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THE FIDIC DAB: LEGAL NATURE, EFFECTS AND INTERACTION WITH ARBITRATION AGREEMENT***

Summary

The paper examines the Dispute Adjudication Board (DAB) as an integral component of the multi-tier dispute resolution clause within FIDIC contracts, focusing on three key aspects. Firstly, it analyzes the legal nature of the DAB and whether it satisfies the conditions necessary to align with the right to a fair trial under the European Convention on Human Rights. Secondly, it examines the effects of DAB decisions, focusing on issues of their finality, binding nature and enforceability. The discussion highlights the contractual obligations arising from DAB decisions and their impact on subsequent legal proceedings.

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Thirdly, the paper explores whether the DAB is an obligatory step in the multi-tier dispute resolution clause preceding arbitration. It assesses the mandatory nature of this pre-arbitration mechanism, the consequences of bypassing it, and exceptions that may apply. Together, these aspects underline the DAB's pivotal role in construction dispute resolution frameworks.

***Key words*:** *FIDIC. – DAB. – Construction Arbitration. – Enforceability. – Multi-Tier Dispute Resolution Clause.*

I Introduction

Construction projects are of immense importance to every country, encompassing a wide range of infrastructure, from traditional civil engineering works like buildings, bridges, roads and highways to cutting-edge projects such as wind farms and heavy-duty oil and gas processing plants.[1] These ventures require substantial time, effort and financial investment, often giving rise to intricate legal relationships across multiple levels. These relationships frequently involve international stakeholders and financial institutions. Consequently, the standardization of contract conditions becomes essential, benefiting all parties involved – employers, engineers, contractors and banks alike,[2] by providing a clear, uniform framework that ensures smoother project execution and reduces the potential for disputes.

The International Federation of Consulting Engineers (FIDIC), as the global representative body for national associations of consulting engineers, recognized the need for standardized construction contracts and, in the 1950s, published the first edition of the Conditions of Contract for Works of Civil Engineering Construction. This marked the beginning of the influential FIDIC contract system, which has since become a cornerstone for international construction contracts worldwide. Over the years, FIDIC has issued numerous standard forms of contracts and best practice guidelines. Notably, the 1999 publication of the „rainbow suite"[3] of contracts significantly

1 Turner&Townsend, The FIDIC Suite of Contracts, available at: *https://fidic.org/sites/default/files/FIDIC_Suite_of_Contracts_0.pdf*, 9. 9. 2024, 2.

2 Michel Nardin, „A Practical Approach on the FIDIC Principles", *Revista Română de Arbitraj*, Vol. 3, Nr. 3/2009, 34.

3 The FIDIC published: Conditions of contract for Construction for Building and Engineering Works designed by the Employer: The Construction Contract (Red Book), Conditions of Contract for Plant and Design-Build for Electrical and mechanical Plant, and for Building and Engineering Works, designed by the Contractor: The Plant and Design/Build Contract (Yellow Book), Conditions of Contract for EPC/Turnkey Projects: The EPC/Turnkey Contract (1) (Silver Book), Short form of Contract: The Short Form (Green Book).

shaped the global construction industry by providing essential frameworks for various project types.

In 2017, FIDIC introduced a new, upgraded suite of contracts, enhancing the 1999 editions. These updates aimed to address modern project complexities, improve risk management and provide clearer contractual guidance. Accompanying the new suite was a comprehensive guide designed to help stakeholders navigate the updated terms and effectively implement them in practice. These revisions further solidified FIDIC's role as a global standard in construction contract management.

Large construction projects carry significant risks of disputes due to their complexity, the involvement of multiple parties, high value and their dependence on various economic, labor, political, environmental, and global conditions. The construction industry as a whole, along with individual projects that often span several years or even decades, faces numerous risks. Currently, the construction market is grappling with major social and economic challenges, including war, the lasting effects of the pandemic, climate change and increasing inequality. Population growth and the rising demand for natural resources have further strained societies and placed additional pressure on the industry. As a result, the construction industry has experienced serious repercussions such as disrupted supply chains, rising material costs, project delays and labor shortages.[4] At the same time, the average value of disputes has significantly increased.[5] In Serbia, construction activity continues robustly, with the highest value concentrated in three types of projects: transportation infrastructure, non-residential buildings and residential developments,[6] especially in light of the upcoming needs for the Belgrade Expo 2027. On the global stage, construction contracts are commonly executed using various FIDIC standard forms, a practice that is also prevalent in the Southeast European region.[7]

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4 See the global report for 2022: Arcadis, 2022 Global Construction Disputes Report, Successfully Navigating Through Turbulent Times, 2022, available at: *https://www.arcadis.com/en/knowledge-hub/perspectives/global/global-construction-disputes-report*, 16. 11. 2024, 6.

5 See the report for North America: Arcadis, Construction Disputes Report 2023, available at: *https://www.arcadis.com/en-us/knowledge-hub/perspectives/north-america/united-states/2023/construction-disputes-report-2023*, 16. 11. 2024, 2.

6 See Statistical Office of the Republic of Serbia, Construction activity, 2024, available at: *https://www.stat.gov.rs/en-us/oblasti/gradjevinarstvo/gradjevinska-aktivnost/*, 16. 11. 2024.

7 The use of FIDIC standard terms is recommended by major financial institutions, including the World Bank, the International Bank for Reconstruction and Development, leading international commercial banks, investment funds, and other prominent investors. See Selma Mujezinović, „Upotreba opštih i posebnih uslova FIDIC ugovora u Srbiji – ograničenja i teškoće njihove primene i opasnosti njihove pogrešne primene", *Pravo i privreda*, Nr. 7–9/2011, 367. FIDIC forms of contract are widely used, particularly

Given the significant value, complexity and societal impact of the construction industry, it is crucial that the management of dispute resolution processes is conducted efficiently and effectively. One of the most important clauses in FIDIC standard contracts is the one addressing dispute resolution. This multi-tier clause outlines a structured process, beginning with the initial stage of claim resolution by Engineer, after which the claim is formally transformed into a dispute. Once this occurs, the dispute resolution clause is activated. The parties are first required to submit their dispute to a Dispute Adjudication Board (DAB) or in new FIDIC terms, Dispute Avoidance and Adjudication Board (DAAB).[8] If the DAB process fails, the parties are directed to attempt an amicable settlement, and as a final step, the dispute may be referred to arbitration or, in rare cases, litigation.[9]

DAB was introduced into FIDIC with the primary aim of ensuring prompt payment to the contractor of interim instalments of the contract price, notwithstanding that the underlying dispute would eventually be finally determined in other proceedings.[10] There are two types of DABs in the FIDIC forms: (1) the standing DAB, which is appointed by the parties at the outset of the contract and remains in place until the end of contract performance; and (2) the *ad hoc* DAB, which is appointed after a dispute has

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in the Middle East, Southeast Asia, and Eastern Europe. In our neighbouring country, Bosnia and Herzegovina, they are especially prevalent in the construction of highways, railways, and dams. See Almir Gagula, Zlatan Meškić, „Termination of the contract under FIDIC – the perspective of Bosnia and Herzegovina", *Revija Kopaoničke škole prirodnog prava*, Nr. 2/2020, 57–58.

8 This paper will use the original term „DAB" and conduct analysis based on the FIDIC 1999 Edition. While the FIDIC 2017 Edition maintains the overarching dispute resolution framework of the 1999 Edition, it renames the Dispute Adjudication Board (DAB) as the Dispute Avoidance and Adjudication Board (DAAB). The 2017 Red Book provides a more detailed scheme, expanding the provisions on claims and disputes from 4 to over 10 pages, with an added focus on conflict avoidance. See Marco Schoups, Geert de Buyzer, Pim van de Bos, „Demystifying construction disputes and FIDIC", *Liber Amicorum CEPANI (1969–2019): 50 Years of Solutions* (eds. Dirk De Meulemeester, Maxime Berlingin), Wolters Kluwer, Alphen aan den Rijn, 2019, 448.

9 Construction disputes are generally not well-suited for submission to courts in most jurisdictions, especially in Serbia and the region. These disputes involve an enormous amount of documentation, exhibits, and reports, often with multiple parties and issues that are highly complex, requiring technical expertise and experience to be adequately addressed. Arbitration offers more flexibility, including the option to appoint a non-lawyer, such as an engineer, as an arbitrator. However, it is not advisable to have an arbitral tribunal without any legal professionals, as construction disputes frequently involve complex legal issues in addition to technical ones.

10 Herbert Smith Freehills, Enforceability of Dispute Adjudication Board's Decision in FIDIC Contracts, London, 2015, available at: *https://www.herbertsmithfreehills.com/latest-thinking/enforceability-of-dispute-adjudication-boards-decision-in-fidic-contracts*, 16. 11. 2024.

arisen. DAB decides on its procedures, however the members (adjudicators) of the DAB must note that they are not empowered to act as arbitrators. The procedure to be followed should be inquisitorial rather than adversarial.[11]

The aim of this paper is to analyze this critical first step in the FIDIC multi-tier dispute resolution process. First, we will examine the legal nature of the DAB, followed by an analysis of the effects of its decisions. Lastly, we will explore the intersection between the DAB process and arbitration, which serves as the final stage in the dispute resolution mechanism.

