Teare J. considered this provision important because the reference to a period of 4 continuous weeks ensures that a defaulting party cannot postpone the commencement of arbitration indefinitely. In conclusion Teare J. held:[145] "*There is, it seems to me, much to be said for the view that a*

[140] *Ibid* at [74].
[141] *Ibid* at [80].
[142] [2012] SGHC 226.
[143] [2014] EWHC 2104.
[144] *Ibid* at [4].
[145] *Ibid* at [52].

time limited obligation to seek to resolve a dispute in good faith should be enforceable. Such an agreement is not incomplete."

In an unreported arbitration, the arbitral tribunal held that the amicable settlement provisions at Sub-Clause 20.5 of a FIDIC contract were a condition precedent. The tribunal therefore concluded that it did not have jurisdiction to proceed with the arbitration in the absence of an attempt to settle the dispute.[146] The IBA Arbitration Guide for the Middle East similarly states that: "*Where mandatory pre-conditions to arbitration are not followed, a respondent may argue that the claim is inadmissible and that a constituted tribunal does not have jurisdiction to hear the dispute. Awards made notwithstanding a claimant's failure to follow the pre-conditions may be annulled by the courts.*"[147] Similarly, in an arbitration held in Dubai relating to a FIDIC form of contract the arbitration was suspended until the amicable settlement procedure had taken place and only then the arbitration proceeded.

Case law indicates that Sub-Clause 20.5 of the FIDIC contracts is often considered to be a condition precedent to arbitration and that if a party commences an arbitration, without waiting 56 days, the arbitral tribunal may find that the claim is inadmissible.[148]

Hindrance, Prevention and Refusal to Negotiate – A further question that arises is whether a party is entitled to commence an arbitration where one party refuses to enter into negotiations? The question of hindrance and prevention under a FIDIC 4th edn. contract was considered by the courts in *Al-Waddan Hotel Ltd v Man Enterprise SAL (Offshore)*.[149] In this case HHJ Raeside QC was asked to consider whether an arbitral tribunal had jurisdiction where an Engineer had failed to issue a decision under Sub-Clause 67.1 [*Engineer's Decision*] of the contract. HHJ Raeside QC referred to the case of *Panamena Europea Navigacion v Leyland*[150] and stated that where a party intends:[151]

[146] However, see *contra Emirates Trading Agency Llc v Sociedade de Fomento Industrial Private Ltd*.
[147] For a further discussion on admissibility and jurisdiction see Andrew Tweeddale, *Jurisdiction and admissibility in dispute resolution clauses,* Construction Law International Vol 16, Issue 1 page 13
[148] *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm)
[149] [2015] EWHC 4796.
[150] [1947] A.C. 428.
[151] [2015] EWHC 4796 [53].

> *"to rely on the non-performance of a condition precedent he must do nothing to prevent the condition from being performed, and if there is anything that must be done by him to render possible the performance of the condition, a failure by him to do what is required disentitles him from insisting on performance of the condition."*

HHJ Raeside QC then rhetorically asked the question why one party could simply not wait until the time for issuing a decision had elapsed and then commence arbitration. The learned judge set out two situations where a condition precedent would no longer be binding. First, referring to *Shell UK Ltd v Lostock Garages Ltd,*[152] the learned judge stated that if there was a "*clear*" and "*absolute*" refusal to perform a contractual function then both parties can proceed with the certain knowledge that this contractual requirement no longer binds them. However, the position of one party must be absolute and unequivocal if a party sought to escape from a condition precedent. Second, a party could be excused where there was hindrance and prevention by the other party (in this case a failure to appoint a new Engineer). Applying these observations to a time limited amicable settlement clause it would appear that if the clause is a condition precedent then a party may avoid having to wait 56 days before commencing arbitration if the other party shows an absolute and clear intention not to engage in amicable settlement discussions.

Sub-Clause 20.6 Arbitration

Sub-Clause 20.6 provides that, unless settled amicably, "*any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.*" The Parties may agree their own rules of arbitration but in the absence of an agreement the ICC Arbitration Rules apply with three arbitrators and the arbitration would be conducted in the language for communications. There is provision within the Particular Conditions to specify alternative arbitration rules and (unless prescribed in the rules) the entity which will nominate the arbitrator(s) and also administer the arbitration.

