Dispute Board Determination and Recourse to Arbitration

How has the Link between Dispute Board Determination and Arbitration been Clarified in the 2017 FIDIC Conditions of Contract, and in ICC Practice?

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Tiivistelmä – Referat – Abstract

Tässä tutkielmassa selvitetään, miten rakennusalalla hyödynnettyjen FIDIC-mallisopimusehtojen mukaista Dispute Board -asiantuntijapaneelin (jäljempänä “riidanratkaisupaneeli”) sisältävää riidanratkaisulauseketta on täsmennetty vuoden 2017 versiossa vuoden 1999 versioon verrattuna. Sopimusehtojen täsmentymistä tutkitaan siitä näkökulmasta, miten riidanratkaisupaneelin ratkaisut voidaan saattaa välimiesmenettelyyn FIDIC-mallisopimusehtojen mukaisesti. Lisäksi asiaa analysoidaan myös Kansainvälisen kauppakamarin välimiesmenettelysääntöjen mukaisessa välimiesmenettelyssä (“ICC välimiesmenettely”) annettujen välitystuomioiden perusteella. Tarkastelun kohteena ovat FIDIC-mallisopimusehtojen käytetyimmän niin sanotun ”sateenkaarisarjan” sopimustyypit (“punainen”, ”keltainen” ja ”hopea kirja”, jäljempänä “FIDIC-sopimusehdot”).

Riidanratkaisupaneelit ovat vähitellen yleistymässä. Sopimusperusteinen riidanratkaisupaneeli perustetaan usein pitempiaikaisiin riitaherkkiin rakennushankkeisiin niiden koko keston ajaksi. Riidanratkaisupaneeli voi avustaa osapuolia urakan aikana ilmenevien riitaisuuksien epämuodollisessa välttämisessä sekä antaa osapuolia väliaikaisesti sitovia ratkaisuja hankkeen aikana syntyviin riitoihin. Näitä ratkaisuja voidaan jälkikäteen uudelleen arvioida ja ratkaista lopullisesti välimiesmenettelyssä. Riidanratkaisupaneelin ratkaisusta tulee osapuolia lopullisesti sitova, mikäli kumpikaan osapuolista ei ilmoita tyytymättömyyttä ratkaisuun määräaikaan mennessä. Mikäli osapuoli kieltäytyy noudattamasta riidanratkaisupaneelin antamaa molempia osapuolia sitovaa ratkaisua, voi toinen osapuoli myös tässä tapauksessa hyödyntää välimiesmenettelyä ja pyytää välimiesoikeutta vahvistamaan ratkaisun molempia osapuolia sitovaksi joko väliaikaisin vaikutuksin tai lopullisesti sitovana. Riidanratkaisupaneelien käytön taustalla on niin kutsuttu ”*maksa nyt, riitele myöhemmin*” -periaate (engl. “pay now, argue later”). Periaatteen tausta-ajatuksena on turvata hankkeen ja sen kassavirran jatkuminen urakkasuunnitelmien mukaisesti riitaisuuksista huolimatta.

Tutkielmassa keskitytään FIDIC-sopimusehtojen moniportaisen ja varsin monimutkaiseksi rakennetun riidanratkaisulausekkeen kahteen portaaseen: riidanratkaisupaneelin ratkaisuun sekä välimiesmenettelyyn viimesijaisena keinona. Yrityksen riidanratkaisukeinojen valintaan vaikuttavat muun muassa ratkaisun lopullisuus ja täytäntöönpanokelpoisuus. Lisäksi uusien vaihtoehtoisten riidanratkaisumenetelmien valitseminen kansainvälisesti tunnustetun ja täytäntöönpanokelpoisen välimiesmenettelyn rinnalle edellyttää, että niihin ei liity suuria riskejä. Muuten laajasti omaksutusta välimiesmenettelystä poikkeamiselle ei välttämättä ole riittäviä perusteita yrityksen riskien hallinnan kannalta. Riidanratkaisupaneelien ratkaisujen heikkoutena voidaan kuitenkin pitää niiden täytäntöönpanokelvottomuutta. Ratkaisujen välitön noudattaminen on osapuolten sopimusoikeudellinen velvollisuus, eikä ratkaisujen tunnustamiseen ja täytäntöönpanoon ole vastaavaa kansainvälisesti tunnustettua instrumenttia kuin välimiesmenettelyyn soveltuva New Yorkin yleissopimus (1985). Tämän vuoksi riidanratkaisupaneelin ratkaisun saattaminen välimiesmenettelyyn viimesijaisena keinona onkin tärkeää prosessin ennakoitavuuden säilyttämiseksi, ja ilman näiden prosessien välistä selkeää yhteyttä vaarantuu myös hankkeen jouheva eteneminen.

FIDIC-sopimusehtojen vuosien 1999 ja 2017 versioiden vertailussa havaitaan, että FIDIC-sopimusehtojen mukaisesti riidanratkaisupaneelin ratkaisun saattaminen välimiesmenettelyyn on mahdollista kahta eri reittiä pitkin: i) osapuoli voi pyytää välimiesoikeutta vahvistamaan ratkaisun välittömästi osapuolia sitovaksi, ja ii) osapuoli voi pyytää välimiesoikeutta uudelleen arvioimaan ja ratkaisemaan asian lopullisesti. Vuoden 1999 versiossa sopimusehdoista havaitaan puutteita molempiin reitteihin liittyen, joita on selkeytetty vuoden 2017 FIDIC-sopimusehdoissa. Merkittävimpänä 1999 vuoden version puutteena mainittakoon epäselvyys siitä, voidaanko osapuolia väliaikaisesti sitova ratkaisu vahvistaa välimiesmenettelyssä. Vuoden 2017 versio sopimusehdoista sisältää myös muilta osin yksityiskohtaisempaa sääntelyä, minkä vuoksi niiden tulkinnanvaraisuus on vähentynyt vuoden 1999 sopimusehtoihin verrattuna.

Lisäksi riidanratkaisupaneelin ratkaisujen saattamista välimiesmenettelyyn tarkastellaan ICC välimiesmenettelyn välitystuomioiden valossa. ICC välitystuomioita tarkastellaan, koska ICC välimiesmenettely on FIDIC-sopimusehtojen mukainen suositus. Valitut välitystuomiot koskevat vuoden 1999 FIDIC-sopimusehtoja, joita on julkaistu ja näin ollen saatavilla. Valikoitujen ratkaisujen perusteella havaitaan, että osittain annetut ratkaisut ja niiden perustelujen sisältö vaihtelevat saman tyyppisissä kysymyksissä. Välitystuomioista johdettuja havaintoja peilataan lisäksi 2017 FIDIC-sopimusehtojen muutoksiin ja havaitaan, että tapausten ratkaisuista voidaan hakea ainakin osittain johtoa niin 1999 kuin 2017 vuoden FIDIC-sopimusehtojen soveltamisessa.

FIDIC-sopimusehtojen vertailun ja ICC välimiesmenettelyn ratkaisukäytännön perusteella johtopäätöksenä todetaan, että FIDIC-sopimusehtoihin voitaisiin tehdä edelleen täsmennyksiä. Esimerkiksi sitovien riidanratkaisupaneelin maksuvaatimuksia koskevien ratkaisujen väliaikaisessa vahvistamisessa voitaisiin välimiesoikeudelle lisätä nimenomainen valta edellyttää mahdollisen vakuuden asettamista vahvistamista pyytävältä osapuolelta. Lisäksi täsmennyksiä voitaisiin tehdä kuittausvaatimuksen esittämisestä välimiesmenettelyssä sekä välimiesmenettelyn kustannustenjaossa huomioon otettavista seikoista. Nämä kaikki täsmennykset edistäisivät osaltaan ”maksa nyt, riitele myöhemmin” -periaatteen toteutumista. Tutkielman yhteenvetona väitetäänkin, ettei riidanratkaisupaneelien käyttäminen välttämättä yleisty, mikäli riidanratkaisupaneelin ratkaisujen vahvistaminen ja niiden lopullinen arvioiminen välimiesmenettelyssä ei toteudu sopimusehtojen hengen mukaisesti.

Avainsanat – Nyckelord – Keywords
Asiantuntijaratkaisujen käsittely välimiesmenettelyssä, vaihtoehtoinen riidanratkaisu, välimiesmenettely

Ohjaaja tai ohjaajat – Handledare – Supervisor or supervisors
Professori Ville Pönkä ja Tutkijatohtori Alexander Gurkov

Säilytyspaikka – Förvaringställe – Where deposited

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ABBREVIATIONS

AAA	American Arbitration Association
CDB	Combined Dispute Board
DAAB	Dispute Avoidance and Adjudication Board
DAB	Dispute Avoidance Board
DB	Dispute Board
DRB	Dispute Review Board
EPC	Engineering, Procurement and Construction
FIDIC	Fédération Internationale des Ingénieurs Conseils, or the International Federation of Consulting Engineers
ICC	International Chamber of Commerce
NOD	Notice of Dissatisfaction

INTRODUCTION

Commercial dispute resolution continues to evolve and adopt new forms. Especially in sectors typically prone to disputes such as construction industry, new forms of alternative dispute resolution have been introduced alongside with arbitration. While arbitration remains the "top choice" of dispute resolution mechanism for disputes arising in international construction projects, its users also perceive inefficiencies related to that dispute resolution method. [2] One additional tool to be used with traditional arbitration are dispute boards. While the use of dispute boards has been reported to be increasing, the method is still significantly less common than arbitration.[3]

A dispute board[4] can be constituted at the infancy of a project and its term may be agreed to last for the whole duration of the project. Its services include project oversight, dispute avoidance as well as issuing quick interim binding decisions[5] that can be later challenged in arbitration. The dispute board determination can also become final and binding on the parties, if no party files a valid notice of dissatisfaction within the time limit. The objective of dispute board determination is to secure the vital cash flow in a project and advance the project works, when conflicts arise during the completion of the project. This idea of "*pay now, argue later*" is the key principle distinguishing dispute boards from other available dispute resolution services.