II Legal Nature

1. How does dispute resolution mechanism in FIDIC work?[12]

The first stage of the contractual parties' procedure in resolving the claim starts after timely submission of the notice of a claim. A claim is essentially a request from one party for something which it considers is due to him under the terms of the contract.[13] Under FIDIC's 1999 Red, Yellow, and Silver Books (sub-clause 20.1), if the contractor believes they are entitled to an extension of time or additional payment, they must notify the engineer of the event or circumstance within 28 days of becoming aware of it. Failing to do so forfeits the contractor's claim, freeing the employer from any related liability. Conversely, while the employer must also notify claims promptly, a delay does not affect the employer's entitlement to the claim (per sub-clause 2.5).[14] In this stage, additionally, the contractor is obliged to submit to the employer a claim with complete details about the event giving rise to its right to an extension of time or additional payment within the period of 42 days from the day when the contractor became aware of the stated event. When the employer receives the detailed claim, it should respond to the contractor

11 Michael Mortimer-Hawkins, Clause 20, Dispute Resolution, FIDIC Contracts Committee, available at: *https://fidic.org/sites/default/files/24%20CLAUSE%2020,%20DISPUTE%20RESOLUTION.pdf*, 16. 11. 2024, 10.

12 The dispute resolution method under FIDIC Contracts is discussed in numerous doctrinal contributions. See instead all Cremona Ana Maria Cotovelea, „A Comparative View between FIDIC 1999/2017 Editions, Part 1 – Constitution", *Romanian Arbitration Journal*, Nr. 1/2011, 80–90; M. Schoups, G. de Buyzer, P. van den Bos, 445–456; Götz Sebastian Hök, FIDIC/MBD Approach in Respect of DAB, available at: *https://www.disputeboard.org/wp-content/uploads/2016/02/110bppt-sebastian-hok.pdf*, 16. 11. 2024.

13 M. Mortimer-Hawkins, 2.

14 On enforceability of this term under the Croatian law see Davor Babić, Fran Pelicarić, „Chapter 7: Validity of the Time Bar under FIDIC Sub-Clause 20.1 in Croatian Law", *Construction Arbitration in Central and Eastern Europe: Contemporary Issues* (eds. Crina Baltag, Cosmin Vasile), Kluwer Law International, Alphen aan den Rijn, 2019, 140.

in the next 42 days, whether it approves the claim or not, with a detailed explanation of its decision. If the employer does not approve the claim, it is possible to start the next stage of the procedure in resolving the contractor's claim.

A dispute arises when a party does not agree with the claim, so the claim becomes a dispute.[15] Within the dispute resolution phase, the parties shall appoint the members of the DAB, within 28 days after one party informs other party of its intention to refer their dispute to the DAB. DAB's task is to propose the resolution of dispute to the parties.[16] If some of the parties disagree with the DAB's proposed decision, it is entitled to start the next stage of the procedure to resolve the dispute. After an attempt to amicably resolve the dispute or 56 days from when the notice of dissatisfaction (NOD) was given without an attempt to amicably resolve the dispute, parties can go to the final stage of resolving their dispute. It usually consists of starting the procedure before the arbitration.

In brief, the multi-tier dispute resolution clause is activated when a dispute occurs. The first tier must be based on a „dispute", i.e. not just a difference of opinion that is still under discussion. The key to the door to clause 20.4 lies in clause 3.5[17] – i.e. non-acceptance of an engineer's determination.[18] In general, the construction dispute can be defined as a disagreement between two parties, typically the owner and the contractor, where they differ in their interpretation or assertion of a perceived contractual right. This disagreement often results in a determination by the owner, following the process outlined in the contract. If the contractor disputes this

15 A conflict arises when one party feels that another party has either frustrated or is about to frustrate its interests or concerns. It's important to note that a conflict can exist even if the other party is unaware of the situation. The conflict doesn't depend on the other party's awareness or reaction, but on the perception of the first party. Conflicts can involve various issues, such as disagreements over facts, resource allocation, values and principles, strategies, or personal relationships. A conflict becomes a legal dispute when one party formally makes a claim, and the other party responds by rejecting or opposing that claim. See Klaus Peter Berger, „Private Dispute Resolution in International Business", *Negotiation, Mediation, Arbitration*, Volume II, Kluwer Law International, 2006, 21.

16 See M. Mortimer-Hawkins, 2.

17 General Conditions, sub-clause 3.5: Whenever these Conditions provide that the Engineer shall proceed in accordance with this sub-clause 3.5 to agree or determine any matter, the Engineer shall consult with the Contractor in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to the Contractor of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination, unless and until revised under clause 20.

18 M. Mortimer-Hawkins, 2.

determination, the issue escalates into a formal dispute, potentially requiring resolution through adjudication, arbitration or litigation.[19]

It is multi-tiered dispute resolution clause that consists of three separate tiers:

FIRST TIER: DISPUTE ADJUDICATION BOARD *(primarily)*
SECOND TIER: AMICABLE SETTLEMENT *(secondly)*
THIRD TIER: ARBITRATION *(finally, as last resort)*

Under FIDIC general terms, parties are obliged to follow all stages of dispute resolution mechanism and consequently to refer their dispute to a DAB.[20]

In the context of dispute resolution, where a notice of dissatisfaction with the decision rendered by the DAB has been communicated, the parties are obligated to engage in an amicable settlement process before escalating the issue to arbitration. If a mutually acceptable resolution is not reached within 56 days, either party is then entitled to refer the dispute to arbitration. According to Glover and Hughes,[21] sub-clause 20.5 represents a condition precedent, and as such, parties must make an effort to secure an amicable settlement for a prescribed duration of 56 days before resorting to arbitration. The authors acknowledge that a party may not necessarily need to make such an attempt at amicable resolution, but they fail to clarify how this is consistent with the condition precedent requiring such an attempt. It is thus inferred that their allusion to a condition precedent is solely in reference to the mandatory 56-day waiting period.

Critics have argued that the mandatory settlement period is an exercise in futility since the parties are often entrenched in their respective positions, making a voluntary settlement impracticable. Nevertheless, we hold a divergent view on this matter. In reality, this prescribed period provides the parties with a valuable opportunity to undertake a comprehensive cost-benefit analysis and weigh the possible implications of pursuing arbitration. Furthermore, where one party is contemplating initiating arbitration, the mandatory cooling-off period allows for a tempering of emotions and affords an opportunity for a more considered approach to be taken prior to making the final decision. In light of this, the mandatory settlement period serves an essential purpose and should not be discounted.[22]

19 The definition derogated from Arcadis, Construction Disputes Report 2023, 3.

20 See further *infra*.

21 Jeremy Glover, Simon Huges, *Understanding the New FIDIC Red Book*, Sweet and Maxwell, 2006, 391.

22 For the same thoughts see M. Mortimer-Hawkins, 10.

If a DAB decision has become both final and binding and a party fails to comply, that non-compliance can be directly referred to arbitration without going through the amicable settlement process under Clause 20.5.[23]

2. DAB in conjunction with the right to a fair trial

In assessing the legal nature of the DAB, it is essential to consider it within the framework of fundamental rights, as guaranteed by national courts bound by the European Convention on Human Rights (ECHR or Convention)[24] and the jurisprudence of the European Court of Human Rights (ECtHR). When reviewing arbitral awards in recognition or annulment proceedings, national courts should respect the rights enshrined in the ECHR. Consequently, arbitrators and all participants in arbitration must ensure that their actions do not infringe upon the fundamental rights safeguarded by the Convention.

Accordingly, it is crucial to assess whether the DAB procedure aligns with the fundamental right to a fair trial. The right to a fair trial, as enshrined in art. 6 para. 1 of the ECHR implies that in the determination of their civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This right includes, among other things, the right of access to a court. This right was elaborated upon by the ECtHR in *Golder v. the United Kingdom*,[25] which defines the scope of access to justice under Article 6.

In principle, everyone has the right to have any claim relating to his „civil rights and obligations" brought before a court or tribunal. In this way art. 6 para. 1 embodies the „right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect.[26] Art. 6 para. 1 may therefore be relied on by anyone who considers that an interference with the exercise of its civil rights is unlawful and complains that it had not the possibility of submitting that claim to a tribunal meeting the requirements of art. 6 para. 1. Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or to the scope of the asserted civil right, art. 6 para. 1 entitles the individual

23 *Ibid*., 11.

24 European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. Serbia ratified the ECHR – *Official Gazette of Serbia and Montenegro – International Agreements*, Nos. 9/2003, 5/2005, and 7/2005, and *Official Gazette of the Republic of Serbia – International Agreements*, Nos. 12/2010 and 10/2015.

