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Analysis of the FIDIC arbitration clause in the light of international jurisprudence

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Abstract — **The aim of the paper is to present the subject matter related to the procedure of resolving disputes arising in connection with implementation of agreements concluded on the basis of contract models published by the international federation FIDIC in 1999 Red and Yellow Book. The intention of the authors of the FIDIC templates was to apply an autonomous multistage procedure (the so-called multi-step clause) for resolving disputes based on arbitration without taking the matter to court. However, the application of the procedure proposed by FIDIC raises controversies of legal and factual nature. The problems concern, in particular: the nature, immediate enforceability, contestability of decisions issued by the Dispute Adjudication Board (DAB) and methods of their reinforcement. Other issues concern the absence of 'standing' or 'full-term' Adjudication Board and the right to arbitration in case when a party violates the internal dispute resolution procedure described in the contract, both for reasons dependent on and beyond its control. The publication is of legal and comparative nature and contains the analysis of related jurisprudence of civil law systems of selected countries.**

Index Terms - FIDIC, dispute, arbitration, the Dispute Adjudication Board (DAB), construction contract.

I. INTRODUCTION

The models for construction contracts drawn up by the International Federation of Engineers and Consultants (Fédération Internationale Des Ingénieurs-Conseils, FIDIC) are based on the common law system (Bunni, 2005). Therefore, some provisions contained in the models proposed by the organization raise considerable doubts when applied in countries with the civil law system. The problems with interpretation of clauses put forward in the templates proposed by FIDIC appear during implementation of FIDIC contracts into the Polish legal system and the same problem is encountered in jurisdictions of other countries. Some of the most controversial provisions concern the methods of resolving disputes arising in connection with the implementation of FIDIC agreements. The subject of this publication is limited to the analysis of clauses contained in 1999 Red Book (Conditions of Contract for Construction for Building and Engineering Work Designed by the Employer) and 1999 Yellow Book (Conditions of Contract for Plant and Design-Build Contract) due to the fact that they are most frequently used in Poland.

II. ALTERNATIVE METHODS OF RESOLVING DISPUTES IN FIDIC

FIDIC models were supposed to help to replace court proceedings with alternative dispute resolution (ADR) methods including international arbitration (Snakowska-Estorinho, 2014) which, however, should not be confused with commercial arbitration and investment arbitration because ADR judgements, unlike commercial arbitration judgements, do not legally bind the parties to the dispute (Szumański, 2010). Unless otherwise agreed by the parties to the contract, FIDIC authors propose to settle a dispute in accordance with the Rules of the International Chamber of Commerce (ICC) in the presence of three arbitrators. As of 1995, the authors of the templates propose a considerably extended arbitration clause, the so-called 'multi-tiered clause' or 'multi-step clause' (Klee, 2015). Since 1957, the dispute resolution procedure consisted of two stages. In the first one the decision was issued by the Engineer, in the second, the case was referred to arbitration. However, this solution had a serious drawback due to the fact that the Engineer, as an entity employed by one of the parties, was a judge in his own case. This means that the arbitration is the last resort and the final level of dispute resolution possibilities agreed by the parties, which comes into play when all other methods specified in the contract have failed (Lewiatan Court of Arbitration, 2010).

The dispute resolution procedure specified in sub-clause 20.4 and subsequent consists of three main stages out of which only the third stage is arbitration. In the first stage, 'if the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer (an

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entity not being the party to the contract, usually acting on behalf of the Employer) describing the event or circumstance giving rise to the claim'. A situation in which the Engineer does not recognize the grounds for the Contractor's claim gives rise to a dispute between the parties (Pochodyła, 2008). In the second stage i.e. the pre-arbitration phase (see judgment of the Supreme Court of 19 March 2015. IV CSK 443/14.) the authors of the templates envisage submitting any kind of dispute that arose in connection with the Contract or execution of works, or resulting from them (...), to be resolved by the Dispute Adjudication Board which, in accordance with the model, consists of one or three suitably qualified persons. Detailed procedure for appointing members of the board must be specified in the contract.