The possible recourse to arbitration is arguably a crucial feature of dispute board determination. Dispute boards often lack the power to enforce their decisions effectively. A link allowing smooth recourse from dispute board determination to arbitration (if necessary) is important, because arbitral awards are internationally reconcilable and enforceable. Dispute board decisions are not – they bind the parties only on contractual basis. Therefore, if one wants to effectively enforce a dispute board decision and/or finally resolve a dispute, the dispute board determination needs to be transformed

[2] Pinsent Masons – Queen Mary University of London 2019, 7.
[3] See e.g. ICC 2019 bis, 8 jo. 18. In 2018, 842 new arbitration cases were registered with the ICC, while only 8 new requests concerned appointment of a dispute board member or administration of dispute board proceedings. It should be noted that with respect to the 842 arbitration cases filed, in some cases dispute board proceedings may be preceded by a request for arbitration.
[4] In this thesis, a generic term 'dispute board' has been selected to refer to any kind of dispute board established under institutional dispute board rules or by virtue of parties' dispute board agreement. Some chapters may also include references to the specific terms referring to a dispute board pursuant to certain institutional dispute board rules (e.g. DAB and DAAB under FIDIC Conditions of Contract; or DAB, DRB and DCB under ICC Dispute Board Rules).
[5] In this thesis, the focus is on FIDIC Conditions of Contract providing only binding decisions. However, other rules governing dispute board proceedings such as the Dispute Board rules of the International Chamber of Commerce ("ICC Dispute Board Rules) provide the parties with an option to choose whether a dispute board may only render binding decisions, non-binding recommendations, or both.

into an arbitral award in order to certainly have global effect. If this link is not sufficiently clear, the whole idea of quick interim binding dispute board determination waters down.

This thesis will look into the link between dispute board determination and arbitration pursuant to the Conditions of Contract of the International Federation of Consulting Engineers (hereinafter "FIDIC Conditions of Contract" or "FIDIC Contracts")[6]. These standard forms of contract incorporate dispute board proceedings as one tier in a complex multi-tier dispute resolution clause. FIDIC Conditions of Contract have been selected for closer scrutiny as they are the most preferred standard general contract terms being used in at least 50% of all international construction projects globally.[7] The FIDIC Conditions of Contract have been recently revised, in 2017. However, the earlier edition from 1999 continues to be in use and parties can freely agree to apply the 1999 edition of FIDIC Contracts also in their future projects. The FIDIC Contracts have also been selected for the reason that some have expressed criticism with regard to the link between dispute board determination and arbitration under the 1999 FIDIC Conditions of Contract.[8] This thesis seeks to understand, *how has this link between dispute board determination and subsequent recourse to arbitration been clarified under 2017 FIDIC Conditions of Contract compared to the 1999 edition?*

Further, the regulation of this link pursuant to the FIDIC Contracts will be mirrored with the decisions adopted in some selected arbitral awards ("ICC Awards") rendered in arbitrations administered by the International Court of Arbitration (the "Court") of the International Chamber of Commerce ("ICC"). Consequently, this thesis will evaluate, *whether the link between dispute board determination and arbitration is clear in light of ICC Awards?*

What should be highlighted, however, is that pursuant to some recent statistics, the recourse to arbitration is not always necessary. This is the case, when parties comply with the dispute board determination voluntarily. Pursuant to a survey published by Pinsent Masons LLP in partnership with the School of International Arbitration at Queen Mary University of London in November 2019 ("Queen Mary Construction Law Survey"), 41% of respondents experienced that parties do not voluntarily comply with pre-arbitral decisions, 31% of respondents reported compliance "half of the

[6] In this thesis, FIDIC Contracts refer to a series of FIDIC's standard forms of contract also so called as 'Rainbow Suite' including Red, Yellow and Silver Books each dedicated to a particular project contract type (contract on works designed by the employer, contract on works designed by the contractor, and turnkey contract).
[7] Scheffer da Silveira 2019, 267.
[8] See e.g. Bunni, Dedezade and Tweeddale.

time", and 28% of respondents reported frequent compliance.[9] However, these pre-arbitral decisions comprised of a varied range of alternative dispute resolution mechanisms, including negotiation, mediation, ad hoc dispute adjudication boards, expert determination, adjudication under local law and standing dispute adjudication/avoidance boards.[10] Interestingly, the respondents noted that a decision rendered by a standing dispute board is more likely to be complied with, especially if the standing dispute board had been appointed at the outset of the works.[11] Pursuant to statistics collected by the Dispute Board Resolution Foundation ("DRBF") in 2018 ("DRBF Survey"), the figure for parties complying voluntarily with dispute board determination is even higher.[12] Out of 512 formal decisions rendered, only 6% (i.e. 32 decisions), where referred to arbitration.[13] In this study, the focus was solely on dispute boards, and the vast majority of the boards examined (166 out of 231 dispute boards examined in total) had been established under different editions of FIDIC Conditions of Contract.[14] Also under statistics collected by the DRBF, the parties had a higher tendency to comply with decisions rendered by a standing dispute board (only 0.90% of the decisions were referred to arbitration) in comparison to a dispute board established ad hoc (14,05%).[15]

Another interesting tendency in arbitrations following dispute board proceedings is that the arbitral tribunals often seem to reach a same conclusion with the dispute board. Pursuant to the Queen Mary Construction Law Survey, 40% of the respondents indicated that the same conclusion is frequently reached in an international construction arbitral award as in pre-arbitral dispute resolution.[16] The turnover rate is even lower, when it comes to dispute board determination only. Pursuant to the DRBF Survey, 78% of all decisions referred to arbitration were eventually upheld by the arbitral tribunals.[17]

[9] Pinsent Masons – Queen Mary University of London 2019, 18. Pursuant to the survey, the data was based on 646 completed questionnaires and 66 personal interviews. The survey assembles the views of a wide range of actors within the dispute resolution community and provides insight into stakeholders' experiences and perceptions of international arbitration and several pre-arbitral processes such as Dispute Boards. According to the authors of the Queen Mary Construction Law Survey, it is the largest sector-specific empirical study ever conducted in international arbitration (see page 4).
[10] Pinsent Masons – Queen Mary University of London 2019, 18. Pursuant to the survey, the respondents indicated to have observed dispute resolution methods other than arbitration to the following extent: negotiation or the intervention of senior representatives (34%), mediation (32%), dispute boards (22%), expert determination (17%), statutory adjudication (17%) and standing dispute boards (14%). Investor-state arbitration had been observed by 13% of respondents (see page 8).
[11] Pinsent Masons – Queen Mary University of London 2019, 19.
[12] DRBF 2018.
[13] *Ibid,* 24.
[14] *Ibid*, 18.
[15] *Ibid*, 25.
[16] Pinsent Masons – Queen Mary University of London 2019, 20.
[17] DRBF 2018, 29.

To make dispute boards an attractive dispute resolution tool, the users must be able to understand all elements and risks associated to the chosen dispute resolution method. Statistically, dispute boards seem to be successful and often recourse to arbitration is not even necessary. Furthermore, if a party resorts to arbitration, the arbitral tribunal seems to often follow the dispute board's determination.

Yet, for parties, who do not yet have such positive experiences with dispute boards, the decisive factor to consider the inclusion of dispute board proceedings in a contract can indeed be the well-functioning link to arbitration, if dispute board determination fails. As long as there are insecurities related to the recourse to arbitration in dispute board proceedings, parties may choose to opt out from dispute board provisions in FIDIC Contracts, finding them an unnecessary step to final resolution through internationally recognised arbitration. When choosing just arbitration without a dispute board, the parties might lose other benefits associated to the use of dispute boards, including overall supervision of the project, dispute avoidance, and continuous cash-flow and uninterrupted completion of works.

METHODOLOGY AND SCOPE OF THE RESEARCH

Some have expressed criticism with regard to the link between dispute board determination and arbitration under the FIDIC Conditions of Contract.[18] In this thesis, the purpose is to understand, *how has this link between dispute board determination and subsequent recourse to arbitration been clarified under 2017 FIDIC Conditions of Contract compared to the 1999 edition, and in ICC practice*? As was briefly mentioned above, and will be further elaborated later on, a link allowing smooth recourse from dispute board determination to arbitration (if necessary) is important, because arbitral awards are internationally reconcilable and enforceable. Dispute board decisions are not – they bind the parties only as a contractual obligation. Therefore, if one wants to effectively enforce a dispute board decision or finally resolve a dispute, the dispute board determination should be transformed into an arbitral award in order for the parties to be sure that the decision can have a global effect. If this link is not sufficiently clear, the whole idea of quick interim binding dispute board determination waters down.

By *clarifying*, this thesis refers to the use of regulatory methods to exclude ambiguities that may cause contradicting interpretations of certain provisions adopted in the FIDIC Conditions of Contract on this topic. Further, the term *clarification* may also mean inclusion of express mention on certain issues, which have not been expressly addressed in the FIDIC Conditions of Contract. Also, decisions adopted by some arbitral tribunals in ICC Awards dealing with this topic will be used as clarifying, possible interpretations that can be adopted in practice to cure certain issues and ambiguities in the parties' contract terms.

The research question incorporates two sub-questions, which will be addressed consecutively:

i) How has the regulation of dispute board determination and consequent recourse to arbitration been clarified in 2017 FIDIC Conditions of Contract compared to the 1999 edition?
ii) Is the link between dispute board determination and arbitration clear in light of ICC Awards?

The methodology adopted to address these questions is comparative and evaluative in nature. In this context, the comparative approach does not mean comparison of legal rules in two or more jurisdictions[19], but comparison of two editions of standard forms of contract.

[18] See e.g. Bunni, Dedezade and Tweeddale.
[19] Hirvonen 2011, 39

The first sub-question will be addressed by comparing the two most recent editions of FIDIC Conditions of Contract, i.e. editions from the years 1999 and 2017. The purpose is to analyse, whether one can identify differences between the two editions of FIDIC Conditions of Contract as to how can one recourse to arbitration after obtaining a dispute board decision. The purpose is also to systematise the different routes leading to arbitration in this context. Furthermore, these identified differences will be compared to understand, whether the regulation of recourse to arbitration has become clearer in the 2017 FIDIC Conditions of Contract, when compared to the 1999 edition. Finally, also some proposals will be made as to how the regulation could be further clarified.