25 ECtHR, *Golder v. the United Kingdom*, Judgment of February 21, 1975, paras. 28–36.

26 *Golder v. the United Kingdom*, para. 36.

concerned „to have this question of domestic law determined by a tribunal".[27] The refusal of a court to examine allegations by individuals concerning the compatibility of a particular procedure with the fundamental procedural safeguards of a fair trial restricts their access to a court.[28]

3. Limitations which may affect the DAB Procedure[29]

The „right to a court" and the right of access are not absolute. They may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.[30] Furthermore, a limitation will not be compatible with art. 6 para. 1 if it does not pursue a legitimate aim and if there is not a „reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[31]

The right of access to a court must be „practical and effective".[32] For the right of access to be effective, an individual must „have a clear, practical opportunity to challenge an act that is an interference with his rights",[33] or a clear, practical opportunity to claim compensation.[34]

The rules outlining the procedural steps and time limits for filing an appeal or seeking judicial review are designed to uphold the proper administration of justice and ensure adherence to the principle of legal certainty.[35] Consequently, the rules in question, or their application, should not obstruct litigants from exercising an available remedy.[36]

27 ECtHR, Judgment of December 14, 2006, *Markovic and Others v. Italy* [GC], 2006, para. 98.

28 ECtHR, Judgment of June 21, 2016, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], 2016, para. 131.

29 Hereinafter we refer only to limitations which may affect the DAB Procedure. For more limitations such as state immunity etc., see instead all Christoph Grabenwarter, Katharina Pabel, „Article 6", *EMRK Kommentar*, 7. Auflage, München, 2021, No. 50 and ff, or consult the ECtHR case law.

30 European Court of Human Rights, Guide on Article 6 of the Convention – Right to a fair trial (civil limb), 2013, 14 with reference to ECtHR, Judgment of January 17, 2012, *Stanev v. Bulgaria* [GC], 2012, para. 229; See also ECtHR, Judgment of June 23, 2016, *Baka v. Hungary* [GC], 2016, para. 120; ECtHR, Judgment of March 15, 2018, *Naït-Liman v. Switzerland* [GC], 2018, para. 113.

31 European Court of Human Rights, Article 6 (2013), 15 with reference to ECtHR, Judgment of November 29, 2016, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], 2016, para. 89; *Naït-Liman v. Switzerland* [GC], 2018, para. 115.

32 ECtHR, Judgment of April 5, 2018, *Zubac v. Croatia* [GC], 2018, paras. 76–79.

33 ECtHR, Decision of April 4, 2003, *Nunes Dias v. Portugal*, 2003.

34 ECtHR, Judgment of October 26, 2011, *Stoicescu v. Romania*, 2011, para. 74.

35 ECtHR, Judgment of October 15, 2002, *Cañete de Goñi v. Spain*, 2002, para. 36.

36 ECtHR, Judgment of January 25, 2000, *Miragall Escolano and Others v. Spain*, 2000, para. 36.

However, the right of access to a court is impaired when the rules cease to serve the aims of „legal certainty" and the „proper administration of justice" and form a sort of barrier preventing the litigant from having its case determined on the merits by the competent court.[37] When authorities provide inaccurate or incomplete information regarding time limits, domestic courts should consider the specific circumstances of the case and avoid applying the relevant rules and case law too rigidly.[38]

The right to initiate an action or file an appeal should arise from the moment the parties can effectively become aware of a legal decision that imposes an obligation on them or could potentially harm their legitimate rights or interests. Without this, courts could significantly shorten the time for lodging an appeal or even make it impossible by delaying the delivery of their decisions. Service, as a means of communication between the judicial body and the parties, informs them of the court's decision and its rationale, enabling them to appeal if necessary or allowing an interested third party to intervene, especially in cases where a party, not summoned to provide evidence, is affected by the outcome.[39] It is the responsibility of the domestic authorities to act with due diligence in ensuring that litigants are properly informed about proceedings affecting them.[40]

In the specific circumstances of a case, the practical and effective nature of the right of access to a court may be impaired, for instance:[41]

a) By the prohibitive cost of the proceedings in view of the individual's financial capacity;
b) Excessive court fees;[42]
c) By issues relating to time-limits: the time taken to hear an appeal leading to its being declared inadmissible;[43]

37 *Zubac v. Croatia* [GC], para. 98.

38 European Court of Human Rights, Guide on Article 6 of the Convention – Right to a fair trial (civil limb), 2024, 35 with reference to ECtHR, Décision du 14 septembre 2014, *Gajtani v. Switzerland*, and *Clavien v. Switzerland* (Décision du décembre 2017).

39 European Court of Human Rights, Article 6, 2024, 35 with reference to *Miragall Escolano and Others v. Spain*, 2000, para. 37 and *Cañete de Goñi v. Spain*, 2002, para. 40.

40 European Court of Human Rights, Article 6 (2024), 35 and see ECtHR, Judgment of April 27, 2017, *Schmidt v. Latvia*, 2017, paras. 86–90, 92 and 94–95, where the applicant had not been informed of divorce proceedings and the Court emphasised that given what was at stake in the proceedings, special diligence had been required on the authorities' part to ensure that the right of access to a court was respected.

41 The parts of the list relevant for the DAB procedure is derived from European Court of Human Rights, Article 6 (2024), 36–39.

42 ECtHR, Judgment of October 10, 2011, *Georgeta Stoicescu v. Romania*, 2011, paras. 69–70.

43 ECtHR, Judgment of April 25, 2000, *Miragall Escolano and Others v. Spain*, 2000, para. 38; ECtHR, Judgment of March 26, 2000, *Melnyk v. Ukraine*, 2006, para. 26.

d) Limitation periods for bringing a claim;[44]

e) Excessive delays in the examination of a claim may also render the right of access to a court meaningless;[45]

f) The unjustified lack of a decision for a particularly lengthy period by the court dealing with the case may be regarded as a denial of justice.[46]

Furthermore, Article 6(1) guarantees not only the right to institute proceedings but also the right to obtain a determination of the dispute by a court.[47]

4. Waiver of the limitations

In the domestic legal systems of ECHR Contracting States, it is common to encounter waivers of a person's right to have their case heard by a court or tribunal, particularly in civil matters, through arbitration clauses in international commercial contracts. While such a waiver offers clear benefits to both the individual and the administration of justice, it does not, in principle, violate the Convention. Art. 6 of the Convention, therefore, does not prohibit the establishment of arbitration tribunals for resolving specific disputes. Parties are free to agree that certain disputes arising from the performance of a contract will be settled outside the ordinary courts. By agreeing to an arbitration clause, the parties voluntarily waive specific rights protected by the Convention.[48] Individuals may waive their right to have their case heard by a court in favour of arbitration, as long as such a waiver is permissible and made clearly and voluntarily. This waiver must be supported by minimum safeguards. Case law differentiates between voluntary and compulsory arbitration. Generally, no issues arise under art. 6 in cases of voluntary arbitration.[49]

44 See, regarding harm to physical integrity, the case-law references cited in paragraphs 53–55 of ECtHR, *Sanofi Pasteur v. France*, Arrêt du 13 juin 2020, including ECtHR, Arrêt du 11 juin 2014, *Howald Moor and Others v. Switzerland*, 2014, paras. 79–80.

45 ECtHR, Judgment of May 2, *Kristiansen and Tyvik v. Norway*, 2013, para. 57.

46 ECtHR, Arrêt du 15 Avril 2020, *Sailing Club of Chalkidiki „I Kelyfos" v. Greece*, 2019, para. 60.

47 ECtHR, Judgment of November 29, 2016, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], 2016, para. 86.

48 European Court of Human Rights, Article 6 (2024), 48.

49 European Court of Human Rights, Article 6 (2024), 48 with references to ECtHR, Arrêt du 28 octobre 2010, *Suda v. the Czech Republic*, paras. 48–49 and case-law references cited; *Tabbane v. Switzerland* (dec), 2016, paras. 26–27 and 30; *Eiffage S.A. and Others v. Switzerland* (dec), 2009; *Tabbane v. Switzerland* (dec), 2016, para. 31.

The ECHR is not directly applicable to arbitration or any other voluntary alternative dispute resolution method.[50] On the contrary, there is a constitutionally guaranteed right to arbitration derived from the higher principle, i.e. the party autonomy.[51]

However, recently, national courts have increasingly attached importance to the principle of equality of parties in arbitration proceedings. Particular attention is paid to equal access to arbitration, given the fact that the parties are usually of unequal economic power, and that arbitration is, as a rule, an expensive procedure.

It is usual for the rules of all institutional arbitrations to require certain payments from the parties (especially from the claimants when filing a claim). If the parties are unable to do so, failure to pay shall result in termination or suspension of the arbitration proceedings.[52] If one of the parties lacks the financial means to initiate the arbitration proceedings, this does not necessarily result in its exclusion from the arbitration process. A notable example is the recent case decided by the French Court of Cassation, First Civil Chamber (La Cour de Cassation, Cass. Civ. 1), on 28 March 2013 in

See explicitly in relation to commercial arbitration, ECtHR, Judgment of May 20, 2021, *Beg S.p.a. v. Italy*, 2021, paras. 135 et seq, and ECtHR, Judgment of May 20, 2021, *Beg S.p.a. v. Italy*, 2021, paras. 135 et seq (explicitly in relation to commercial arbitration).

