

Enforcement of DAB Decisions in Romania

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The Problem

Pursuant to sub-clause 20.4 [Obtaining Dispute Adjudication Board's Decision] a DAB Decision, irrespective of a Notice of Dissatisfaction having been served or not, 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.

If the losing party does not promptly give effect to the DAB Decision, the winning party should be able to seek enforcement which means as a first mandatory step to obtain a writ of execution ordering the losing party to comply with the DAB Decision.

Arbitral awards – available but under what conditions?

The Arbitral Award (I)

Final and Binding DAB Decisions – an easy route

Sub-clause 20.7 [Failure to comply with Dispute Board's Decisions]

In the event that:

- a) Neither Party has given notice of Dissatisfaction with 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.

The arbitral award (II)

Binding but not final Decisions – a historical challenge

DAB decisions which are only binding, but not final as at least one Notice of Dissatisfaction has been served do not benefit of the direct fast track provisions of sub-clause 20.7.

This has been identified in the doctrine as “the gap in sub-clause 20.7”, in respect of which different remedies were suggested:

- Amendment of sub-clause 20.7 by removing the restriction to the final and binding nature of the DAB Decisions;
- Amendment of sub-clause 20.4 by including a contractual deadline by which the dissatisfied party should be allowed to refer the case in arbitration.

The arbitral award (III)

Sub-clause 20.6

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 arbitrator(s) shall have full power to 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. (...)

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, or the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible as evidence in the arbitration.

The arbitral award (IV)

Two key questions:

1. Can enforcement of binding but not final DAB Decisions be sought pursuant to sub-clause 20.6?
2. Can a tribunal vested with such a request rule on it without opening up, reviewing and revising the merits of the respective DAB Decision?

The arbitral award (V)

Arguments for positive answers:

- The failure to promptly give effect to the DAB Decision which is binding but not final represents a different dispute from the underlying merits decided upon by the DAB.
- Such failure to comply with sub-clause 20.4 can be referred to arbitration just as any other dispute arising from or in connection with the contract.
- The dispute referred to arbitration is limited to the losing party's failure to comply with sub-clause 20.4.
- Under sub-clause 20.6, the arbitral tribunal has the power but not the obligation to open up, review and revise the DAB Decision.

The arbitral award (VI)

Successful reported cases of enforcement:

1. Case 10619/2001

The tribunal accepted to order enforcement by way of an interim award justifying its solution by reference to the will of the parties rather than urgency, irreparable harm or prima facie entitlement.

2. Case 16948/2011

The tribunal upheld Claimant's request and ordered immediate payment on grounds that no party sought to have the DAB Decisions revised and that the only dispute actually referred which should be analysed on the merits is Respondent's failure to comply with sub-clause 20.4

The arbitral award (VII)

Unsuccessful reported case of enforcement:

Case 16122/2009 (Singapore case)

The tribunal ordered payment by way of final award reserving Respondent's right to commence arbitration for the revision of the DAB Decisions.

The award was set aside by Indonesian courts as for the following main reasons:

- The Claimant had not referred Respondent's failure to comply with the DAB decision to DAB;
- Sub-clause 20.6 does not allow an arbitral tribunal to make final and binding DAB Decision without hearing the merits of that DAB decision
- By refusing to open up, review and revise the DAB Decision, the arbitral tribunal ignored the language of sub-clause 20.6 to "finally settle" the dispute between the parties.

The arbitral award (VIII)

- 1st of April 2013 FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract:
- *“designed to make explicit the intentions of FIDIC in relation to the enforcement of the DAB decisions that are binding and not yet final which is that in the case of failure to comply with these decisions, the failure itself should be capable of being referred to arbitration under sub-clause 20.6 [Arbitration] without sub-clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and sub-clause 20.5 [Amicable Settlement] being applicable to the reference.”*

The arbitral award (IX)

Lessons to be learned

If you are a Claimant in an enforcement case:

- Re-refer the second dispute to DAB;
- When fully satisfied with the DAB Decision, refer to arbitration solely the second dispute;
- If the underlying merits are also included in the proceedings, request for bifurcation and make sure that the arbitral tribunal understands the crux issue, i.e. that the failure to comply with sub-clause 20.4 is distinct from the underlying dispute.

If you are a Respondent in an enforcement case:

- Include the request for the tribunal to open up, review and revise the DAB Decision in a counterclaim rather than a mere defence.

**Court judgements –
currently not an available
remedy**

Court judgments

Arguments pro enforcement by way of “payment ordinance” fast track procedure provided by the Civil Procedure Code in force as of 15 February 2013

- Payment ordinance is a special procedure available only in front of courts of law, not compatible with arbitration rules;
- Any creditor which had not expressly waived its right to apply this procedure should benefit from it;
- The arbitration clause in the Statutory forms of Contract do not include any such waiver;
- Denying access to this procedure in front of the courts is equal with denying any and all access to this procedure, where no waiver had been made by the creditor;
- Such denial results in a breach of constitutional equal treatment and non-discrimination principle.

Thank you.