The second sub-question will be answered by evaluating the link between dispute board determination and recourse to arbitration in light of ICC Awards. ICC Awards have been chosen because the default arbitration rules pursuant to the FIDIC Contracts are the Rules of Arbitration of the ICC (”ICC Arbitration Rules”)[20]. Hence, it is assumed that many parties end up adding ICC Arbitration Rules in their contract and the recourse to arbitration pursuant to FIDIC Contracts often means recourse to ICC Arbitration. This analysis seeks to evaluate how clear is the application of the FIDIC Contracts in practice, when seeking recourse to arbitration. The purpose is to understand, what are the issues and possible obstacles that arbitral tribunals consider when they either i) enforce a dispute board decision, or ii) finally revise a dispute board decision. The selected ICC Awards concern the 1999 FIDIC Conditions of Contract or older editions, as no awards concerning the 2017 edition have been published and were hence not available. It should be stressed that it has not been possible to review all ICC Awards related to the topic exhaustively. The selected awards only present a fraction of all ICC Awards on the topic. Therefore, the analysis on the selected arbitration practice by no means produces statistically reliable results, but the purpose is to discuss selected cases by way of example in order to describe the approaches adopted by some arbitral tribunals. The evaluation of ICC practice will also include some observations as to how the 2017 edition of the FIDIC Conditions of Contract may answer to the obstacles identified in the selected ICC Awards, and whether the 2017 edition still remains unclear in some respects.

Finally, this thesis includes some critical notions by the author commenting on how both editions of the FIDIC Conditions of Contract manage to establish the link between dispute board determination and arbitration, and how the link could be further clarified.

[20] In this thesis, all references to the ICC Arbitration Rules refer to the Rules of Arbitration of the International Chamber of Commerce in force as of 1 March 2017, unless expressly specified otherwise.

To walk the reader briefly though the structure of this thesis, the text has been divided into three parts. The first part provides for a general introduction on dispute boards. To wrap up the general introduction, the first part ends with listing key benefits associated to the use of dispute boards. This is followed by the second part, which starts by explaining why it is important that dispute board determination is connected to arbitration and thereby attached to the international legal framework of enforcing arbitral awards. Then we will move on comparing the different routes leading to arbitration after obtaining a dispute board decision pursuant to 1999 and 2017 editions of the FIDIC Conditions of Contract. The third part will discuss the selected ICC practice on enforcement of dispute board decisions and revision of dispute board decisions consecutively.

To close the discussion, some critical notions will be presented commenting on how both editions of the FIDIC Conditions of Contract manage to establish a link between dispute board determination and arbitration. The findings will also be mirrored with the decisions adopted in the selected ICC Awards. In the end, some proposals will be made on how this link could be further clarified.

PART I

1 DISPUTE BOARDS AS A DISPUTE RESOLUTION TOOL

Dispute boards are dispute resolution panels providing methods of early dispute avoidance and standing (and sometimes also ad hoc) dispute determination services. They are typically used in sectors prone to mistakes (and hence also to disputes) such as construction industry[21]. The key benefit associated to the use of dispute boards is the continuation of the project during any dispute board proceedings. The Dispute boards have the power to issue interim binding decisions that can be later challenged in arbitration or in litigation. Such '*pay now, argue later'* approach safeguards the vital cashflow in construction industry.

Dispute boards are set up in relation to a particular project to support its completion, with a particular function to avoid any conflicts that may arise during the project phase. This dispute resolution type has evolved from the role of the engineer as decision maker in the first instance under various standard forms of construction contracts.[22] A dispute board can consist of one or more members, the default number of dispute board members being often three. The dispute board members can be any experts in the field, and the members usually include lawyers and engineers. The modern dispute board rules constitute a flexible role for the dispute boards to both actively avoid any conflict or dispute from arising and determine any disputes that may arise during the project. Dispute boards may sometimes be appointed only when a dispute has arisen, but the tendency in the modern dispute board rules seems to be to favor 'standing' dispute boards. Standing dispute boards are appointed already in the infancy of a project and their term is valid for the whole duration of the construction project.

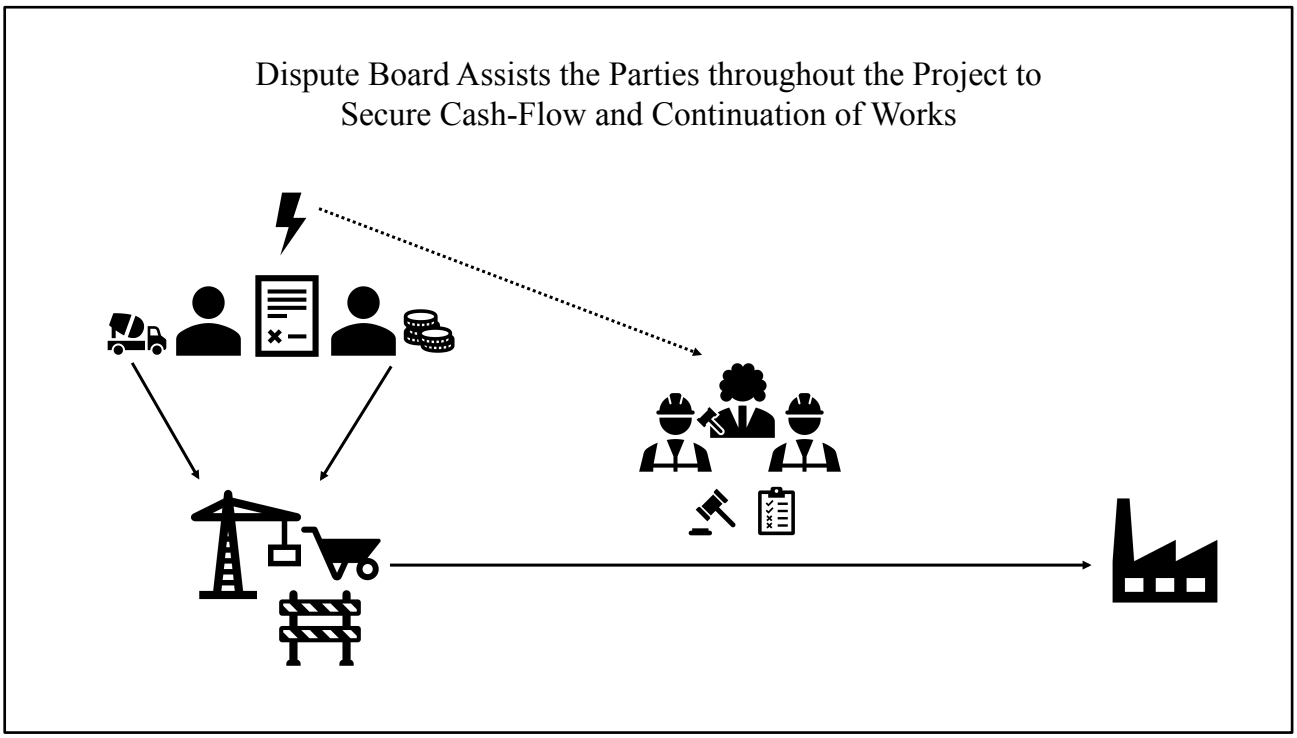
The dispute boards participate actively in the completion of the project by arranging site visits and meetings. Many dispute board rules grant dispute boards the power to tailor the dispute determination process as they deem fit, including e.g. rules on taking of evidence or arranging hearings. Further, the ICC Dispute Board Rules and FIDIC Conditions of Contract allow the dispute boards to order interim or conservatory measures for the parties. In some cases, the dispute board proceedings may start to resemble 'mini-arbitrations' if the dispute boards decide to adopt very complex procedural rules in

[21] Regjo 2020, 32.
[22] Jenkins 2013, 58.

their proceedings. On the other hand, it has been argued that the availability of interim or conservatory measures for the dispute boards might aid the process of enforceability of their decisions.[23]

The dispute boards may assist in conflict avoidance as well as in dispute determination. The dispute boards can be asked to assist informally with any issues or disagreements at any time during the project, or under some rules the dispute boards may even seek to avoid conflicts of their own motion. The parties may agree that the board's determination has only a non-binding recommendatory effect. In contrast, the parties may also agree that the decision be binding on the parties on contractual basis. In such case, the 'losing party' would be in breach of a contract if it fails to comply with the dispute board's binding decision. Further, many dispute board rules provide a system, where the determination becomes both final and binding if no notice of dissatisfaction is issued within a usually short time limit of approximately one month. Furthermore, most dispute board rules provide that the parties may refer the dispute to be finally resolved in arbitration or by a competent court. Also a failure to comply with a dispute board's determination may be directly referable to arbitration, or a competent court for enforcement purposes. This is why the dispute board decisions are also called interim binding decisions. The picture below illustrates the use of dispute board proceedings in a nutshell.

Picture 1: Dispute Boards in a Nutshell



[23] Brown, David – Khokhar, Nabeel – Trett, Driver 2016.

2 RULES GOVERNING THE DISPUTE BOARD PROCEEDINGS

The rules governing dispute board proceedings are usually contractually established. Dispute boards have been described as a creature of contract.[24] Some jurisdictions provide also statutory adjudication as explained below. In case of contractually established dispute board proceedings, the parties usually adopt a set of standard dispute board rules and agree upon the details of the proceedings in a separate dispute board agreement together with the dispute board members, once they are constituted.

Many institutes providing commercial dispute resolution services have developed their dispute board rules.[25] Perhaps the most used set of dispute board rules are those of the International Federation of Consulting Engineers ("FIDIC").[26] Founded in 1913, FIDIC promotes and implements the consulting engineering industry's strategic goals on behalf of its member associations. The federation also publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.[27] FIDIC acronym stands for the French version of the name – *Féderation Internationale des Ingénieurs-Conseils*.