50 See instead all Aleksandar Jakšić, *Arbitration and Human Rights*, Peter Lang Verlag, Frankfurt, 2002. See however, C. A. M. Cotovelea, 76 ff.

51 The doctrine in Serbia does not deal with this problem, so we have to use the comparative legal approach, analyzing the doctrine and practice of those civil law countries which serve as model for constituting the legal order in Serbia (Austria, Germany). According to the private autonomy approach (See instead all Roderich C. Thümel, Bernhard Wieczorek, Rolf A. Schütze, *Zivilprozessordnung und Nebengesetze: Grosskommentar*, Band V, Berlin, 1995, 388; Reinhold Geimer, „Schiedsgerichtsbarkeit und Verfassungsrecht", *Integritätsprobleme im Umfeld der Justiz* (Hrsg. Peter Schlosser), Bielefeld, 1994, 115). The simple legislator has the possibility of accepting both state jurisdiction and arbitration if certain substantial requirements are met. The agreement of a non-governmental and thus alternative dispute resolution procedure is a result of private autonomy, which enables the parties to agree on their legal relationships in terms of material and procedural law. The special feature of arbitration lies in the state recognition of the party's autonomy agreed arbitration court, the arbitration procedure and the arbitral award and its normative effect. In addition, one sees in private autonomy arbitration an outflow of the unwritten „*fundamental right to private autonomy*", which in Austria is covered by the property guarantee (Article 5 of the Constitution), in Germany by Article 2 Section 1 which reads as follows: „*Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law*." Similar, if not the same, provision is to be found in Article 23 Section 2 of the Constitution of the Republic of Serbia: „*Everyone has the right to free personal development, if it does not violate the rights of others guaranteed by the Constitution.*"

52 See DIS Arbitration Rules, Effective as of 1 March 2018 Annex 2 effective as of 1 July 2021, art. 42 para. 5. See also Rules of the Belgrade Arbitration Centre, Applicable as of 1 January 2014, art. 46 para. 3.

Société Pirelli & C. v. Société Licensing Projects. In this case, the court affirmed that access to justice in arbitration is governed by the same principles as access to court proceedings under art. 6 of the ECHR.[53]

5. Does DAB preserve all required conditions to be in line with the right to a fair trial?

Within the judicial system of the Republic of Serbia, including the above-mentioned source of international law that are incorporated into the domestic legal system, parties may waive the right to sue before a court of ordinary jurisdiction.

In FIDIC terms they often do it in such a way that they clearly and unambiguously agreed that all their disputes (of any kind whatsoever)[54] would be finally resolved by arbitration with stipulated seat and that tribunal would apply the rules of some arbitral institution. As of Serbian Arbitration Act, the arbitration agreement concluded in this way is also valid in terms of form, because the parties in their written agreement refer to the arbitration agreement contained in the FIDIC general conditions.[55] The freedom of contract and party autonomy allow the parties to agree on a different way of resolving disputes, such as conciliation, settlement, mediation and adjudication.

Within the principle of party autonomy, which serves as the foundation for alternative dispute resolution methods, the parties have the opportunity to choose the applicable procedural law or equally national procedural rules that apply to the procedure (*lex mercatoria arbitralis processualis*). They are entitled to do so to the limits of (international) public policy of Serbia. The Serbian (international) public policy consists of the principles of the Constitution, as well as the elements of the right to a fair trial guaranteed by Article 6(1) of the ECHR (principles of equality of parties, equality of arms and adversarial proceedings).

53 The case involved an Italian company, Société Pirelli, which initiated arbitration against a Spanish company, Société Licensing Projects (LP), to recover outstanding debts. LP, which had entered insolvency and was placed in liquidation, submitted counterclaims at the start of the arbitration. However, it failed to make the required advance payment of costs under the ICC arbitration rules. As a result, the ICC informed the parties that LP's counterclaims would be deemed withdrawn. The French court of appeal later annulled the arbitral award, finding that it violated LP's right to access justice. This decision was upheld by the French Court of Cassation, reaffirming that financial obstacles should not prevent a party from accessing arbitration, echoing the fundamental rights enshrined in Article 6 ECHR.

54 Compare FIDIC Silver Book, clause 20.4. sec. 1.

55 Arg. ad Serbian Arbitration Act, art. 12 para. 3.

As to the DAB procedure, all these principles are preserved:

a) The parties are put on the equal foot as regards the constitution of an *ad-hoc* DAB: the parties shall jointly appoint a DAB.
b) If the DAB is compromised by three persons[56] each party shall nominate one member of a DAB for the approval of the other party.[57]
c) To ensure that the mechanism's efficiency relies on an independent and impartial DAB, FIDIC introduced the General Conditions of Dispute Adjudication Agreement as an appendix to the General Conditions of Contract (GCC), along with the Procedural Rules as an annex to the GCC.[58]
d) The appointment is based on a formal notification to the other party of its intention to settle the dispute before the DAB.[59]
e) The deadline for constituting the DAB is appropriate, neither short nor excessive, i.e. 28 days after the party gives notice to the other party.[60]
f) The agreed conditions do not deprive the potential claimant of „the right to access to a court", nor do they violate the principle of equality of the parties when it comes to the obligation of the parties to pay in advance compensation for the work of DAB members. The parties regulate the amount of compensation by contract and pay it in equal amounts.[61]
g) In principle, the proceedings before the DAB are far cheaper than proceedings before a three-member arbitration.
h) The DAB renders a decision that must be reasoned. It is binding on the parties, and they are obliged to execute it. The DAB decision is not only binding but also may be final, if no party gives to the other notice of dissatisfaction (NOD).[62]
i) The DAB is obliged to make a decision within 84 days from the day when the members of the DAB received remuneration. The

56 See FIDIC Silver Book, clause 20.2. sec. 1 and 2.

57 See FIDIC Silver book, clause 20.2. sec. 2.

58 Giovanni Di Folco, „Chapter 3: Relevance and Probative Value of Dispute Adjudication Boards in Arbitration Proceedings", *Construction Arbitration in Central and Eastern Europe: Contemporary Issues* (eds. Crina Baltag, Cosmin Vasile), Kluwer Law International, Alphen aan den Rijn, 2019, 36.

59 See FIDIC Silver book, clause 20.1. sec. 1.

60 See FIDIC Silver book, clause 20.2. sec. 1.

61 See FIDIC Silver book, clause 20.2. sec. 6.

62 See FIDIC Silver book, clause 20.4. sec. 5.

deadline for giving a NOD is 28 days after the parties have received the decision of the DAB.[63] Both deadlines must be considered reasonable, so neither too short nor too long.

j) Neither party shall be entitled to commence arbitration of a dispute, unless a NOD has been given in accordance with the FIDIC provision.[64]

k) If the DAB has given its decision on the matter of a dispute to both parties and no NOD has been given by either party within 28 days after receiving the DAB decision, then the decision shall become final and binding upon both parties.[65]

l) The decision of the DAB is executed in an arbitration proceeding as provided by the parties in the main agreement or in a FIDIC book.

m) As far as arbitration is concerned, the parties, with their contract that has procedural effects, have created two positive procedural preconditions (*Prozessvoraussetzungen*) that must be met in order for one of them to be able to submit a claim to arbitration. The creation of such procedural assumptions is permitted on the condition that they do not deprive the parties of their right to arbitration and that they themselves do not conflict with international public policy.[66]

n) There may be a legitimate reason for limiting the right to direct individual access to an arbitration tribunal.[67] As previously

63 See FIDIC Silver book, clause 20.4. sec. 4 and 5.

64 See FIDIC Silver book, clause 20.4. sec. 7.

65 See FIDIC Silver book, clause 20.4. sec. 7.

66 Serbian procedural law allows the execution of procedural contracts even in civil proceedings before courts of general jurisdiction, as for example *pactum de non petendo*, agreement in which parties promise not to institute an action against each other or to enforce a debt within a certain defined period. See further Aleksandar Jakšić, *Građansko procesno pravo*, 10th ed., Belgrade, 2018, 2099; Borivoje Poznić, *Građansko procesno pravo*, 5th ed., Beograd, 1976, 52. Because, if the parties can waive the guarantees enshrined in the right to a fair trial, they can within the limits of their party autonomy create special procedural preconditions which must be fulfilled before a lawsuit is filed with an arbitration. *Pactum de non petendo* is allowed both in EU and national laws. See further Opinion of advocate general Kokkot delivered on November 6, 2014, in ECJ Case C–564/13 P, *Planet AE Antonimi Etairia Parokhis Simvouleftikon Ipiresion v. Europen Commision*, § 40. And especially German Federal Supreme Court, 14 January 2016, I ZB 50/15. Arbitration clause stated as follows: „*Technical disputes ... shall at the written request of either party be referred to a mutually acceptable technical expert ... All other disputes ... shall be submitted and settled by arbitration in Hamburg...*" The Court held: „*...an agreement on expert determination may include a pactum de non petendo which temporarily excludes the right of a party to bring a claim before the court or arbitral tribunal. However, the legal consequence of such an agreement would 'only' be that arbitration proceedings are either temporarily inadmissible or the claim has to be dismissed as temporarily un-founded until the expert determination proceedings have been competed...*"

67 ECtHR, Judgment of July 8, 1986, *Lithgow and Others v. the United Kingdom*, 1986, para. 197.

mentioned, the right to access a court or to engage in arbitration is not absolute. It can be subject to limitations; however, such limitations must not diminish or restrict individual access to the extent that the core essence of the right is compromised.

o) Furthermore, a limitation does pursue a legitimate aim. The legitimate aim in constituting the DAB consists in avoiding conducting proceedings before arbitration, that is, in reducing the costs of resolving disputes and significantly shortening the time for making a binding and final decision.