Pursuant to the content of sub-clause 20.4, the decision issued by DAB 'becomes immediately binding on the parties and must be put into immediate effect (even if one of the parties intends to contest the decision). The decision is binding until it is changed in the course of adjudication or arbitration proceedings (...). Either party then has 28 days in which to give a 'notice of dissatisfaction' if he is not happy. Such notice is his key to proceed further to arbitration. Unless a notice of dissatisfaction is issued within 28 days, the decision is final and for ever binding on both Parties.' Following such notification, according to the content of 20.5 sub-clause, the parties still have time to settle their dispute amicably. If no agreement is reached, the dispute will enter the third phase and finally be subject to appropriate arbitration. Pursuant to sub-clause 20.7, the dispute will also be the subject of arbitration proceedings in a situation when none of the parties has submitted the notice of dissatisfaction within the contractual deadline. Then the decision of DAB becomes binding and final, but at least one of the parties did not comply with the decision. In this case, the appeal of the party is the sole reason for appealing to arbitration. Pursuant to sub-clause 20.8, the dispute may also be referred directly to arbitration if, for any reason, there is no DAB in place because in the above case the decision was not issued at all.

III. "BINDING" AND "FINAL" DECISIONS

One of the most controversial issues related to sub-clause 20.6 concerns the interpretation of the terms 'binding' and 'final' in relation to decisions issued by DAB. 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 (Latawiec, 2014, Nowaczyk, 2014). However, due to the lack of legal possibilities to enforce the decisions because in the Polish legal system they are not treated as rulings of an arbitration court (see judgment of the Supreme Court of 19 March 2015 IV CSK 443/14) (Seppälä, 1997, Pietkiewicz, 2010), and there are no instruments of coercion provided for in the templates (Dedezade, 2014), these decisions are often not executed by the parties (Klee, 2015, Lachna, 2015).

A good example here is a dispute which arose between the parties: Perusahaan Gas Negara (Persero) TBK (Persero) with CRW Joint Operation (CRW) in respect to variation claims made by CRW under a 1999 FIDIC Red Book contract (Contract) for the design, procurement, installation, testing and pre-commissioning of a pipeline to convey natural gas from South Sumatra to West Java, Indonesia. During the performance of this contract CRW submitted, in accordance with the provisions of the contract, 13 proposals for amendments to the implementation of the contract, but the parties did not reach a consensus on their valuation. Therefore, the matter was referred to DAB as prescribed by the contract. DAB issued a decision granting CRW an amount of over 17 million USD. Despite the fact that the Contract contained a provision requiring PGN Persero to comply with the DAB Decision, it refused to do so. As a result, Persero submitted a notice of dissatisfaction and CRW provided Persero with an invoice requesting the immediate execution of the decision. The invoice was not paid and CRW applied for arbitration under sub-clause 20.6 for the sole purpose of giving prompt effect to the adjudicator's decision. Persero responded that the decision did not become final and binding due to the submitted notice of dissatisfaction which overruled the obligation to pay. PGN argued that it could not be compelled to comply unless or until the tribunal revised and made a determination on the correctness of the merits of the DAB Decision (the Primary Dispute). The tribunal issued an award which found that PGN was required to comply with the DAB Decision under sub-clause 20.4. On appeal, the High Court of Singapore set aside the award, and the Court of Appeal upheld the High Court's decision. The Court of Appeal held that inter alia the tribunal should not have granted a final award requiring compliance with the DAB decision without revisiting the merits of the decision in question (i.e. without dealing with the Primary Dispute). Further, it held that the Secondary Dispute should have been dealt with by way of an interim or partial award, after which, in the same arbitration, the merits of the DAB decision should have been dealt with by way of a final award. The court considered that sub-clause 20.6, which was breached by CRW, should be applicable in the case because of the attempt to restrict the scope of proceedings before the tribunal only to the question whether Persero should pay it immediately, without waiting for arbitration to reassess the case. Thus, the court violated the provision of sub-clause 20.6, by virtue of which the case should be reopened, examined and ruled on its merits by confirming the correctness or amendment of the decision issued by DAB.