FIDIC has long been renowned for its standard forms of contract for use between employers and contractors on international construction projects. The first contract suite issued by the federation was the Employer/Contractor contracts issued in 1957.[28] In the early editions of FIDIC Conditions of Contract, any disputes had to be first referred to the engineer.[29] A form of dispute board was first time introduced in the dispute resolution clause in the FIDIC Conditions of Contract, when 1995 Conditions of Contract for Design-Build and Turnkey ("1995 Orange Book") included a DAB as new tier in the dispute resolution clause.[30]

[24] Klee 2015, 249.
[25] See e.g. American Arbitration Association's AAA Dispute Resolution Board Guide Specifications; International Federation of Consulting Engineers' FIDIC Conditions of Contract ("Rainbow Suite"); International Chamber of Commerce's ICC Dispute Board Rules; Institution of Civil Engineers' ICE Dispute Board Procedure; Chartered Institute of Arbitrators's CIArb Dispute Board Rules, and Centre for Effective Dispute Resolution's CEDR Model Project Mediation Protocol (non-exhaustive list).
[26] DRBF 2018, 18.
[27] FIDIC.
[28] Chern 2011, 40.
[29] *Ibid.*
[30] Scheffer da Silveira 2019, 269.

The Federation's most commonly used standard form of contract series is the so called 'Rainbow Suite' including Red, Yellow and Silver Books (contract on works designed by the employer, contract on works designed by the contractor, and turnkey contract). The Rainbow Suite has been revised several times, and most recently in 2017. Hence, a company may use several editions of the FIDIC Conditions of Contract in its business simultaneously depending on, when a project contract has been signed.

The dispute resolution provisions in Red Book, Yellow Book and Silver Book include almost identical wording and there is no need to make more detailed analysis of the dispute resolution clauses in each set of the FIDIC Conditions of Contract.[31] In this thesis, the citations of the FIDIC Conditions of Contract originate from the 1999 Red Book and 2017 Silver Book.

A key theme in the latest edition of the Rainbow Suite – with respect to dispute resolution issues – is the increased emphasis on dispute *avoidance*. Under the 2017 FIDIC Contracts, dispute boards are called Dispute Avoidance and Adjudication Boards ("DAAB"), whereas in 1999 edition the term is Dispute Adjudication Board ("DAB").[32] The 2017 FIDIC Conditions of Contract regulate the use of a Dispute Boards under Clause 21. The provisions under the new Clause 21 are based on the provisions set out in Clause 20 of the 1999 FIDIC Conditions of Contract, which have been further developed.

In this thesis, the focus will be only on 1999 and 2017 editions of the FIDIC Conditions of Contract. FIDIC Conditions of Contract have been chosen as they are the most preferred general contract terms used in at least 50% of all international construction projects globally.[33] Further, even if the parties would not have strictly adopted the full wording of FIDIC Conditions of Contract, parties' dispute resolution clauses often include similarities with the FIDIC Contracts' dispute resolution scheme.[34] Further, the existing case law and published ICC practice on the use of dispute boards are mainly focused on the application of the FIDIC Conditions of Contract.

[31] Scheffer da Silveira 2019, 269, see also FIDIC 2013.
[32] In this thesis, a generic term 'dispute board' has been selected to refer to a DAB under 1999 FIDIC Conditions of Contract, a DAAB under 2017 FIDIC Conditions of Contract as well as to any other dispute board established under other institutional dispute board rules or by virtue of parties' dispute board agreement.
[33] Scheffer da Silveira 2019, 267.
[34] *Ibid,* 268.

2.1 Dispute board agreement

Usually after the dispute board has been constituted, the parties and the dispute board members sign a dispute board agreement. In Engineering, Procurement and Construction ("EPC") or similar contracts, it is usually a tripartite agreement between the employer, contractor and the dispute board. In the dispute board agreement, the parties and the dispute board members agree amongst other issues on general obligations of the parties and dispute board members, confidentiality, dispute board members' independence and impartiality as well as their challenge, resignation of a dispute board member, fees of the dispute board members and their payment terms, duration and termination of the agreement, and indemnity and warranties issues. Many institutions also provide standard dispute board agreements.[35]

2.2 Statutory adjudication

What is noteworthy is that in some jurisdictions the parties have a statutory right to refer their dispute to a dispute board. In the UK, Section 108 of Part II of the Housing Grants, Construction and Regeneration Act 1996 provides for such right for parties in a construction contracts carried out in England, Wales, and Scotland, and prescribes procedural rules for adjudication. As a result, even if parties have decided not to use adjudication for their project, if that project falls within the scope of Part II of the UK Construction Act 1996, they may nevertheless have adjudication imposed on them in respect of certain types of dispute.[36] The statutory adjudication process is extremely fast: the adjudicator must reach his decision within 28 days, unless both parties agree to extend the time limit after the dispute has been referred or the claimant agrees to an extension of 14 days. The decision from an adjudicator is enforceable by the courts save for in limited circumstances. The decisions by the adjudicators are interim binding, which means that they are binding until the dispute is finally determined by legal proceedings, arbitration or by agreement.[37] Further, statutory adjudication exists also in Hungary and a number of the Australian states (not necessarily an exhaustive list).[38]

[35] See for instance model dispute board agreements provided by FIDIC, ICC, and AAA.
[36] Chern 2011, 42.
[37] *Ibid*, 43-44.
[38] Klee 2015, 256-264

3 THE USE OF DISPUTE BOARDS COMES WITH MANY BENEFITS

3.1 Early Appointment of the Dispute Board

Dispute Boards can be either standing or ad hoc panels. Many institutional dispute board rules, including ICC Dispute Board Rules and FIDIC Conditions of Contract, now provide that a standing dispute board must be appointed within a short time limit (usually within a month) after the parties have reached an agreement on the contract.[39] The process of jointly establishing a standing dispute board might itself mitigate conflicts. Further, in case a disagreement between the parties arises, the disagreement can be directly referred to the standing dispute board. Hence, the parties do not need to participate in a time-consuming appointment process (like in arbitration) when the conflict has already escalated. The parties are arguably in a better position to jointly agree on the suitable dispute board members in the infancy of a construction project when no dispute has arisen yet. In arbitration, parties also have the autonomy to appoint the arbitral tribunal. Yet, the arbitrators are usually appointed only when the request for arbitration is being filed. The parties often fail to jointly appoint an arbitrator, and the appointment process is assigned to an arbitration institute. In court proceedings, the parties do not have the power to influence the selection of a judge.

3.2 Site Visits and Meetings

The dispute board members are usually required to keep themselves regularly informed of the progress of the project, for example by reading progress reports and other materials provided jointly by the parties and arranging regular site visits or meetings (e.g. every three months).

3.3 Dispute Avoidance

Depending on the applicable dispute board rules, some dispute boards may also informally assist the parties to avoid or resolve any issues or disagreements. This is true in 2017 FIDIC Conditions of Contract, which allow the dispute board to informally assist the parties in discussing and resolving an issue between them.[40] Yet, under the 2017 FIDIC Conditions of Contract such informal dispute avoidance services must be jointly requested by the parties in writing. The dispute board may also propose such request for the parties out of its own motion. However, the final decision whether or not to make such request rests with the parties. Finally, it should also be noted that a party alone

[39] Sub-Clause 21.1 of 2017 FIDIC Conditions of Contract and Article 7 of ICC Dispute Board Rules.
[40] Sub-Clause 21.3 of 2017 FIDIC Conditions of Contract.

cannot make a request for dispute avoidance under 2017 FIDIC Contracts. Furthermore, parties are not bound to act on any advice given during informal dispute avoidance meeting. Nor are the dispute board members bound by their views or advice expressed during such informal session in any future dispute resolution process.

3.4 Continuation of the Project

The idea behind obtaining recommendations or interim binding decisions from the dispute board during the project phase is to ensure the smooth continuation of the construction work. FIDIC Conditions of Contract explicitly stipulate that parties must continue to perform their contractual obligations after a dispute has been referred to a dispute board.[41] FIDIC Conditions of Contract provide that parties may refer a failure to comply with the DB's decision directly to arbitration for the enforcement of the decision.[42] Such 'pay now, argue later' approach safeguards the vital cashflow in construction industry.

3.5 Interim Binding Decision

If a dispute arises between the parties, either party may refer the dispute to the dispute board for its decision. ICC Dispute Board Rules for instance provide that parties may either agree that the Dispute Board may issue non-binding recommendations, binding decisions, or both.[43] FIDIC Conditions of Contract stipulate that the dispute board decisions have a binding nature.[44] Further, the FIDIC Contracts provide a system, where the determination becomes final and binding if no Notice of Dissatisfaction is served within a time limit of approximately one month.[45] Dispute boards may order interim or conservatory measures for the parties under ICC Dispute Board Rules and FIDIC Contracts.[46] It is noteworthy that the decisions, recommendations or any other orders or measures issued by the dispute board are merely contractually binding on the parties. There is no international regime for the enforcement of dispute board decisions similar to the international legal framework on the recognition and enforcement of arbitral awards.

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[41] Sub-clause 21.4.2 of 2017 FIDIC Conditions of Contract.

[42] Sub-Clause 21.7 of 2017 FIDIC Conditions of Contract.

[43] Articles 4(2), 5(2) and 6(1) of the ICC Dispute Board Rules.

[44] Sub-Clause 20.4.4 of 1999 edition and Sub-Clause 21.4.3 of 2017 FIDIC Conditions of Contract.

[45] Sub-Clause 20.4.7 of 1999 edition and Sub-Clause 21.4.4 of 2017 FIDIC Conditions of Contract.

[46] Article 25(1) of the ICC Dispute Board Rules, and Rule 8(g) of the 1999 edition and Rule 5.1(j) of the 2017 edition of the DAB/DAAB Procedural Rules under FIDIC Conditions of Contract.

3.6 Speediness

Dispute board rules include time limits to speed up the process. Below you may find the most crucial default time limits under the FIDIC Conditions of Contract. The rules also provide default provisions in case the parties or the dispute board fails to fulfil their obligations within the set time limits (e.g. an appointing entity may act on behalf of the parties).