6. Remarks on DAB's legal nature

Regarding its legal nature, the DAB holds both procedural and substantive aspects. The procedural nature of the DAB positions it as a pretrial or pre-arbitration dispute resolution method, similar to mediation. From a substantive perspective, the DAB is fundamentally a contractual dispute resolution body created through the parties' contractual arrangements. In line with the principle of freedom of contract, the DAB process is a set of contractual obligations. This contractual basis grants the DAB's decisions a binding nature by virtue of the substantive commitments the parties have agreed to uphold. Noncompliance with a DAB decision thus constitutes a breach of contract. The principle of freedom of contract supports this framework, allowing parties the autonomy to define their dispute resolution processes and enforceability terms, making the DAB's role a direct outcome of their substantive contractual relationship.[68] Conclusively, DABs are fundamentally contractual in nature, and while their characteristics blend elements of both expert determination and arbitration, they are not arbitral tribunals, and their conclusions do not carry the enforceability of arbitral awards.[69]

68 Same perspective as in other jurisdictions, see for example Yaroslav Petrov, Oleksandr Volkov, Mykhailo Soldatenko, „Chapter 15: FIDIC Dispute Adjudication Board in Ukraine: Legal Nature and Enforcement of the Decisions", *Construction Arbitration in Central and Eastern Europe: Contemporary Issues* (eds. Crina Baltag, Cosmin Vasile), Kluwer Law International, Alphen aan den Rijn, 2019, 246–247.

69 Jurgita Petkute-Guriene, „Chapter 1: Access to Arbitral Justice in Construction Disputes (Dispute Board–Related Issues, Time Bar and Emergency Arbitration)", *Construction Arbitration in Central and Eastern Europe: Contemporary Issues* (eds. Crina Baltag, Cosmin Vasile), Kluwer Law International, Alphen aan den Rijn, 2019, 6.

III Effects of the DAB

1. Are DAB Decisions Binding and Final?

Decisions issued by the DAB automatically become an integral part of the contract, and failure to comply with them may constitute a breach of contract, potentially having legal consequences, including liability for damages due to non-compliance.[70]

As stated in 20.4, 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.

A DAB decision is binding by default but can be either binding or final, depending on the circumstances. Specifically, while a DAB decision is initially binding on both parties, it is not necessarily final. If a party disputes the decision, it may issue a NOD within 28 days of receiving the DAB's decision, as outlined in sub-clause 20.4.

FIDIC uses the term „binding" for any decision issued by DAB, regardless of whether the decision was challenged by any of the parties in due time or not. This means that until the dispute is resolved by the arbitration tribunal, the parties should comply with any decision issued by DAB, even a decision they disagree with.[71] Such a DAB decision, in line with the „pay now, argue later" principle, remains binding until an arbitral tribunal issues its ruling.[72]

A DAB decision must be reasoned and becomes immediately binding on the parties, requiring prompt implementation, even if one party intends to challenge it. If dissatisfied, either party has 28 days to issue a NOD, which serves as a prerequisite for proceeding to arbitration. Unless a notice of dissatisfaction is issued within 28 days, the decision is final and (forever) binding on both Parties,[73] as a contractual obligation to be fulfilled.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become

70 The same is in British law and Polish law. See Agnieszka Małgorzata Dąbrowska, „Analysis of the FIDIC arbitration clause in the light of international jurisprudence", *ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law*, 2019, available at: *https://asej.eu/index.php/asej/article/view/359*, 16. 11. 2024, 7.

71 Götz-Sebastian Hök, *FIDIC/MDB Approach in respect of Dispute Adjudication Boards*, Berlin, available at: *https://fidic.org/sites/default/files/FIDIC%20MDB%20Approach%20in%20respect%20of%20Dispute%20Adjudication%20Boards.pdf*, 16. 11. 2024, 7.

72 See A. M. Dąbrowska, 7.

73 M. Mortimer-Hawkins, 10.

final and binding upon both Parties. The binding nature of these decisions is equated with the binding effect produced by any contractual provisions. The final award has two possible outcomes: 1) the parties can voluntarily enforce the decision, which is when the full potential of the DAB process is achieved, or 2) the parties do not enforce the decision, in which case arbitration proceedings can be initiated.[74] Given that such a decision is not an enforceable title and that arbitration proceedings must be initiated for its enforcement, it is clear that a DAB decision is not really final.[75] It is not final in the same way as an arbitral award, but it holds finality as a binding contractual provision, establishing an obligation that both parties are contractually bound to uphold.

The Singaporean Court of Appeal[76] has underscored the criticality of promptly complying with a decision made by a DAB and ensuring timely payment to contractors, where contractually specified. The court has articulated its interpretation of the impact of a NOD on a DAB decision, culminating in three crucial points. Firstly, a DAB decision acquires immediate binding force upon its issuance. Secondly, the parties involved in the dispute are obligated to promptly give effect to the decision, unless it is superseded by either a friendly resolution or a subsequent arbitral award. Thirdly, a NOD cannot upend the binding nature of a DAB decision or the parties' corresponding responsibility to expeditiously comply with and execute it.[77]

The South African Court,[78] much like the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero)*,[79] has held that a decision of the DAB, while binding, is not necessarily final and must be obeyed. The court directed DBT Technologies to comply with the DAB decision until such time that it was revised by either an amicable resolution or an arbitral award. In expressing this opinion, the Court stated that the provisions pertaining to the decision's binding nature and the need for revision were clear. Specifically, the decision remains binding until it is revised, and the parties must promptly comply with the decision once it is issued. This requirement to act swiftly arises even before a NOD is submitted, as a dissatisfied party has 28 days

74 Jovan Nikčević, „Prethodni (pred-arbitražni) postupak za rešavanje sporova prema FIDIC-ovim opštim uslovima ugovora", *Pravo i privreda*, Nr. 7–9/2011, 381.

75 *Ibid*., 381–382.

76 See Andrew Burr, „Failure Properly to Constitute a DAB under FIDIC: Some illustrative case notes", *Yearbook on International Commercial Arbitration*, Nr. 5/2017, 272.

77 These findings have been echoed by the *South Gauteng High Court in South Africa, in the case of Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd. Ibid*., 272.

78 *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd,* (06757/2013) [2013] ZAGPJHC 155 (3 May 2013).

79 (2015) SGCA 30; (2011) 4 SLR.

to provide such notice. The implication is that giving prompt effect to the decision precedes the provision of a notice of dissatisfaction.

The parties must stick to the time limit of 28 days for referring their dispute to arbitration. Neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with sub-clause 20.4. In 2013, the ICC was presented with a case (No. 16435)[80] that involved a dispute between two parties, C and E. After an adjudicator made a decision that C was not entitled to all of the additional costs it claimed, C referred its claim to arbitration. However, E challenged the jurisdiction of the arbitral tribunal, arguing that C had failed to comply with the agreed dispute resolution procedure, which required a referral to arbitration within 28 days of the adjudicator's decision. E contended that the adjudication had become final and binding and was no longer eligible for arbitration. The arbitral tribunal concluded that the 28-day time limit was triggered regardless of whether there was a discernible dispute, and that a formal referral to arbitration was necessary within this timeframe. As C had not made such a formal referral within the specified time limit, the adjudicator's decision had become final and binding. Consequently, the arbitral tribunal did not have jurisdiction to revisit the decision.

2. Are DAB decisions enforceable?[81]

DAB decisions are not equivalent to judicial or arbitral awards, they possess a contractual nature. The enforcement of pre-arbitral decisions, such as those made by a DAB, does not fall under the purview of the New York Convention or the Singapore Convention[82] (which has a relatively limited scope of application).[83] When it comes to enforcement, if parties do not comply with dispute board decisions amicably, they generally proceed to international arbitration. While dispute board decisions are binding, they are not considered automatically final. This means that parties are obligated to follow them unless they are revised by the ultimate dispute resolution forum,

80 Emmanuel Jolivet, Philip Kucharski (eds.), *ICC Dispute Resolution Bulletin*, Nr. 1/2015.

81 See further instead all Yasemit Cetinel, „Chapter 14: Enforceability Isuues of Dispute Boards: Considerations for an Efficient Practice in Turkey", *Construction Arbitration in Central and Eastern Europe: Contemporary Issues* (eds. Crina Baltag, Cosmin Vasile), Kluwer Law International, Alphen aan den Rijn, 2019, 231–242. About the probative value of DAB's decision see further G. di Folco, 33–46.

