

MDA CONSULTING



FIRST AID FOR CONTRACTS



Seventh Edition – July 2015

The pertinent clauses of FIDIC (Red Book), in this regard, are Clauses 20.4, 20.6 and 20.7.

FIDIC: Enforcing Adjudicator's Awards Under FIDIC

The relevant portion of Clause 20.4 states:

Introduction

MIND THE LACUNA

Any party who is regularly involved in the cut and thrust of adjudication proceedings will, from time to time, know the sting of defeat. This, of course, will be due to either the “poor workmanship of his legal team”, the “incompetence of the adjudicator” or the “blatantly misleading statements made by the opposition”. Never due to any weakness in his case!

There is a perceived gap or lacuna in the FIDIC dispute clauses. Parties who have received an unfavourable ruling from a DAB are often tempted to take advantage of this perceived lacuna in order to avoid making payment in terms of such ruling.

“...the DAB shall give its decision...The decision shall be binding on both Parties, 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. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed

with the Works in accordance with the Contract...If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction.”

The adjudication process itself is still relatively new to South Africa and the law surrounding the enforcement of awards resulting from this process has not yet been developed to the standards, for example, of the United Kingdom. This situation is not assisted by unclear or ambiguous contractual clauses employed to govern this process.

The relevant portion of Clause 20.6 states:

“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.”

For these reasons, a losing party may feel justified in taking steps to avoid making payment in terms of a DAB award, pending the outcome of arbitration proceedings. Such a party will often attempt to rely on what is commonly perceived as a gap or lacuna in the FIDIC dispute clauses.

Clause 20.7 states:

“In the event that:

Disclaimer: *The contents of this newsletter does not constitute legal advice. If you have a specific problem please contact MDA on 011 648 9500, at our Durban office on 031 764 0811 or by e-mail on info@mdaconsulting.co.za*

- (a) *neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],*
- (b) *the DAB's related decision (if any) has become final and binding, and*
- (c) *a Party fails to comply with this decision,*

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference."

It will be noted from the above, that there are two scenarios envisaged. Firstly, where a DAB award has been made and no Notice of Dissatisfaction delivered within the 28 day period, this award becomes final and binding, and the successful party may enforce it by way of arbitration proceedings, in terms of Clause 20.7.

The second scenario, is where the DAB award has been made, but a Notice of Dissatisfaction has been delivered within the 28 day period. In terms of Clause 20.4, this decision is binding, but not final. In order to obtain a final and binding decision, the dispute must then be referred to arbitration, for a decision upon the merits, in terms of Clause 20.6.

This is where the perceived lacuna rears its head. In terms of certain schools of thought, where a DAB's award is binding but not final, it cannot be enforced by way of either Clause 20.6 or Clause 20.7 thus rendering it unenforceable pending the outcome of the arbitration proceedings.

There have been a number of cases referred to court in recent years, concerning a successful parties right to enforce such binding but not final award, prior to the outcome of the arbitration proceedings.

In the matter of Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd, 12 February 2013 (Case No. 12/7442 – South Gauteng High Court, Johannesburg), Esor Africa/Franki Africa applied to the High Court for the enforcement of a DAB's award. In defence of this application Bombela, attempting to rely upon the above perceived lacuna argued that *"once a notice of dissatisfaction is given then the parties are required to engage one another in attempting to settle the matter amicably failing which the matter must go to arbitration"*.

The court found, however, that:

"the issues are resolved by a proper interpretation of the dispute resolution clauses dealing with the effect of a DAB decision...clause 20.4, 20.5 and 20.6 of the contract ought to be considered together.

...[Clause 20.4 makes] it clear that the applicant was entitled to receive cash flow in accordance with the outcome of a favourable DAB decision on a monetary claim. The benefit gained by the respondent was that the applicant could not withhold performance of its obligations but was obliged to carry on with the works even if a DAB finding was not in its favour. In the construction industry cash flow for the contractor and ensuring completion of the works for the employer are essential. The DAB provision is clearly intended to provide an expedited process of

Disclaimer: *The contents of this newsletter does not constitute legal advice. If you have a specific problem please contact MDA on 011 648 9500, at our Durban office on 031 764 0811 or by e-mail on info@mdaconsulting.co.za*

dealing with disputes as and when they arise, including the adequacy of interim payment certificates. The DAB decision is not final but the obligation to make payment or otherwise perform under it is. In the most elementary way the DAB process ensures the interim solution of an issue which requires performance and requires that the decision is implemented. The parties' position may be altered by the outcome of the eventual arbitration which is a lengthier process and there may be a refund ordered of monies paid or an interest readjustment if too little was decided by the DAB.

The key to comprehending the intention and purpose of the DAB process is that neither payment nor performance can be withheld when the parties are in dispute.

In order to give effect to the DAB provisions of the contract the respondent cannot withhold payment of the amount determined by the adjudicator, and in my view 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. In my view it was precisely to avoid this situation that the clauses were worded in this fashion."

This decision was cited with approval in the matter of Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Limited, 3rd May 2013 (Case No. 06757/2013 – South Gauteng High Court, Johannesburg).

These two decisions rightly highlight what appears to be a general misunderstanding regarding the purpose of adjudication proceedings, which is, in fact, to promote cash flow.

Addressing this very issue, the Minister of Public Works has recently published a proposed amendment of the regulations issued in terms of the Construction Industry Development Board Act No. 38 of 2000 (the Prompt Payment Regulations), for public comment.

Regulation 26R [Effect of adjudicator's decision] of these proposed regulations states:

- "(1) Notwithstanding any intention to take the decision of an adjudicator on review or on arbitration, the parties must give effect to the adjudicator's decision within 10 days from the delivery of that decision.*
- (2) The decision of an adjudicator constitutes a liquid document or in the case where it orders the payment of an amount of money, a liquidated amount as contemplated in Rule 32(1) of the High Court Rules."*

Should these regulations be issued in their current form, this will go a long way towards addressing the gaps, perceived or otherwise, currently to be found in the adjudication process and permitting the adjudication process to serve the purpose for which it was intended, without need for relatively lengthy and sometimes unpredictable court proceedings.

Author: Michelle Kerr

Disclaimer: *The contents of this newsletter does not constitute legal advice. If you have a specific problem please contact MDA on 011 648 9500, at our Durban office on 031 764 0811 or by e-mail on info@mdaconsulting.co.za*