1999 FIDIC Conditions of Contract	2017 FIDIC Conditions of Contract
- Obtaining a DAB decision: 84 days - Period for serving NOD: 28 days - Amicable settlement period: 56 days	- Obtaining a DAAB decision: 84 days - Period for serving a NOD: 28 days - Amicable settlement period: 28 days

On the other hand, when dispute boards are required to provide decisions or recommendations within a relatively short period of time, the panel may not be able to conduct very detailed analysis of all the issues that the parties consider to be relevant to their dispute. Furthermore, the procedural aspects for issuing a dispute board decision must be adjusted to the short time frame.

3.7 Neutrality

FIDIC Conditions of Contract impose a strict requirement of impartiality and independence for the dispute board members.[47] The members must disclose in writing any such circumstances that might cause reasonable doubt as to their impartiality or independence. Even if the dispute board members remain independent and impartial from the parties, it can be challenging for the panel to approach each fresh dispute with an entirely fresh view in light of the information received in previous disputes during the project.

3.8 Cost Efficiency

The costs associated to dispute board proceedings can include a monthly management fee, daily fee for meetings and site visits, travel costs and other expenses of the dispute board members as well as

[47] Clause 4 of the model General Conditions of DAB/DAAB Agreement annexed to 1999 and 2017 editions of FIDIC Conditions of Contract.

appointing or administrative expenses of any institution involved in the proceedings. The dispute board's fees are usually agreed upon between the parties and the dispute board members.[48]

In practice, it has been reported that the costs of a typical dispute board amounts to 0.1-0.25% of the total construction costs of a project. It is noteworthy that it seems that the costs are about the same despite the size of the project, which indicates that dispute boards are more cost effective on larger projects.[49] Further, statistics show that in most cases a dispute board will prevent conflicts from resorting to further dispute resolution methods.[50] In such case, the parties must only bear the costs associated to the dispute board. When successful, the use of dispute boards will not only affect the dispute management costs but the project costs in total. Dispute boards are proven to reduce delays and cost overruns.[51] The costs of using dispute boards are criticized for the fact that a standing dispute board will charge its monthly fees even if no disputes are referred for its conclusion. Further, large construction projects might require dispute boards of three or more members (to have both legal and technical expertise in the panel), which also increases the costs. Finally, in order to find sufficiently experienced and neutral dispute board members, the parties may have to consider recruiting members from abroad, which also translates into additional traveling and accommodation expenses. In order to manage the costs, it has been proposed to agree to use a 1+1 model for the appointment of dispute board members. In such model, only one standing dispute board member (for instance a mediation-friendly lawyer) would be appointed at the outset of the proceedings, and when a dispute crystallises and in case the sole dispute board member cannot solve the dispute, more dispute board members can be added to the panel (for instance to include technical expertise to the panel).[52]

3.9 Expert Determination

Parties are free to select dispute board members with appropriate skills, technical expertise and experience for the project in question. The dispute board decisions or recommendations are often made by technically qualified people who will understand and be familiar with the particular dispute. It should be noted that it can sometimes be difficult to find suitably qualified and available people to act as dispute board members. The FIDIC Conditions of Contract provide that in case the parties fail to appoint the dispute board members, the appointing entity (FIDIC Conditions of Contract do not

[48] It should be noted that some institutional rules provide the option that the institute fix the dispute board's fees. This is the case e.g. with ICC Dispute Board Rules (see Article 28(4).
[49] Armes 2015, 10.
[50] DRBF 2017.
[51] Armes 2015, 13.
[52] Wietzorek – Stubbe 2011, 332.

specify the entity, but FIDIC also maintains the FIDIC President's List and appoints DB members by request) will appoint the dispute board members.[53] Further, given the expertise of the dispute board members, the determination by the dispute board may sometimes be more technical than legal of its nature. Also, the dispute board members with technical expertise might not be best suited to deciding mixed questions of fact and law. However, these considerations are mitigated by the fact that the dispute board's decisions or recommendations may be later revised by an arbitral tribunal or a competent court.

[53] Sub-Clause 20.3 of 1999 edition and 21.2 of 2017 FIDIC Conditions of Contract.

PART II

4 DISPUTE BOARD DECISIONS AND THEIR CONNECTION TO THE INTERNATIONAL LEGAL FRAMEWORK OF ENFORCING ARBITRAL AWARDS

The purpose of this essay is to understand how clear the link is between dispute board determination and subsequent arbitration pursuant to the FIDIC Conditions of Contract, and how this link works in practice. What should be emphasized however, is that arbitration will only be needed when one (or more) party does not accept the dispute board's determination.[54] Hence, arbitration as a last tier in the parties' dispute resolution clause provides a safety net for the parties, in case dispute board proceedings fail.

The reason, why the recourse to arbitration can be seen as important safety net in the dispute board proceedings, is the international recognition and enforcement of arbitral awards. In contrast to arbitration, there is usually no statutory regulation on dispute board proceedings. As an exception, at least some Latin American countries such as Chile and Peru are reported to have legislation concerning the use of dispute boards.[55] Further, in the UK, certain disputes must be referred to statutory adjudication as has been described above. However, often the only rules governing the dispute board proceedings are the parties' contract terms and the terms of the Dispute Board Agreement.[56] In other words, the parties are contractually obliged to participate in the dispute board proceedings, and consequently comply with a binding dispute board decision. As Jenkins has noted, the effect of a dispute board decision will be governed by the relevant contract, i.e. typically the construction contract or separate dispute board agreement.[57]

Further, there is no international legal instrument governing the dispute board decisions. When it comes to arbitration proceedings, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in 10 June 1958 ("New York Convention") establishes a common legal framework for the recognition and enforcement of foreign arbitral awards. Also, in case of mediation proceedings, as a result of the European Union Directive of 21 May 2008 on certain aspects of mediation on civil and commercial matters, many EU countries have enacted legislation to ensure that mediated settlement agreements can be recognised and enforced from one Member State to

[54] Chern 2010, 7.
[55] De Ly – Gélinas 2017, 120; Figueroa 2017, 164-165.
[56] De Ly – Gélinas 2017, 120.
[57] Jenkins 2013, 115.

another as if they were court judgments or orders and provide for a mediated settlement enforcement orders. In contrast to arbitration and mediation, in dispute board proceedings the parties cannot be sure that a dispute board decision be recognised or enforced as such before national courts.

4.1 The selected terminology to describe the recourse to arbitration

In dispute board proceedings, the 'second instance' for the proceedings is arbitration. This structure in the proceedings links the contractually binding dispute board proceedings to an internationally recognised dispute resolution system. Under both 1999 and 2017 editions of the FIDIC Conditions of Contract, in simple terms a party may recourse to arbitration if:

a) a party fails to comply with a dispute board decision;
b) a party wishes to finally revise a dispute board decision; and
c) no dispute board is in place.

This essay focuses on the routes to arbitration after obtaining a dispute board decision, and therefore the scenario (c) above has been omitted from this analysis. In the scenario (a), this essay will adopt the term *enforcement* to describe the process of requesting an arbitral tribunal to order compliance with the contractually binding dispute board decision.[58] In other terms, the term *enforcement* in this context refers to confirming the binding effect of a dispute board decision by way of an arbitral award or other appropriate measure adopted by the arbitral tribunal. It should be emphasised that by enforcement in scenario a), I mean the link between the contractually binding dispute board decision and the arbitral tribunal's decision, which transforms the dispute board decision into an internationally enforceable arbitral award. In the enforcement process of scenario a), the tribunal will not look into the merits of the dispute board decision, but merely investigates, whether the dispute board decision has become binding (and sometimes also final) on the parties. As will be described more in detail in Chapter 5, according to the 1999 edition of the FIDIC Conditions of Contract, merely binding dispute board decisions may not be enforceable in arbitration without reviewing their merits. If such interpretation is maintained, only dispute board decisions, which have become final since no party has filed a notice of dissatisfaction, would be directly enforceable in arbitration. In the 2017

[58] The term enforcement has been also used e.g. by the Singapore High Court (par. 66), when describing the powers granted for arbitral tribunals under Sub-Clause 20.7 of the 1999 FIDIC Conditions of Contract. Further, many authors have adopted the term to describe the process by the arbitral tribunals to order (interim) compliance with a binding or binding and final dispute board decision without reviewing its merits (see e.g. Bunni, Chern, and Seppälä, and Tweeddale).

edition, the enforcement of binding dispute board decisions has been allowed subject to the express reservation that the rights of the parties as to the merits of the dispute are reserved until they are finally resolved in arbitration (in the scenario (b)). Therefore, when discussing the enforcement of merely binding dispute board decisions, I may also use the term *interim enforcement* in this thesis.

In the scenario (b) the term *enforcement* would not be appropriate. Under the FIDIC Conditions of Contract, a party dissatisfied with the dispute board decision can refer the whole dispute to arbitration and request that the arbitral tribunal opens up, reviews and finally revises the merits of the decision. This option is only available for dispute board decisions, which have not become final, i.e. to which no party has filed a notice of dissatisfaction. The arbitration proceedings are another way to finally conclude the dispute in addition to obtaining a final and binding dispute board decision. Therefore, when talking about the recourse to arbitration as in scenario (b), we shall use the term *final revision in arbitration*.

4.2 Recognition and Enforcement of Arbitral Awards

But how should the arbitral tribunals treat the dispute board decisions? In particular, can they be ensured that their award confirming interim binding effect for a dispute board decision is in fact enforceable before national courts? When rendering an award, the tribunal should at least avoid giving awards, which may be set aside pursuant to Article V of the New York Convention.

The scope of the New York Condition has been defined in broad terms under Article I (1):

> *"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."*

From this broad definition, two issues require closer scrutiny when discussing the enforcement of dispute board decisions: the definitions '*arbitral award'* and '*difference between persons'.* Do decisions by the arbitral tribunals enforcing dispute board decisions with interim effect classify as 'arbitral awards' in the meaning of the New York Convention, and are such decisions arising out of a 'difference between the parties' as required by the convention?