82 United Nations Convention on International Settlement Agreements Resulting from Mediation.

83 This raises the question of how to achieve greater voluntary enforcement of DAB decisions. See Milena Đorđević, „Rešavanje sporova iz ugovora o građenju", *Savremeni problemi pravnog sistema Srbije* (ur. Miloš Živković, Maja Lukić Radović), Beograd, 2023, 100.

such as arbitration or litigation. However, if the parties do not voluntarily comply with the decision, the prevailing party has no practical means to force the losing party to comply, apart from initiating an ordinary action for breach of contract. In such cases, arbitration regarding the same subject matter in dispute typically needs to be pursued. This is because arbitral awards can be legally enforced under the 1958 New York Convention, which applies in the 172 States[84] that are currently parties to it. Additionally, the procedure under the New York Convention is streamlined, prohibiting any re-examination of the case on its merits.[85]

The statistics show that when asked about voluntary compliance with pre-arbitral decisions, 41% of respondents reported that parties do not comply, 31% noted compliance „half of the time", and only 28% experienced frequent compliance.[86] While the efficacy of dispute board decisions may be called into question given that their enforcement depends on the losing party's willingness to comply, a closer examination of their utility reveals their practicality as a „comply now, argue later" solution. This approach enables the performance of the main contract to proceed without unnecessary disruption, while safeguarding the parties' rights to seek a final resolution of their disputes later through arbitration or litigation. Moreover, dispute board decisions often encourage settlement by offering an impartial perspective on the issues, thereby helping to preserve business relationships. Additionally, refining disputes during this stage can significantly reduce the time and costs of subsequent arbitration proceedings. While arbitrators and national judges are not strictly bound by dispute board decisions, they are often guided by them and may draw adverse inferences when a losing party unjustifiably refuses to comply.[87] This illustrates the significant weight that DAB decisions carry and underscores their role in resolving disputes efficiently and effectively.

84 UNCITRAL, Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at: *https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2*, 16. 11. 2024.

85 See Aceris Law, Dispute Boards and International Construction Arbitration, available at: *https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/#_ftn10*, 16. 11. 2024.

86 Queen Mary University of London, Pinsent Masons, International Arbitration Survey, Driving Efficiency in International Construction Disputes, 2019, available at: *https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey*, 16. 11. 2024, 18.

87 See Aceris Law, Dispute Boards and International Construction Arbitration.

IV Interaction between DAB and Arbitration Agreement

After conducting a survey on construction disputes, it has been acknowledged that while arbitration remains the preferred method for resolving disputes in international construction projects, there is a need for greater efficiency and flexibility throughout the arbitral process. This is particularly true for disputes valued at USD 10 million or less, where the high cost of arbitration is often perceived as a barrier to justice and a fair resolution.[88] The challenge, therefore, lies in streamlining the process to make it more accessible and cost-effective for all parties involved.

The advantages of resolving disputes through a DAB include early resolution while the project is still ongoing, allowing the project to continue without major interruptions, and substantial cost and time savings compared to arbitration. Even if a dispute proceeds to arbitration following a DAB procedure, it is already, to some extent, refined, which can positively impact time and cost efficiency.[89] However, there are disadvantages, such as the overrated time and cost efficiency, particularly with *ad hoc* DABs, and the high fees for DAB adjudicators. Other drawbacks include the adjudicators' potential lack of legal expertise and the uncertainty around voluntary enforcement of DAB decisions.[90]

Despite these challenges, dispute boards play a crucial role in mitigating the costs and delays associated with international arbitration. Engaging in dispute board proceedings is typically a mandatory condition precedent for initiating arbitration, meaning parties must adhere to this step unless they mutually agree to bypass it. If one party unilaterally disregards the requirement, arbitral tribunals often respond by either dismissing the case for lack of jurisdiction or suspending the proceedings until the condition precedent (referral to dispute board proceedings) has been satisfied. This practice is exemplified in Section 9(2) of the 1996 English Arbitration Act, which states that an application for a stay of legal proceedings may still be made, even if the matter is to be referred to arbitration, only after exhausting other dispute resolution procedures.[91]

This means that arbitration serves as the last resort and final stage of dispute resolution, to be pursued only when all other methods outlined in the contract have been exhausted or have failed.

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88 Pinsent Masons, International Arbitration in Construction, 2019, available at: *https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey*, 16. 11. 2024.

89 J. Petkute-Guriene, 4.

90 M. Đorđević, 97.

91 About mandatory condition to international arbitration see Aceris Law, Dispute Boards and International Construction Arbitration.

When parties resort to a DAB, a decision is rendered, and one of the parties issues a NOD, it becomes an important consideration to determine the role and significance of the DAB decision in the ensuing arbitral proceedings. As Di Folco correctly emphasized, if one interprets a referral to arbitration under clause 20.6 by a dissatisfied party as an „appeal" against the DAB's binding decision under clause 20.4, it would imply that the arbitral tribunal must examine and assess the DAB decision to determine its accuracy within the specific context of the case. This interpretation suggests that the DAB decision would become the central point of focus for the tribunal, with limited consideration given to any additional claims or circumstances that either party might otherwise have raised. Conversely, if a referral for arbitration following a binding but non-final DAB decision is viewed as a fresh process initiated by the aggrieved party, it implies that the DAB decision is more of historical relevance. In this scenario, the arbitral tribunal would review the dispute in its entirety, considering all claims and counterclaims, including those submitted for the first time in arbitration, which might raise issues of admissibility. Determining the proper approach relies heavily on the wording of clause 20.6, particularly the third paragraph, which clearly provides that the party initiating arbitration is not restricted to the evidence or arguments previously presented to the DAB. Thus, so far as the parties may bring new submissions to the arbitral tribunal, the case ultimately presented could differ significantly from the matter originally addressed by the DAB.[92]

The important issue is whether the non-compliance with the requirement to submit the dispute to a DAB affects the admissibility of the claim or the jurisdiction of the arbitral tribunal. The importance of the issue lies on the understanding that issued of jurisdiction may be challenged before the court and the issues of admissibility cannot.[93] The claim is not admissible when the tribunal has jurisdiction, but the claim is premature because of the existence of some condition to be fulfilled before submitting the claim to arbitration. That condition can be some alternative dispute resolution mechanism such as negotiation, conciliation, mediation or dispute boards procedures (as DAB), or a cooling off period which is common in international investments agreements.[94] There is no consensus in international practice or among legal scholars regarding whether such objections are matters of the arbitral tribunal's jurisdiction or simply questions of admissibility. The distinction

92 G. Di Folco, 38–39.

93 For Swiss law see Christian Oetiker, Claudia Walz, „Non-Compliance with Multi-Tier Dispute Resolution Clauses in Switzerland", *ASA Bulletin* (ed. Matthias Scherer), Vol. 35, Nr. 4/2017, 874–875.

94 See more in Crina Baltag, „Not Hot Enough: Cooling-Off Periods and the Recent Developments under the Energy Charter Treaty", *Indian Journal of Arbitration Law*, Vol. 6, Nr. 1/2017, 190–196.

is significant, as it affects which body, the arbitral tribunal or the national courts, has the authority to make the ultimate determination on whether arbitration may proceed.[95]

The focus is on the admissibility of arbitration in cases where the parties have failed to follow the dispute resolution procedure specified in the contract, either through their own volition or fault, particularly when the claim notification was not properly communicated. Whether the initiator of the dispute is obligated to exhaust the entire multi-step procedure before proceeding to arbitration depends on the terms of the contract, determining whether it is a duty or a right, and whether it constitutes a *sine qua non* condition for arbitration. According to the literature,[96] when it comes to FIDIC templates, parties are obliged to initiate pre-arbitration proceedings aimed at resolving the dispute. This means that submitting a claim to DAB is a prerequisite for the admissibility of arbitration at a later stage, and any application for arbitration without having exhausted the contractual procedure will be considered premature. Therefore, the mere intention of a party to initiate arbitration is not sufficient, the dispute must have arisen when the claim was submitted to the DAB in accordance with the procedure outlined in the contract.

For a multi-tier dispute resolution clause to be enforceable, it must clearly reflect the parties' intent for each stage to be mandatory. This determination cannot be made in general but must be based on a close interpretation of the specific clause. The wording is crucial, so the clause should explicitly state that the pre-arbitral steps, such as mediation or adjudication, are required before arbitration. Furthermore, the clause should specify the conditions under which these preliminary steps are deemed complete[97] to avoid ambiguity and ensure enforceability. The obligatory nature of DAB can be seen as well in sub-clause 20.3 which provides the solution when parties fail to nominate a member or to agree on DAB, then the appointing entity or official named in the Particular Conditions shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. The parties can supplement the sub-clause 20.3 with provision which states the appointing entity, for example it can be the President of FIDIC or a person appointed by the President of FIDIC.