According to T. Latawka, under Polish jurisdiction decisions issued by DAB automatically become an integral part of the contract (Ibidem, cf. Knutson, 2015). In foreign literature (Bunni, 2011, Seppälä, 2011) and jurisprudence (Channel Group v Balfour Beatty Ltd. [1993] Adj.LR 01/21) there is a viewpoint that of similar nature is a decision issued under British law and because of a certain legal loophole (Bunni, 2005, Pietkiewicz 2008) the failure to comply with the decision

may constitute a breach of contract which triggers legal consequences in the form of compensation for its improper execution (Bunni, 2015, Knutson, 2015). It should be noted, however, that under Polish law a claim for compensation for improper execution of the contract may relate to a claim for an extension of the Time of Completion, while in case of a claim for additional payment, the party shall be entitled to default interest from the moment the claim for payment has become payable.

The problem of enforceability of decisions, signalled by practitioners and arbitration institutions, was also noted by the International Federation of Consulting Engineers (FIDIC) who, on 1 April 2013, published a set of guidelines aimed at clarifying the intention of the authors of the models and the enforceability of the 'binding' but 'not-final' decision (FIDIC, 2013, SIDiR, 2015) and, as previously discussed by the High Court of Singapore, the possibility of challenging the failure to implement the decision itself to the arbitration tribunal (FIDIC, 2013). The authors of the guidelines assume that in the case of non-compliance by a party, the other party should be able to refer such a violation directly to arbitration under sub-clause 20.6, disregarding clause 20.4 and sub-clause 20.5. This solution has already been applied in the FIDIC Contract Conditions for Design, Build and Operate Projects published in 2008 (the so-called Golden Book) in clause 20.9. To this end, FIDIC organization proposed and recommended changes to 20.7, 14.6 and 14.8 sub-sections of the Yellow and Red books, which should be implemented by the parties in the contract in order to be consistent with the intention of the organization. In the end, however, the Court of Appeals, by the verdict of the case PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30, confirmed the intentions of FIDIC organization and ruled that the very fact of immediate execution of DAB's decision can be directly subject to arbitration. The Singapore Court of Appeal ruled, in compliance with the intention of the FIDIC organization, that the mere failure of the party to comply with the 'non-final' decision of DAB is the subject of arbitration proceedings. Therefore, those who did not immediately comply with the decision of DAB are referred to the tribunal (ICC case 16083). Thus, the court established a second case in which the decision 'binding' but 'not final' can be submitted for arbitration.

With regard to the concept of 'finality of the decision', it should be noted that FIDIC sub-clause 20.2 requires the parties to implement it without delay, regardless of the fact that the deadline for submitting the Notice of dissatisfaction has not yet expired. Such a decision of DAB, in accordance with the 'pay now, argue later' principle (Tan and Coldwell, 2015) remains binding until the ruling of the arbitral tribunal is issued. However, as stated above, not every decision issued by DAB becomes 'final'. If one party submits the Notice of dissatisfaction to the other party, the decision of DAB will not be given the final status. The dispute can become subject to arbitration proceedings provided that the entire procedure specified in the contract is completed. Then the decision of DAB ceases to be binding and the arbitral tribunal issues a ruling. It should be noted, however, that proceedings before the tribunal do not, as a rule, constitute an appeal instance with regard to the decision of DAB (Bunni, 2005). The second paragraph of sub-clause 20.6 indicates that arbitration proceedings may include new factual circumstances. The arbitrator or arbitrators will have full authority to open, examine and amend any certificates, findings (...) as well as the decisions of DAB regarding a given dispute (...). None of the parties will be limited in the proceedings before arbitration to the evidence and arguments previously submitted to DAB in order to obtain its decision, nor to the reasons for rejection stated in the protest (...) (FIDIC, 1999).