[152] [1976] 1 WLR 1187.

The FIDIC Guide makes clear that "*FIDIC will not nominate arbitrators, and does not have the facilities to administer or support arbitration in any way.*"

The arbitrator(s) may "*open up review and revise any certificate, determination, instruction, opinion, or valuation of the Engineer, and any decision of the DAB, relevant to the dispute.*" Evidence and arguments are not limited to that previously put before the DAB. As the Parties are expressly permitted to change their arguments, it is probable that the Parties may change or add to the contractual and other legal basis of their claims; although this may potentially give rise to challenges on admissibility. The Engineer may be called as a witness and the DAB decision will be admissible in evidence.

The arbitration may be commenced prior to the completion of the Works (or, indeed, thereafter) and the obligations of the Parties are not altered by reason of an arbitration being conducted during the progress of the Works.

"any dispute is respect of which the DAB's decision (if any) has not become final and binding"

Sub-Clause 20.6 is concerned with disputes where a notice of dissatisfaction has been served so that the decision (if any) has not become final and binding. This does not require that a claim asserted as a set-off first be submitted to the DAB.[153]

"Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision…"

This sub-paragraph is similar to Sub-Clause 20.4. A Party will not forfeit its claims, defences or rights of set-off by not submitting them first to the DAB.[154] However, this provision cannot be used to advance a new dispute into an arbitration, which has not been referred to the DAB.

"Any decision of the DAB shall be admissible in evidence in the arbitration."

[153] *Interim Award in Case 11813* ICC International Court of Arbitration Bulletin, Vol 24 No 2 at p 59.
[154] *Ibid*.

The FIDIC Contract does not specifically address the status of the DAB decision in a subsequent arbitration, save that it refers to it being admissible. Sub-Clause 20.4 states that: "*The decision shall be binding on both Parties…unless and until it shall be revised by amicable settlement or an arbitral award as described below."* The FIDIC Guide states that "*The arbitrator(s) may regard a well-reasoned decision as very persuasive, especially if it was given by a DAB with direct knowledge of how the Party was affected by the relevant event or circumstance.*"

Sub-Clause 20.7
Failure to Comply with Dispute Adjudication Board's Decision

This Sub-Clause provides that if neither party gives a notice of dissatisfaction, the DAB's decision becomes final and binding and if a Party fails to comply with it then the other Party may refer the failure to comply straight to arbitration.

What was referred to as the "*gap*" in the FIDIC 1999 contracts was the failure to refer a binding but not final decision straight to arbitration (or litigation). This scenario is different from the one covered in Sub-Clause 20.7 and it has been addressed in the 2017 FIDIC suite of contracts.

Sub-Clause 20.8
Expiry of the Dispute Adjudication Board's Appointment

The Sub-Clause provides that if a dispute arises and there is no DAB in place then Sub-Clauses 20.4 and 20.5 shall not apply and the dispute may be directly referred to arbitration under Sub-Clause 20.6.[155]

"whether by reason of expiry of the DAB's appointment or otherwise"

[155] This issue was considered in Taner Dedezade's article *Can a party ignore FIDIC's DAB process and refer its dispute directly to arbitration?* Corbett & Co Knowledge Hub 17/11/2014.

The issue of when a Party may go straight to arbitration without appointing a DAB has been the subject of much judicial debate. The word "*otherwise*" seems to suggest that if a DAB is not appointed when the dispute arises then a party is entitled simply to ignore the DAB and amicable settlement provisions and commence arbitration. However, the case law which is set out hereafter seems to suggest that a party may have a duty to try and operate the DAB provisions prior to commencing an arbitration.

The FIDIC Contracts Guide (First Edition, 2000) on Sub-Clause 20.8 states:

> *"There may be 'no DAB in place' because of a Party's intransigence (e.g., in respect of the first paragraph of P&DB/EPCT 20.2), or because the DAB's appointment had expired in accordance with the last paragraph of Sub-Clause 20.2. If a dispute arises thereafter, either Party can initiate arbitration immediately (subject to the first paragraph of P&DB/EPCT 20.2), without having to reconvene a DAB for a decision and without attempting amicable settlement. However, the claimant should not disregard the possibility of settling the dispute amicably."*