Sub-Clause 20.2 states that disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4. The word „shall" is intended to make

95 See more in J. Petkute-Guriene, 11–12.

96 See *supra*.

97 C. Oetiker, C. Walz, 867.

this a mandatory obligation.[98] The parties are required to carry out any pre-arbitration procedures prior to commencing arbitral proceedings. Otherwise, the submission to arbitration is considered premature.[99]

In the realm of international arbitration, parties may have the option to vary or waive the requirement of a DAB as a preliminary step before initiating arbitral proceedings. This discretion can be exercised by the parties in certain circumstances, as seen in the case of *ICC Case 16083*.[100] In this case, the arbitral tribunal examined the parties' conduct and found that both parties did not consider the DAB to be an essential preliminary step before referring the dispute to arbitration. As a result, the tribunal affirmed its jurisdiction in the arbitration, demonstrating the significance of parties' actions in shaping the arbitral process. This highlights the importance of parties carefully considering the impact of their conduct when making decisions regarding dispute resolution mechanisms in international contracts.

In this juncture of the dispute resolution process, a critical aspect that warrants careful analysis is whether the parties involved in a dispute explicitly or implicitly agreed to circumvent the DAB procedure. Ascertaining the parties' position on this matter is a crucial step in ensuring the integrity of the potential arbitration process and maintaining the sanctity of the parties' contractual agreement. Given the complexities involved in international commercial contracts, it is not uncommon for parties to encounter disputes during the performance of their contractual obligations. To effectively manage such disputes, the inclusion of dispute resolution mechanisms such as DAB and arbitration in the contract becomes essential. However, the effectiveness of these mechanisms is contingent upon the parties' adherence to the agreed-upon procedures. Hence, the inquiry into whether the parties waived the DAB procedure assumes great significance in ensuring a just and equitable outcome for all parties involved. The failure to adhere to the DAB procedure, when required, can have far-reaching consequences, including unwarranted delays, increased costs, and the potential for irreversible harm to the parties' interests. Therefore, the parties' agreement or waiver of the DAB procedure is a crucial factor in determining the validity of the arbitration process and the resolution of the current dispute.

In situations where parties have not agreed to bypass the DAB procedure, it is crucial to adhere to this stage of the dispute resolution

98 J. Petkute-Guriene, 6.

99 In *Midroc Water Drilling Co Ltd v Cabinet Secretary, Ministry of Environment, Water & Natural Resources & 2 others* (Civil Suit No 267 of 2013), the Court made an order to stay the proceedings so that the Parties could comply with the settlement procedure in the Contract. See Corbett & Co, Clause 20, Corbett & Co International Construction Lawyers Ltd, 2021, 22.

100 All ICC cases cited here are published in *ICC Dispute Resolution Bulletin*, Nr. 1/2015.

process. If one party emphasizes the importance of constituting the DAB while the other fails to meet this obligation, it can lead to a breakdown of the procedural framework. Unless there is clear evidence that both parties have explicitly or implicitly agreed to waive the DAB process and move directly to arbitration, the DAB remains a mandatory step. Therefore, without mutual consent to bypass the DAB, the parties are bound to follow this procedure before proceeding to arbitration.

Additionally, in the absence of cooperation from one of the parties, or a failure to nominate an adjudicator, a mechanism exists to appoint the members of the DAB. In the event that the parties are unable to jointly appoint a DAB, resulting in a failure to reach an agreement with a member or members of the DAB, sub-clause 20.3 serves as an auxiliary provision. Sub-clause 20.3 outlines the specific scenarios where the parties may not be able to agree on the DAB, including the failure to agree on a sole member by the deadline specified in the first paragraph of sub-clause 20.2, the inability of either party to nominate a member of a DAB consisting of three individuals, the parties' failure to come to an agreement on the appointment of a third member of the DAB, or the parties' failure to agree on a replacement member within the given 42-day timeframe.

Should any of these circumstances arise, the appointing entity identified will be authorized to appoint a member of the DAB upon the request of either or both Parties. The appointment made by the appointing entity will be deemed to be final and conclusive, and each party will be responsible for paying one-half of the appointing entity's remuneration.

As far as arbitration and court practice is concerned, the ICC Partial Award[101] serves as a cautionary tale of the difficulties and delays that can arise during the appointing process. This particular case involved a dispute over an amended FIDIC Red Book 1999, and the arbitration proceedings took place in a city located in Eastern Europe. Despite the parties' obligation to agree on a standing DAB within 42 days after the Commencement Date, they were unable to do so. The Contractor made multiple requests to the Employer to agree to the appointment of a member of the DAB but received no response despite the Engineer's recommendation to do so. As a result, the Contractor had no choice but to apply to the President of FIDIC, who ultimately appointed a sole member. The DAB subsequently issued two decisions, which the Contractor sought to enforce. The Employer argued that the DAB had not been properly appointed, leading to further disputes. In the end, the arbitral tribunal determined that the DAB had indeed been properly appointed and ordered the Employer to comply with the DAB decisions.

101 ICC Case 15956 *(*June 2010). See *ICC Dispute Resolution Bulletin*, Nr. 1/2015.

The other ICC Partial Award[102] provides valuable insight into the complexities of the DAB process under the FIDIC Yellow Book 1999. The case highlights the importance of constituting a standing DAB in a timely manner and the consequences of failing to do so. In this case, despite the parties agreeing on a standing DAB, they failed to constitute it, leading to a dispute over the termination of the Contract. The Contractor sought to appoint a DAB to decide on the validity of the termination, but the Employer did not respond. As a result, the Contractor unilaterally applied to the President of FIDIC, and a sole DAB was appointed. Two DAB decisions were issued, but the Employer did not participate in the DAB proceedings and served a notice of dissatisfaction with the 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 contended that the DAB decisions (which were binding but not final) could not be summarily enforced. The arbitral tribunal ultimately found that sub-clause 20.8 requires the parties to go directly to arbitration to solve any dispute once a contract is terminated with no DAB in place. As such, 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.[103]

It is assumed that even in the event of a dispute arising between the parties, they will continue with their project, as specified in sub-clause 20.4. This Sub-Clause emphasizes that unless the contract has been abandoned, repudiated, or terminated, the Contractor must proceed with the works in accordance with the contract.

The use of the term „shall" in sub-clause 20.2 denotes a mandatory requirement to refer disputes to a DAB for resolution, whereas the use of the term „may" in sub-clause 20.4 (*either Party may refer the dispute in writing to the DAB for its decision*) has created some ambiguity. We agree with the opinion that in sub-clause 20.4, the word „may" does not make the DAB procedure optional, rather, it indicates that each party has the choice either to defend its rights using the contract's dispute resolution mechanism or to decide not to pursue the dispute within the contractual framework at all.[104] This uncertainty, nevertheless, has led to questions in the context of the FIDIC Red Book 1999, about whether the obligation to refer disputes to a DAB is mandatory, particularly when an *ad hoc* DAB has been constituted. The issue was addressed in the ICC Interim Award,[105] where the arbitral tribunal

102 ICC Case 16570 (2012).

103 See Corbett & Co, Clause 20, 27.

104 See also J. Petkute-Guriene, 7.

105 ICC Interim Award in Case 14431.

noted that the contradictory language used in sub-clauses 20.2 and 20.4 has created confusion. However, the tribunal concluded that the intention behind sub-clause 20.4 was that there is a mandatory requirement to refer disputes to a DAB in the first instance. The tribunal also considered whether a draft document could satisfy the requirement that the dispute be submitted in writing. It concluded that such a document would not suffice because the other party must clearly know when the process had been initiated. This decision highlights the importance of following the procedures outlined in the contract and submitting disputes in a clear and unambiguous manner.

FIDIC has increasingly observed that substantial modifications to its standard General Conditions (GCs) are being made through Particular Conditions (PCs), often altering or omitting core provisions. Such extensive changes have sometimes resulted in final contracts that deviate significantly from FIDIC principles, potentially misleading contractors and the public and impacting FIDIC's reputation. In response, FIDIC's Contracts Committee created Task Group 15 (TG15) to identify key contractual principles in each FIDIC contract form that are essential and should remain unchanged. These principles are known as the „FIDIC Golden Principles" (GPs). TG15 also explored ways to prevent or limit the misuse of FIDIC contract conditions.

The golden principle no. 5 (GP5) reads as follows: „Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration."

According to the FIDIC Contracts Guide,[106] a contract aligns with GP5 if it includes a Dispute Avoidance/Adjudication Board (DAAB) or Dispute Adjudication Board (DAB) and is allowed under applicable law. Exclusion of a DAAB/DAB from the contract results in non-compliance with GP5. Importantly, Serbian Law on Contracts and Torts does not conflict with GP5. While certain modifications are allowed, GP5 prohibits removing all DAAB/DAB clauses or limiting the types of disputes that can be referred to the DAAB/DAB, as such changes would violate the principle's intent. This all speaks in favour of the opinion that the DAB procedure is mandatory to be not just included in the dispute resolution clause, but also not just dead letter on the paper. The parties, hence, have to fulfil the DAB requirement before the submitting the dispute to the arbitration.