IV. NON-OPERATION OF THE PROCEDURE

A separate issue with regard to the parties' right to arbitration, is the question of admissibility of arbitration in a situation when the parties have not applied the dispute resolution procedure specified in the contract and they did so of their own volition or fault, and particularly in situations when the parties did not communicate the notification about the claim in a proper form. Whether the exhaustion of the entire multi-stage procedure by the initiator of the dispute is the initiator's duty or right constituting the sine qua non condition of arbitration, depends on the contents of the contract (Pryles, 2001). According to the literature, in the case of FIDIC templates the party is obliged to initiate pre-arbitration proceedings aimed at resolving the dispute (Kijowska, 2017, Srokosz and in 2011). This means that submitting a claim to the Engineer is a prerequisite for admissibility of arbitration at a later stage, and any application to an arbitration court without exhaustion of the contractual procedure will be considered premature. The subject matter of arbitration is a dispute that arises only when the claim is submitted to the Engineer in accordance with the procedure described in the contract (otherwise Lewiatan, 2010). The mere intention of the party to bring the dispute before the court will not, therefore, be sufficient. However, further actions or omissions by the Engineer will not affect the admissibility of the arbitration process itself. In the absence of a notification, there may be no jurisdiction of the court of arbitration. However, according to the author of the publication, each case should be assessed individually.

V. ABSENCE OF DISPUTE ADJUDICATION BOARD (DAB)

Another important issue with respect to the parties' right to arbitration is a situation when an ad hoc DAB has not been appointed, and there is no 'full-time' board acting on a given project under the contract. The parties did not appoint members of DAB at the stage of concluding the contract, and at the time the claim arises they are no longer able to agree on its composition or remuneration. In the literature and jurisprudence there are two conflicting positions. One advocates a theory that the appointment and adaptation of a decision by DAB is a mandatory stage specified in the contract,

the non-compliance of which closes the way to arbitration and constitutes exceeding the competences by the arbitral court (see International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd [2013] SGCA 55). According to the second viewpoint, under sub-clause 20.8, when there is no DAB in place due to the expiry of its appointment or by any other reason: (...) (b), the dispute may be directly referred to arbitration'.

According to the first opinion, the failure to comply with the procedures set out in the contract constitutes a breach of contract which goes beyond the arbitration agreement. The opposing theory, on the other hand, assumes that in order to resolve the above issue, it is essential to specify in the contract the deadline for setting up an ad hoc DAB. According to supporters of this theory, the absence of such a deadline indicates that the failure to appoint DAB does not close the way for the parties to arbitration while at the same time making the appointment of DAB a voluntary act (Latawiec, 2014). Others, however, make the possibility of opting out of the DAB procedure subject to contract provision concerning the fact whether a given DAB operates on a permanent or ad hoc basis. From the literal wording of the English version of sub-clause 20.8, it appears that if no DAB has been appointed, the dispute can be referred directly to arbitration. Therefore, if the parties in the contract agreed to an ad hoc DAB appointed for the purposes of one specific claim, it is obvious that the DAB was not in place at the time the dispute arose, so in any case opt out would always be possible. Therefore, it should be considered that the right to claim against the procedure of DAB under sub-clause 20.8 is available to a party only when the Board, pursuant to the contract, is a standing board (see the ruling of the High Court of Justice Queen's Bench Division Technology and Construction Court [TCC] in the case of Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 [TCC]) but the board, for some important exceptional reasons, is not in place in a given moment.

The issue of absence of DAB was also recognised by the Polish Supreme Court. The court discussed the question whether 'exhaustion of pre-arbitration procedures is a premise for bringing a claim to arbitration court, and consequently, whether non-exhaustion of procedures results in dismissal of the claim as premature' (see judgment of the Supreme Court of 19 March 2015. IV CSK 443/14). In the justification of the verdict, the Supreme Court of the First Instance confirmed that under sub-clause 20.1 it is necessary to submit the claim to the Engineer in advance. Next, despite the fact that the court in its argumentation considered that the interpretation of clauses 20.2 and 20.3 of the FIDIC conditions leads to a conclusion that the formation of an arbitration committee is mandatory, it is possible, under sub-clause 20.8, to submit the dispute directly to arbitration, if there is no DAB 'for other reasons' such as, for example, the failure of the parties to reach agreement on the composition of the board and the failure of any of them to submit a petition to the entity entitled to appoint a member. The judgment of the Supreme Court was undoubtedly long-awaited and is the first ruling issued by the Civil Chamber in this area.