Interim Award in ICC Case 16155 (July 2010) concerned the FIDIC Red Book 1999. The arbitration proceedings were held in Paris. The arbitral tribunal found that the Claimant was entitled to refer the dispute to arbitration because the Respondent had "*forgone its rights to insist on the appointment of a DAB because it ignored the Claimant's attempt to appoint a DAB during performance of the Contract*". However, it stated:

> *"…the Tribunal believes that the mere fact that a DAB has not yet been appointed may not always permit a party to bypass resort to a DAB. The Tribunal should account for the specific facts of this case, and examine, in particular, the circumstances or reasons for which the parties did not constitute a DAB".*

This issue has also been addressed by the English High Court in *Doosan Babcock Limited v Comercializadora de Equipos y Materiales Mabe Limitada.*[156] The case concerned a modified form of the FIDIC Red Book 1999. Mr Justice Edwards-Stuart was asked to issue an interim injunction to restrain Mabe from making a demand under two performance guarantees – which it did. As there was no DAB in place (the standing DAB not having

[156] [2013] EWHC 3010 (TCC).

been appointed within the prescribed 42-day period) the Parties were entitled to refer the dispute directly to arbitration. Consequently, Doosan undertook to issue a request for arbitration under the ICC Rules as soon as reasonably practicable.

Final Award in ICC Case 18505[157] (November 2013) was a case under the FIDIC Yellow Book 1999. The Arbitral Tribunal found that a Claimant did not need to refer the dispute to the DAB, before referring to arbitration, where the DAB had not been established. The Arbitral Tribunal interpreted Sub-Clause 20.8 broadly and stated that it:

> *"did not see why the words 'or otherwise' in Sub-Clause 20.8 of the General Conditions should not precisely mean what they say; i.e. that a Party to the Contract is able to bring arbitration proceedings at any time if there is a dispute in circumstances where a DAB is, as in the present case, not 'in place'."*

The case of *Swiss Supreme Court Decision 4A 124/2014* is similar to the above in that the Swiss Supreme Court was asked to consider the issue of where one party prevented the DAB from being established. The case involved a FIDIC Red Book 1999. The Contractor referred a dispute to arbitration after trying to set up a DAB for 18 months. A partial award was issued. The Employer applied to the Court to annul the partial award and order that the Contractor pay the costs of the arbitral and Court proceedings. The Swiss Supreme Court held that the arbitral tribunal did have jurisdiction to hear the dispute. Whilst it confirmed that reference of a dispute to a DAB was mandatory before commencing arbitration, it took into account the Employer's passivity and found that it would be a breach of good faith for the Employer to insist on referring the dispute to DAB when it had interfered with the constitution of it.

The Court said that a broad interpretation of Sub-Clause 20.8 would mean that *"…it would be sufficient for a DAB not to be operational at the time arbitration proceedings are initiated, no matter for what reason, for a decision of this body to become optional. Such a conclusion would ultimately turn the alternate dispute resolution mechanism devised by FIDIC into an empty shell."* It continued:

[157] ICC Dispute Resolution Bulletin 2015 No 1 p 137.

> *"First, while it is true that pursuant to Art. 1.2 of the General Conditions the titles do not have to be taken into consideration when interpreting the aforesaid conditions, comparing their text with that of the Sub-Clause they are a title to is still of some interest to understand it properly. As to Sub-Clause 20.8, it appears that what is contemplated here is primarily the exceptional situation in which the mission of a standing DAB expires at the end of the time limit it was given before a dispute arises between the parties. As to the reason for this Sub-Clause, some Red Book commentators emphasize that in its absence there would be uncertainty as to whether the dispute could nonetheless be submitted to arbitration or instead to the competent state court (Baker, Mellors, Chalmers and Lavers, op. cit., p. 552, n. 9.222), whilst other commentators even go as far as excluding any legal recourse other than an amicable settlement in such a case (Glover and Hughes QC, op. cit., p. 409, n. 20-080)".*

Regarding the words *"or otherwise"* the Court commentated:

> *"This very vague expression doubtlessly does not facilitate understanding the Sub-Clause in question. Yet, interpreting it literally and extensively would short-circuit the multi-tiered alternative dispute resolution system imagined by FIDIC when it came to a DAB ad hoc procedure because, by definition, a dispute always arises before the ad hoc DAB has been set up, in other words, at a time when "there is no DAB in place," however, such interpretation would clearly be contrary to the goal the drafters of the system had in mind (Baker, Mellors, Chalmers, and Lavers, op. cit., p. 553, n. 9.224). The expression "or otherwise" must, in reality, permit taking into consideration other occurrences than the mere expiry of the mission of the DAB without limiting them to any objective circumstances independent of the will of the parties, as the Appellant would like – without substantiating its opinion in this respect on the text of Sub-Clause 20.8. According to the guide published by FIDIC and quoted in the award under appeal, these other occurrences could include the inability to constitute a DAB due to the intransigence of one of the parties (The FIDIC Contracts Guide, 2000, p. 317 i.f.). The finality of the Sub-Clause in question is ultimately to preserve the capacity of the parties in any circumstance to avail themselves of one of the dispute resolution mechanisms they agreed upon and in particular of the most important one, namely arbitration (Baker, Mellors, Chalmers, and Lavers, op. cit., p. 553, n. 9.223)".*

> *"Finally, the same applies to the aforesaid passage of the FIDIC guide in which the intransigence of a party is given as an example of a situation in which the implementation of the DAB may be omitted. That the mandatory recourse to the DAB may suffer certain exceptions does not suggest that resorting to this body would allegedly be voluntary but rather confirms the general rule making the recourse to this alternate dispute resolution mechanism compulsory before introducing a request for arbitration."*

The English case of *Peterborough City Council v Enterprise Managed Services Ltd*[158], concerned the FIDIC Silver Book 1999. Mr Justice Edwards-Stuart thought that there was a significant distinction between FIDIC's Red Book, which required a standing DAB, and the Yellow and Silver Books, which provided for *ad hoc* DABs. He held that where a dispute arises where there is only an *ad hoc* DAB then the Parties had to attempt adjudication prior to commencing an arbitration. The point made was that as a dispute would always arise prior to the appointment of the DAB (where it was *ad hoc*) then if there was no obligation to use the DAB the whole process could be circumvented. Edwards-Stuart J. held: "*It seems to me 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, rather than the procedure of appointing an ad hoc DAB after a dispute has arisen*". He went on to reject the submissions that Sub-Clause 20.8 gives a Party a unilateral right to opt out of the DAB process. He stated:[159] "*the contract requires that the determination of the current dispute is to be by way of adjudication and amicable settlement under sub-clauses 20.4. and 20.5 and, only failing that, by litigation.*"

The South African case of *Divine Inspiration Trading 130 (PTY) Limited v Aveng Greenaker-LTA (Pty) Ltd and others*[160] highlights the problems caused by not appointing a standing DAB. This was a dispute under a FIDIC Red Book 1999. The contract provided for appointment of a standing DAB which was not complied with. Subsequently, Divine Inspiration Trading referred a dispute directly to arbitration. It relied on Sub-Clause 20.8. An arbitral tribunal was appointed by the Association of Arbitrators of South Africa. The Respondent argued that the arbitral tribunal had no jurisdiction to hear the dispute. After

[158] [2014] EWHC 3193.
[159] [2014] EWHC 3193 at [36].
[160] (2015/10455) [2016] ZAGPJHC 99 (13 May 2016).

hearing submissions from both Parties, the arbitral tribunal found (without giving reasons) that it had no jurisdiction. Divine Inspiration Trading then requested that the Court should order the Association of Arbitrators of South Africa to appoint another Arbitral Tribunal. The Association of Arbitrators of South Africa argued that it could not do so. The Court found that the relief sought by Divine Inspiration Trading was misdirected. Further, the Court was not persuaded to grant the relief sought.

In *ICC Final Award 19581,*[161] the Arbitral Tribunal gave a broad interpretation to the word "*otherwise*". This was a case where the Claimant elected to bypass the DAB provisions and referred the dispute straight to arbitration. In this case a DAB had been appointed but the Arbitral Tribunal found that there was no longer a valid DAB in place because the DAB member lacked the necessary independence and impartiality at the time the dispute arose.[162] The facts related to a failure by the DAB member to update its notice of disclosure about its relationship with an employee of one of the parties. The Arbitral Tribunal held that this was a breach of Clauses 3 and 4 of the General Conditions of Dispute Adjudication Agreement.

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[161] [2015] ICC Dispute Resolution Bulletin 2015 No 1 at p 147.
[162] *Ibid* at [289].