4.2.1 Which decisions by the arbitral tribunals classify as 'Arbitral Awards'?

Pursuant to a Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards prepared by Professor Emmanuel Gaillard and Professor George Bergmann in 2016[59] ("New York Convention Guide"), the Convention does not define *arbitral awards*.[60] The travaux préparatoires suggest that it is up to the courts of the Contracting States, where recognition and enforcement is sought, to determine when a decision can be characterised as an "arbitral award" under the New York Convention.[61] However, sometimes in case law, a broad definition has been interpreted to be construed in accordance with the spirit of the New York Convention.[62] Further, the nature and content of the award has been seen as a more determining factor than the label given to it by the arbitral tribunals.[63] Courts have further concluded that only those decisions made by arbitrators that determine all or some aspects of the dispute in a final and binding manner, can be considered "arbitral awards" within the meaning of the New York Convention.[64] In other words, in order for a decision to be defined as an 'arbitral award' within the meaning of the New York Convention, it must be 1) made by arbitrators, 2) resolve a dispute or part thereof in a final manner, and 3) be binding.

There seems to be broad agreement that decisions rendered in valuation and expert determination proceedings are not "awards made by arbitrators" and cannot therefore be recognized and enforced under the New York Convention.[65] Dispute board determination would very likely be classified as expert determination proceedings, and therefore the dispute board decision as such is not an arbitral award in the meaning of the New York Convention. However, when an arbitral tribunal orders compliance with a dispute board decision by rendering an award, such award would in fact be given by the arbitrators.

When it comes to the finality of the award, the courts have held that the award must "finally and definitely dispose of a separate independent claim"[66]. Further, the "finality" requirement was interpreted to mean that awards are final "not because they put an end to the arbitration or to the tribunal's function, but because they settle in a final manner some of the disputes that have been

[59] UNCITRAL 2016.
[60] *Ibid*, par 18.
[61] Travaux préparatoires, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, p. 10.
[62] UNCITRAL 2016, par. 19.
[63] *Ibid*, par 20.
[64] UNCITRAL 2016, par 21.
[65] *Ibid,* par 22.
[66] *Ibid,* par 23.

submitted to arbitration"[67]. This condition is arguably problematic, when it comes to binding but not final dispute board decisions. When the tribunal enforces binding dispute board decisions, they have only power to order compliance with the decision subject to the reservation that the dispute board decision can be finally revised in arbitration. We can ask, is such an award ordering interim compliance with the dispute board's determination final in the meaning of the New York Convention? On one hand, it could be argued that when ordering interim compliance with the dispute board decision, the arbitral tribunal decides with a final effect that the party failing to comply with the binding dispute board decision has been in breach of the contract. This failure would constitute a separate issue from the underlying dispute board decision. The arbitral tribunal, hence, finally resolves the party's failure to comply with a dispute board decision, without opening its merits. On the other hand, some could argue that the failure to comply with a dispute board decision is so closely connected with the underlying dispute subject to the dispute board's determination that the tribunal could not decide about the failure without to comply with the dispute board decision without reviewing its merits.

The third condition, binding award, has been interpreted to mean that the award is not subject to appeal before other arbitral tribunals or national courts. A French court, for instance, refused to enforce an award on the ground that it was not binding because one of the parties was seeking review of the award before another arbitral tribunal.[68] The requirement of a binding award is also problematic in case of awards ordering interim compliance with binding dispute board decisions. As a dispute board decision, which has been enforced though an arbitral award with an interim effect, can be later submitted to a subsequent arbitration, the binding nature of the first arbitral award becomes questionable. Yet, again it could be argued that the award ordering interim compliance with a dispute board decision decides an issue on the contract breach (i.e. non-compliance with a binding dispute board determination) finally, whereas the underlying dispute subject to the dispute board decision can be later challenged in subsequent arbitration.

4.2.2 Which disputes classify as 'difference between the parties'?

Another condition for an enforceable award under the New York Convention is that the award arises out of a *difference between the parties*. Unfortunately, pursuant to the New York Convention Guide, this definition has not been addressed often in case law. What seems to be clear is that the term

[67] UNCITRAL 2016, par. 23.
[68] *Ibid,* par 24.

difference refers to a dispute.[69] In dispute board proceedings, the dispute subject to arbitration can arise out of multiple reasons. Arbitration proceedings may be commenced under FIDIC Conditions of Contract 1) due to a party's failure to comply with a dispute board decision (in case of merely binding dispute board decisions this may not be possible pursuant to 1999 FIDIC Conditions of Contract), 2) when a party is dissatisfied with the dispute board's determination and a valid Notice of Dissatisfaction has been filed, or 3) when no valid dispute board is in place. Someone could argue that an arbitral tribunal enforcing a dispute board decision without reviewing its merits is not rendering an award arising out of the dispute between the parties. This is because the underlying dispute, which was referred to a dispute board, has not been reviewed by the tribunal, but it has merely enforced the dispute board's decision. In a way, the arbitration is commenced due to procedural reasons (i.e. non-compliance with the dispute board decision), and is not directly arising from the underlying dispute between the parties. However, as the parties have entered into FIDIC Conditions of Contract, parties have agreed that certain scenarios occurring during the performance of their contractual obligations, including non-compliance with a dispute board decision, constitute a dispute directly referable to arbitration. The non-compliance with a dispute board decision would therefore constitute a breach of a contract, which *per se* could be seen as a dispute or *difference between the parties*.

4.2.3 Grounds for refusing the recognition and enforcement

Further, in addition to the general scope of the New York Convention described above, the convention includes particular conditions, which must be present in order to refuse the recognition and enforcement of an arbitral award. Perhaps most relevantly, Article V (1)(c) of the New York Convention provides that the recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party furnishes proof that:

> *"(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;"*

[69] UNCITRAL 2016, par 64.

The provision suggests that if the arbitral tribunal has exceeded the scope of its powers by deciding issues falling outside the tribunal's jurisdiction, such decision by the tribunal could not be recognized or enforced.

In the same vein, the Model Law on International Commercial Arbitration (1985) ("UNCITRAL Model Law") includes an almost identical ground for setting aside an arbitral award pursuant to Article 34(2)(a)(iii). Given that 80 states (in a total of 111 jurisdictions) have adopted legislation based on the UNCITRAL Model Law[70], this ground for setting aside an arbitral award exists in almost half of the world's jurisdictions and probably also the other jurisdictions, which have not adopted the UNCITRAL Model Law, may include similar provisions in their arbitration legislation. This is the case, for example, in Finland[71].

These provisions could be used to argue that the arbitral tribunal would not have jurisdiction to enforce a dispute board decision, as the non-compliance with the dispute board decision would be a separate, *new dispute* from the dispute submitted to the dispute board. Since the parties have agreed the dispute board to be a mandatory tier in their dispute resolution clause, the 'new' dispute concerning the breach of the parties' contract to give immediate effect to dispute board's decision should also be first submitted to the dispute board. This line of argumentation presents the so called two disputes -approach, which is sometimes adopted to argue that the enforcement of non-final dispute board decisions would not be possible pursuant to 1999 FIDIC Conditions of Contract. This issue will be addressed in more detail in the next Chapter 5, which amongst other things explains the *Persero* cases issued in Singapore, where the two disputes -approach was discussed in detail.

[70] UNCITRAL.
[71] See Section 41.1 (1) of the Finnish Arbitration Act (967/1992).

5 DIFFERENT ROUTES TO ARBITRATION AFTER OBTAINING A DISPUTE BOARD DECISION UNDER FIDIC CONDITIONS OF CONTRACT

This chapter will explain, which routes are available for a party seeking recourse to arbitration after obtaining a dispute board decision pursuant to the FIDIC Conditions of Contract. We will analyse, whether the link between dispute board determination and subsequent recourse to arbitration has been clarified under 2017 FIDIC Conditions of Contract compared to the 1999 edition. The expressed criticism on the difficulties related to enforcement of non-final dispute board decisions pursuant to the 1999 FIDIC Conditions of Contract will be on spotlight.

For the sake of good order, it must be noted that FIDIC Conditions of Contract also provide that a party may recourse to arbitration if no dispute board is in place.[72] This may be the situation e.g. if the parties have failed to constitute the dispute board, or when the dispute board's term has expired. Yet, this route to arbitration under FIDIC Conditions of Contract will not be examined more in detail, as the scope of this essay is in routes to arbitration after obtaining a dispute board decision.

In order to understand the different routes to arbitration available under FIDIC Conditions of Contract, the difference between (merely) binding and binding and final dispute board decisions must first be stressed. The finality of a dispute board decision is connected to the system of filing a notice of dissatisfaction (hereinafter also a "NOD"), which will be explained first. Then the different "routes"[73] to arbitration under the 1999 FIDIC Conditions of Contract and subsequent changes made to the 2017 FIDIC Conditions of Contract will be analysed and compared.

5.1 The Effects of a Notice of Dissatisfaction

Before going into details, the concepts of a *binding* or a *binding and final* dispute board decision should be briefly explained. A (merely) binding decision means a dispute board decision, which is *contractually* binding on the parties. In other words, by agreeing to the terms of the FIDIC Conditions of Contract, the parties agree to comply with the decisions issued by the dispute board. Yet, the dispute board does not have the power to order enforcement of its binding decision. The decision is immediately binding after it has been issued and continues to be contractually binding on the parties, even if a party serves a NOD. As will be described below, a party can seek interim enforcement of a

[72] Sub-Clause 20.8 *Expiry of Dispute Adjudication Board's Appointment* of the 1999 FIDIC Conditions of Contract, and Sub-Clause 21.8 *No DAAB In Place* of the 2017 FIDIC Conditions of Contract.
[73] The term '*route'* was also used by Mr. Dedezade, see Dedezade 2012, 146.

binding dispute board decision from an arbitral tribunal, which, depending on the edition of the applicable FIDIC Conditions of Contract, can be more or less willing to enforce such interim decision. A party may also seek final revision of a binding dispute board decision as long as a NOD has been served.