106 FIDIC, Geneva, 1st ed., 2000.

1. The meaning of the Sub-Clause 20.8

The important question is the one relating to the sub-clause 20.8 which deals with the expiry of the Dispute Adjudication Board's Appointment and the situation when the dispute can be referred directly to arbitration.

The interpretation of sub-clause 20.8. of the FIDIC Silver book is disputable (Expiry of DAB's Appointment). The clause provides as follows: „If a dispute arises between the parties ... and where DAB is not in place whether by reasons of the expiry of the DAB's appointment or otherwise:

b) the dispute may be referred directly to arbitration under subclause 20.6. (Arbitration)."

The subclause is entitled „Expiry of Dispute Board's Appointment" which should be only interpreted in the way that the subclause has to be applied only where a DAB is *already* implemented. The clause states that the provisions relating to the DAB do not apply and a dispute may be referred directly to arbitration, in circumstances where „there is no DAB in place", whether by reason of the expiry of the DAB's appointment „*or otherwise*". The phrase „or otherwise" is by no means a clear-cut one.[107]

One particular issue which frequently arises (particularly under the FIDIC contracts, which adopt a multi-tiered dispute resolution process) is what the parties should do where a DAB has not been properly constituted by the parties. This question is particularly pertinent in circumstances where one of the contracting parties attempts to delay and disrupt the constitution of an *ad hoc* DAB, which has to be put in place in order to resolve a specific dispute (as opposed to a standing DAB, appointed at the outset of a project). If no DAB is appointed, how can any dispute be referred to a DAB? Can that dispute instead be referred directly to arbitration (or to litigation) in the alternative?

The standard terms of the FIDIC contracts do not provide a clear answer to these questions. It has, nonetheless, been suggested by some commentators that one answer might possibly lie in sub-clause 20.8 of the FIDIC contract. Whilst this is entitled „Expiry of Dispute Board's Appointment" (which might, perhaps, be interpreted as applying only where a DAB is already implemented), the clause states that the provisions relating to the DAB do not apply and a dispute may be referred directly to arbitration, in circumstances where „there is no (DAB) in place, whether by reason of the expiry of the (DAB's) appointment or otherwise." The phrase „or otherwise" may offer a possible answer to the question.

The question of whether a party can bypass the appointment of a DAB and proceed straight to arbitration has caused considerable judicial discourse.

107 See further A. Burr, 369–370.

The presence of the term „otherwise" in the relevant clause seemingly implies that a party may disregard the DAB and amicable settlement provisions and initiate arbitration proceedings if a DAB has not been appointed at the time of the dispute. Despite this interpretation, the case law discussed below suggest that a party has an obligation to attempt to utilize the DAB provisions before resorting to arbitration.[108]

The Swiss Supreme Court Decision,[109] which concerns the FIDIC Red Book 1999, states that in order to form a Dispute Adjudication Board, the parties must enter into a Dispute Adjudication Agreement (hereafter: DAA) that incorporates the General Conditions of Dispute Adjudication Agreement contained in the annex to the General Conditions. This DAA must be signed by the principal, the contractor, and all members of the DAB individually in order for it to come into force, according to clause 2, paragraph 1 of the General Conditions. If the DAA is not signed by all parties, the DAB is not validly constituted, and the only remedy for a party facing refusal to sign the DAA is to go to arbitration directly pursuant to Sub-Clause 20.8. In the case at hand, the majority arbitrators were correct in finding that the DAB was not in place when the arbitration request was filed because the parties 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* 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* stayed litigation for the parties to adjudicate under a FIDIC Silver Book 1999 contract.

In the case of *Peterborough City Council v. Enterprise Managed Services Ltd*, C initiated court proceedings in the London Technology and Construction Court, claiming that they were entitled to opt out of the requirement in sub-clause 20.2 of the FIDIC Silver Book. They argued that the phrase „or otherwise" in sub-clause 20.8 was broad enough to allow them to refer a dispute directly to court instead of having it resolved by a DAB. C's position was that the parties should not be obligated to appoint a DAB

108 See Corbett & Co, Clause 20, 50.

109 Swiss Supreme Court, No. 4A 124/2014.

and that they could opt out of the process. However, the court ruled that the clause should be interpreted narrowly. The Court held that the phrase „or otherwise" did not give either party a unilateral right to opt out of the DAB process, except in cases where the parties had initially agreed to appoint a standing DAB and that the DAB had ceased to exist by the time the dispute arose. Consequently, the court proceedings were stayed to allow the parties to resolve their dispute using the contractual machinery, i.e., the DAB. The court also rejected the argument that sub-clauses 20.4 to 20.7 of the FIDIC contract were unenforceable due to lack of certainty. Furthermore, the court acknowledged a potential „gap" in the sub-clauses, where the DAB has made a decision, and one party has given a notice of dissatisfaction, resulting in the DAB's decision not being final. The issue arises when the unsuccessful party refuses to comply with the DAB's decision, and the only remedy available to the other party is to refer the dispute to another adjudication. However, the court did not address this problem, as the contract before it provided for court proceedings rather than arbitration.

The majority of doctrine,[110] arbitral and court practice opinion[111] that the decision of DAB is fundamentally mandatory requirement for the invocation of an arbitration. An immediate appeal to the arbitration or a court is then only possible if a DAB used is no longer available or, at least if the principle of good faith so requires. A violation of the principle of good faith would exist if the party does not appoint a member of the DAB within the prescribed time limit, delays his appointment, prevents or in any other way hinders the implementation of the procedure before the DAB in order to prevent or make it difficult to make a decision.[112]

110 Ingrid Andres, „Grenzen der Überlistung des DAB Verfahrens nach FIDIC Einseitiges Opt-out über Ziff. 20.8.?", *Zeitschrift für Baurecht*, Nr. 6/2015, 525, 527; Matthias Scherer, Sam Moss, „Swiss and English Courts Analyse Enforceability of Multi-tier Dispute Resolution Provision Providing for DAB Proceedings (FIDIC Clause 20)", *ASA Bulletin*, Nr. 4/2014, 849–853; Domittile Baizeau, Anne-Marie Loong, „Chapter VI, Part X: Multi-tiered and Hybrid Arbitration Clauses", *Arbitration in Switzerland: The Practitioners Guide* (Hrsg. Manuel Aroyo), 4th ed., Wolters Kluwer, Alphen aan den Rijn, 2018, 1451; J. Petkute-Guierene, 3; Christopher R. Seppäla, „The Arbitration Clause in the FIDIC Contract for Major Works", *Asian Dispute Review*, Nr. 2/2006, 57 ff.

111 See further below *infra*.

112 It is worth noting that English Arbitration Act, art. 9 para. 2 provides as follows: „An application to stay court proceedings may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures."

V Concluding Remarks

FIDIC introduced the multi-tier dispute resolution clause in its suite of contracts to provide a more efficient and tailored approach to resolving disputes typically arising from the complex challenges of the construction industry. The paper explores the dual nature of the DAB, highlighting its procedural role as a pre-arbitration mechanism and its substantive foundation as a contractual body. Created through party agreements, the DAB process reflects the principle of freedom of contract, establishing binding obligations. Noncompliance with DAB decisions constitutes a breach of contract. While resembling elements of expert determination and arbitration, DABs are not arbitral tribunals, and their decisions lack the enforceability of arbitral awards, emphasizing their fundamentally contractual nature.

Together with examining the legal nature of the DAB, we analyzed whether the DAB process aligns with the fair trial requirements under the European Convention on Human Rights. Following a thorough analysis, it was concluded that the DAB complies with these standards and can be recognized and utilized in jurisdictions bound by the ECHR.

A DAB decision is inherently binding but may or may not be final, depending on the circumstances. Specifically, while a DAB decision is initially binding on both parties, it is not necessarily final.

Parties frequently bypass the DAB procedure and proceed directly to arbitration, as claimants often perceive the DAB process as a costly and time-consuming step that delays dispute resolution. This practice raises a critical question: can parties, particularly claimants, lawfully skip the first tier of the FIDIC dispute resolution clause and proceed straight to arbitration, despite being contractually bound by the multi-tier dispute resolution framework stipulated in the FIDIC terms?

Arbitration has long prided itself on upholding party autonomy and respecting the will of the parties. Adhering to the pre-arbitral phase is crucial, as it aligns with the parties' express intent to establish an initial mechanism to address disputes before proceeding to arbitration. Ignoring this preliminary step undermines party autonomy and signals a disregard for the foundational agreement that shapes the arbitration process. Such an approach goes against actively recommended and required practices by national courts, which prioritize honouring the structure agreed upon by the parties.

Long discussion on necessity of DAB is ongoing, challenging the opinion that DAB contributes to the cost and time efficiency, due to the fact that when avoiding DAB, the procedural issues will take significant time and money in order to be resolved in the directly commenced arbitration proceedings. Nonetheless, it is our position that the DAB issues will not

constitute problems in the arbitral proceedings that its necessity was actually respected at the first place, meaning before the arbitration has been commenced. Had the parties actually adhered to the DAB clause, the DAB would potentially fulfil its role.

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