However, to the disappointment of practitioners, the court dealt very briefly with the relevant issue of the access of the parties to arbitration. As can be seen from the grounds for the judgment, the court did not take into account the differences between a standing DAB and one appointed ad hoc, allowing the party to simplify the procedure for resolving disputes despite the intentions of the authors of the model. On the other hand, the Court of Appeal in Katowice (judgment of 8 May 2014 reference number VAcz 353/14) stated that sub-clause 20.8 gives the parties an option of departing from the mode described in sub-clause 20.4 and 20.5 not only on the grounds of failure to appoint DAB. The court based its argument on the assertion that the provisions of sub-clause 20.3 of the contractual terms preclude the risk of the above situation. In the court's opinion, this conclusion is justified by the placement of this provision at the end of arbitration regulations, deriving from it its salvatorial character. In the opinion of the Court of Appeal, sub-clause 20.8 was applicable in all these cases where the parties did not choose, irrespective of the reasons for such a state of affairs, to refer the dispute to be considered by DAB.

The absence of DAB was also addressed by the First Civil Court in Switzerland (ruling of the Swiss Federal Tribunal of 6 June 2007 with reference number 4A_18 / 2007), which in its considerations, similar to those of the Supreme Court, considered that proceedings before DAB as a rule is obligatory, but with some exceptions. Unlike the Supreme Court, however, the Swiss Court went further in considering that bypassing DAB proceedings leads to a distortion of the multi-step dispute resolution mechanism. The first Civil Court in Switzerland also did not derive the right to withdraw from proceedings before DAB from the content of sub-clause 20.8, but from general principles of applicable law. It granted the right to opt out if the contractor breaches the principle of good faith. In the judgment, the Swiss court referred to a situation where the absence of DAB resulted from the breach of the contract by the opposing party in the form of not signing the agreement with the Arbitrator for several months. The court also supported its claim with the argument that the intention of the FIDIC authors was to establish a permanent conciliation authority in order to obtain quick solutions in the course of performance of the contract, which was distorted by the parties entering into ad hoc DAB contracts. The mere constitution of DAB takes a lot of time and in fact serves as the first instance arbitration procedure and its decisions are usually contested by the parties anyway.

Summing up the extensive discussion, the First Civil Court emphasized that the admissibility of pursuing claims before an arbitration tribunal without proceedings before DAB is possible but should be examined only on a case-by-case basis. With regard to the case law cited above, it is impossible not to agree with the standing of the Swiss court. This standing seems to be the most accurate. The author of the publication does not share the opinion of the Court in Katowice as this ruling seems to contradict the intentions of the authors of the FIDIC models.

There is also an issue of incorrect Polish translation. The usage of the Polish phrase 'lub innego' in the wording of sub-clause 20.8, in view of the English version and the entire

wording of the clause, refers only to the situation when there is no DAB in place due to the expiry of its appointment or by any other reason, but for a reason that only concerns the non-functioning of DAB, and not for any reason that does not necessarily have to be related to DAB. 'Otherwise' refers strictly to the phrase 'there is no DAB in place'. In a more precise translation into Polish, the sub-clause should read 'Jeżeli pomiędzy stronami powstanie spór (…) w czasie, kiedy nie ma na miejscu Komisji, bo umowa z Komisją już wygasła lub z innego powodu Komisja nie funkcjonuje (…). Only such a translation reflects the intentions of the creators of the models. The salvatorial nature of sub-clause 20.8 can only be substantiated in situations when DAB really does not exist.

VI. CONCLUSIONS

The jurisprudence of arbitral tribunals and common courts shows a tendency towards allowing the parties to the dispute to have the widest possible access to arbitration. The judgments issued recently illustrate that these institutions are guided by the principle of resolving doubts arising with respect to the admissibility of arbitration in favour of arbitration, while maintaining the validity of the provisions of standard rules as to the obligation of prior exhaustion of the dispute resolution procedure specified in the contract. The analysis of relevant case law and literature made it possible to resolve doubts concerning the nature of decisions and the contractual duty of immediate application of DAB's decisions. Another issue clarified in the paper regards the admissibility of direct referral of the dispute to arbitration tribunal in the case of non-compliance by the parties with the multi-step procedure set out in the arbitration clause models.

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