A binding and final dispute board decision refers to a decision by the dispute board, to which neither party has filed a NOD. Such final and binding decision may not be revised in arbitration. In case of a failure to comply with a final and binding dispute board decision, both versions of FIDIC Conditions of Contract clearly provide an enforcement mechanism through arbitral proceedings as will be explained below.

As has been already briefly noted above, FIDIC Conditions of Contract include a system of a notice of dissatisfaction. The filing of a NOD prevents a dispute board decision from becoming final in case a party expresses its dissatisfaction with the decision. Unless a party files a NOD in accordance with the FIDIC Conditions of Contract, the dispute board's determination becomes final and binding, meaning that the parties may not refer the decision to arbitration and request that the arbitral tribunal revises the merits of the decision. Final and binding dispute board decisions are hence directly enforceable in arbitration proceedings without reviewing their merits.

According to Sub-Clause 20.4 *Obtaining Dispute Adjudication Board's Decision* of the 1999 FIDIC Conditions of Contract:

> "*(...) If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.*
>
> *In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's*

Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

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 final and binding upon both Parties." (emphasis added)

Also, according to Sub-Clause 21.4.4 *Dissatisfaction with DAAB's decision* of the 2017 FIDIC Conditions of Contract:

"*If either Party is dissatisfied with the DAAB's decision:*

a) *such Party may give a NOD to the other Party, with a copy to the DAAB;*
b) *this NOD shall state that it is a "Notice of Dissatisfaction with the DAAB's decision" and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and*
c) *this NOD shall be given within 28 days after receiving the DAAB's decision.*

If the DAAB fails to give its decision within the period stated in Sub-Clause 21.4.3 [The DAAB's decision], then either Party may, within 28 days after this period has expired, give a NOD to the other Party in accordance with sub-paragraphs (a) and (b) above.

Except as stated in the last paragraph of Sub-Clause 3.5.5 [Dissatisfaction with Employer's Representative's determination], in Sub-Clause 21.7 [Failure to comply with DAAB's Decision] and in Sub-Clause 21.8 [No DAAB In Place], neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

If the DAAB has given its decision as to a matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DAAB's decision, then the decision shall become final and binding on both Parties.

If the dissatisfied Party is dissatisfied with only part(s) of the DAAB's decision:

i) this part(s) shall be clearly identified in the NOD;

ii) this part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and

iii) the remainder of the decision shall become final and binding on both Parties as if the NOD had not been given." (emphasis added)

Both versions of the FIDIC conditions of Contract treat dispute board decisions, to which no timely NOD has been filed, as final and binding. The time period for filing a NOD is 28 days from the receipt of the dispute board's decision. In order for a party to preserve its right to challenge the dispute board's determination in further arbitration proceedings, it is therefore essential that the party files a timely NOD.

Further, the NOD must meet other criteria stipulated in the FIDIC Conditions of Contract in order to constitute the effect that it prevents a dispute board decision from becoming final. The 1999 FIDIC Conditions of Contract stipulate that the NOD should state that it is given under the Sub-Clause 20.4, and it should also set out the matter in dispute and the reason(s) for dissatisfaction. As will become apparent in the review of ICC case law on the enforcement of dispute board decisions, this rather broadly formulated criteria for a NOD has been subject to interpretation in practice.

In the 2017 version of the FIDIC Conditions of Contract, the required contents for a NOD have been specified to some extent. Sub-Clause 21.4.4 requires that the NOD must expressly state that it is a "Notice of Dissatisfaction with the DAAB's decision", and shall set out the matter in Dispute and the reason(s) for dissatisfaction as is also required under 1999 FIDIC Conditions of Contract. Further, the 2017 version also takes into account the scenario that a party may be dissatisfied with only part(s) of the DAAB decision. The 2017 FIDIC Conditions of Contract stipulate that in such case, the part of the DAAB decision, with which a party is dissatisfied, must be clearly identified in the NOD. Further, such part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, are deemed to be severable from the remainder of the decision. The remainder of the decision hence becomes final and binding as if the NOD had not been given. This allows the "chopping" of the dispute board decision into several parts in its enforcement phase. When the dispute board's decision can be challenged also only partially, the scope of the remaining dispute after the dispute board's determination can be efficiently narrowed down at early stage.

If no NOD has been filed, both versions of the FIDIC Conditions of Contract treat final and binding dispute board decisions as directly enforceable in arbitration. In other words (and as will be explained in more detail below) parties may refer a failure to comply with a final and binding dispute board decision to arbitration. It must be stressed that if no NOD has been filed, no party may refer the merits of the dispute board decision to arbitration. One could think that in a way the FIDIC Conditions of Contract treat a failure to comply with a final and binding dispute board decision as a type of contract breach, which constitutes a dispute referable to arbitration. Both editions of FIDIC Conditions of Contract include this possibility.

When a NOD has been filed (i.e. the decision remains binding but not final), the 1999 version and the 2017 FIDIC Conditions of Contract include different wording suggesting ambiguities, when it comes to a party's right to request that an arbitral tribunal order interim compliance with such binding but not final decision. These differences between the wording of 1999 and 2017 FIDIC Conditions of Contract will be further elaborated below.

The filing of a NOD has also another effect: the dispute board decision may be referred to arbitration for final revision of its merits. In this regard, the two editions of the FIDIC Conditions also include some differences concerning the NOD's effect for the revision of the dispute board decision. The 2017 edition is a bit more detailed by explicitly allowing dispute board decisions to be only partially challenged by a NOD. The 1999 edition may leave the parties with more ambiguity as to the scope of the NOD. In case a party has filed a NOD with respect to only one issue related to the DAB decision, the whole DAB decision could be requested to be revised in arbitration, even if none of the parties has expressed dissatisfaction to all aspect of that decision. The arbitral tribunal may have to deal with questions of jurisdiction, if a party decides to claim that the matter or a part of the matters referred to arbitration have already been finally determined by the dispute board, and no party has expressed dissatisfaction to that matter in particular. The 1999 FIDIC Conditions of Contract could facilitate an interpretation, according to which only the *matters*, which have been mentioned in the NOD, can be referred to arbitration, leaving the non-disputed matters of the DAB decision finally determined. On the other hand, if only part of the DAAB decision under the 2017 FIDIC Conditions of Contract can be subject to the NOD, the arbitral tribunal will be limited to only reviewing that part of the dispute, which has been subject to a NOD. They will have to take other aspects of the DAAB decision as granted. This means that the arbitral tribunal must base its decision on a dispute board's determination, which merits the tribunal can only review to limited extent.

5.2 Binding and Final Dispute Board Decisions

When no one has filed a NOD, the parties have lost their right to request that the dispute board decision be revised in arbitration. In other words, the dispute board decision has become final on the parties and the arbitral tribunal does not have power to open up the merits of the decision. The tribunal may only enforce such final decision by ordering the parties to comply with the decision.

Pursuant to Sub-Clause 20.7 *Failure to Comply with Dispute Adjudication Board's Decision* of the 1999 FIDIC Conditions of Contract:

> "*In the event that:*
>
> *a)* neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 *[Obtaining Dispute Adjudication Board's Decision],*
> *b)* *the DAB's related decision (if any) has become final and binding, and*
> *c)* *a Party fails to comply with this decision,*
>
> *then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration], Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.*"

Further, pursuant to Sub-Clause 21.7 *Failure to Comply with DAAB's Decision* of the 2017 FIDIC Conditions of Contract:

> "*In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration] shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision. (…)*

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief."

In the case of a failure to comply with a dispute board decision, which has become final and binding, both editions of the FIDIC Conditions of Contract provide that a party may seek immediate enforcement of such decision in arbitration. The party seeking the enforcement does not have to wait that the amicable settlement period has expired. Nor do the parties have to refer the failure itself to the DAB first. As will be explained in more detail below, the 2017 edition of the FIDIC Conditions of Contract also allow the immediate enforcement of merely binding decisions, whereas the express wording of 1999 FIDIC Conditions of Contract seem to suggest that such immediate enforcement is only possible in case of final dispute board decisions.

In 2017 FIDIC Conditions of Contract, the Sub-Clause 21.7 notes the different types of measures available for the arbitral tribunal, when enforcing dispute board decisions. The tribunal may order the enforcement by way of summary or other expedited procedure, an interim or provisional measure or an award, depending on the appropriate way under the applicable law. Further, the 2017 edition grants the tribunal the power to include an order or award of damages or other relief in its enforcement decision. The 1999 edition does not discuss the enforcement proceedings in such detail.

In light of the international case law on the enforcement of arbitral awards, the 2017 edition's provision stipulating that the enforcement of the dispute board decision may take the form of an interim or provisional measure may not be possible in all jurisdictions. Pursuant to the Guide on New York Convention, at least Bulgarian court has declined enforcement of a partial award requiring one party to pay certain sums to the other. The court reasoned that such provisional award was not enforceable under the New York Convention because it did not finally settle the dispute between the parties. The court added that the lack of finality was further demonstrated by the fact that the arbitration proceedings were still pending.[74] On the other hand, in many other jurisdictions the enforcement of provisional measures has not been refused.[75] Further, in legal literature, the enforceability of interim and partial awards has caused discussion.[76] Born has for instance emphasised that a partial award can well be binding and final with respect to a particular claim, and can dispose

[74] UNCITRAL 2016, par. 33, referring to *ECONERG Ltd. v. National Electricity Company AD.*
[75] UNCITRAL 2016, par. 33.
[76] Born 2014, 3620; Waincymer 2020, 1277.

of such claim from the remainder of the proceedings.[77] Following the same logic, it has been argued that also interim awards finally dispose of the request for such measures and judicial enforcement of such measures is important to the arbitral process.[78] Waincymer has instead argued that, in particular, the practice on enforcing interim awards is very varied, which can be partly due to the misleading term. He notes that sometimes the term 'interim award' is used synonymously with partial awards, sometimes it is used to deal with a decision dealing with a key issue leading up to the disposition of a claim without disposing of the claim itself and sometimes it may refer to decisions in relation to provisional measures. It is thus difficult in Waincymer's opinion to identify the proper status of interim awards, when the phrase is used in such distinct ways.[79]

Hence, the most secure way procedure-wise, would seem to be to request the enforcement of a dispute board decision through a final award. This observation applies to both binding and final and binding dispute board decisions. This is particularly the case, if the parties' contract is governed by the 1999 edition of the FIDIC Conditions of Contract, as the terms are silent on the form of the enforcement instrument. When it comes to the 2017 edition, the terms expressly mention that the enforcement can be executed through an interim or provisional measure, and that such measure may include an order or award of damages or other relief. The arbitral tribunal's jurisdiction is, hence, more clearly defined by the parties' contract terms. Even if the 2017 FIDIC Conditions of Contract deviate from the spirit of the New York Convention, when interpreted in a strictly orthodox manner, the national courts would probably find it difficult not to recognise and enforce such instrument, which respects the parties' contractual autonomy.

5.3 Binding Dispute Board Decisions

According to both 1999 and 2017 versions of the FIDIC Conditions of Contract, dispute board decisions are always binding on both Parties. This is a difference e.g. to the ICC Dispute Board Rules, which allow the Dispute Review Boards or Combined Dispute Boards to issue non-binding recommendations.[80] We will now look into the parties' options to recourse to arbitration in case of

[77] Born 2014, 3621.
[78] Born 2014, 2513.
[79] Waincymer 2012, 1277.

[80] It should however be noted that pursuant to Article 4(3) of the ICC Dispute Board Rules, if no party has given a written notice to the other party and the Dispute Review Board expressing its dissatisfaction with a recommendation within 30 days of receiving it, the recommendation becomes also final and binding on the parties. The Parties must comply without delay with such final and binding recommendation and agree not to contest that recommendation, unless such agreement is prohibited by applicable law. Further, pursuant to Article 4(4), if any party fails to comply with a binding and final

binding (but not final) dispute board decisions under the FIDIC Conditions of Contract. In order to link the following with what has been discussed above, in this chapter I refer to dispute board decisions, to which a notice of dissatisfaction has been filed. Hence, what is the legal basis to hold dispute board decisions as immediately binding after they have been rendered.

Pursuant to Sub-Clause 20.4.4 of the 1999 FIDIC Conditions of Contract:

> "*The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with Works in accordance with the Contract."* (emphasis added)

Further, pursuant to Sub-Clause 21.4.3 of the 2017 FIDIC Conditions of Contract:

> "*The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause*." (emphasis added)

Both versions of the FIDIC Conditions of Contract stipulate the immediate binding effect of dispute board decisions. The parties have, hence, contractually agreed on the binding effect of the decision inter partes. The wording of the terms seems to suggest that the binding decision obliges the parties to immediately comply with such decision. However, an essential feature of the dispute resolution scheme incorporated in the FIDIC Conditions of Contract is the possibility to revise the binding decision in arbitration. Therefore, a better term to describe the decision's effect would indeed be *interim binding*. The decision binds the parties, who are obliged to comply with the decision until it has been finally revised in arbitration.

Yet, the two editions of the FIDIC Conditions of Contract differ as to, how the parties can recourse to arbitration with regard to the binding dispute board decision they have obtained. In principle,

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recommendation, the other Party may refer the failure itself, without having to refer it to the Dispute Review Board first, either to arbitration or any court of competent jurisdiction.

parties may recourse to arbitration in two scenarios after obtaining a dispute board decision, which has not become final:

I. a party may request that the binding dispute board decision be finally revised in arbitration; and/or
II. a party may refer a failure to comply with a binding dispute board decision to arbitration, and request that the tribunal orders interim compliance with the decision without reviewing its merits (N.B. this option is not necessarily available under 1999 FIDIC Conditions according to case law).

It goes without saying that it is possible that parties go through both scenarios with respect to the same dispute board decision. A party, who would benefit from the dispute board decision may first seek enforcement of the interim binding decision, if the other party, who is dissatisfied with the decision and has filed a NOD, does not voluntarily comply with the decision. The dissatisfied party may simultaneously file a counterclaim and request that the decision be finally revised in arbitration. In such case, the arbitral tribunal may have to consider bifurcation of the proceeding. In the following chapter, we will consider both types of decisions, which an arbitral tribunal may be requested to decide, separately.

5.3.1 Requesting that a binding dispute board decision be finally revised in arbitration

The 2017 edition of the FIDIC Conditions of Contract does not significantly differ from the 1999 edition, when it comes to revision of binding dispute board decisions in arbitration.

Before any binding decision can be referred to arbitration, both editions of the FIDIC Conditions of Contract set an amicable settlement period for the parties to try to solve their dispute first amicably before advancing to the more complex procedural tool.

Pursuant to Sub-Clause 20.5 *Amicable Settlement* of the 1999 FIDIC Conditions of Contract:

> *"Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be*

commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made."

Further, pursuant to Sub-Clause 21.5 *Amicable Settlement* of the 2017 FIDIC Conditions of Contract:

"*Where a NOD has been given under Sub-Clause 21.4 [Obtaining DAAB's Decision], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eight (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.*"

The amicable settlement period starts to run from the date, when the NOD was given. In the 1999 edition of the FIDIC Conditions of Contract, the amicable settlement period is 56 days. In the 2017 edition, the period has been shortened to 28 days. The parties can contractually exclude the amicable settlement period form their dispute resolution clause.

After the amicable settlement period has expired, and if parties have not settled, a party dissatisfied with the dispute board decision may request its revision in arbitration.

Pursuant to Sub-Clause 20.6 *Arbitration* of the 1999 FIDIC Conditions of Contract:

"*Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*

a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of

the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works."

Further, pursuant to Sub-Clause 21.6 *Arbitration* of the 2017 FIDIC Conditions of Contract:

"*Unless settled amicably, and subject to Sub-Clause 3.5.5 [Dissatisfaction with Employer's Representative's determination], Sub-Clause 21.4.4 [Dissatisfaction with DAAB's decision], Sub-Clause 21.7 [Failure to comply with DAAB's Decision] and Sub-Clause 21.8 [No DAAB In Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*

a) *the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;*
b) *the Dispute shall be settled by one or three arbitrators appointed in accordance with these Rules; and*
c) *the arbitration shall be conducted in the ruling language defined in Sub-Clause 1.4 [Law and Language].*

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Employer and/or of the Employer's Representative, and any decision of the DAAB (other than a final and binding decision) relevant to the Dispute. Nothing

shall disqualify the natural person(s) who has/have acted on behalf of the Employer under the Contract from being called as witness(es) and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in consulting a DAAB under Sub-Clause 21.1 [Constitutiona of the DAAB] and/or Sub-Clause 21.2 [Failure to Appoint DAAB Member(s)].

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [Obtaining DAAB's Decision]. Any decision of the DAAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced before or after completion of the Works. The obligations of the Parties and the DAAB shall not be altered by reasons of any arbitration being conducted during the progress of the Works.

If an award requires a payment of an amount by one Party to the other Party, this amount shall be immediately due and payable without any Statement or Notice."

Both editions propose that the applicable procedural rules be ICC Arbitration Rules. The 2017 edition is more flexible as to its proposal on the number of arbitrators suggesting one or three arbitrators, whereas 1999 edition proposes a three-member tribunal by default.

Further, both editions provide in identical terms that the arbitration may be commenced before or after completion of the Works. The arbitration may hence be commenced at any time after filing the NOD, and in case the parties have not opted out from the amicable settlement period, after the amicable settlement period has expired. FIDIC Conditions of Contract do not provide any final deadline by when the parties should initiate arbitration proceedings at the latest. Of course, prescription periods based on the applicable substantive law to the parties' contract will have an effect in this respect, making prescribed claims inadmissible in the arbitration.

When it comes to the arbitral tribunal's jurisdiction, both editions of the FIDIC Conditions of Contract allow the revision of the dispute board decision only in case a NOD has been served. As has been explained above, if the decision has become final since no NOD has been served, the decision may not be revised in arbitration. Sub-Clause 21.6(2) of the 2017 FIDIC Conditions of Contract expressly provides that the revision of dispute board decisions is only possible for decisions "other than a final and binding decision". The 1999 edition includes similar limitation on the tribunal's jurisdiction in Sub-Clause 20.4, providing that arbitration may not be commenced, unless a NOD has been filed (leaving decisions that have become final outside the tribunal's jurisdiction).

The 1999 edition stipulates that the arbitrator(s) shall have full power to open up, review and revise any decision of the DAB, relevant to the dispute. The 2017 provides for identical wording as to the tribunal's jurisdiction. It should be stressed that pursuant to both editions of the FIDIC Conditions of Contract, the arbitral tribunal has an absolute liberty to deviate from the dispute board's determination. Further, the tribunal is neither limited to the submissions presented to the dispute board. The parties are free to submit further evidence and arguments, which can be new to the evidence or arguments previously put before the dispute board or included as reasons for dissatisfaction given in the party's NOD. The dispute board decisions are, however, admissible as evidence in the arbitration.

In practice, arbitrators tend to follow dispute boards' determination. Statistically speaking, an arbitral tribunal reaches often a same conclusion with the dispute board. Pursuant to the Queen Mary Construction Law Survey, 40% of the respondents indicated that the same conclusion is frequently reached in an international construction arbitral award as in pre-arbitral dispute resolution.[81] This figure includes also other dispute resolution methods than dispute board proceedings. The turnover rate is even lower, when it comes to dispute board determination only. Pursuant to the DRBF Survey, 78% of all decisions referred to arbitration were eventually upheld by the arbitral tribunals.[82] It would be interesting to understand further, what are the grounds that make an arbitral tribunal decide differently as the dispute board's determination. Is there perhaps more evidence available for the arbitral tribunal or some other procedural reasons, which allow the tribunal to have deeper understanding of the merits – or does the tribunal simply disagree with the dispute board's deliberation?

[81] Pinsent Masons – Queen Mary University of London 2019, 20.
[82] DRBF 2018, 29.

The 2017 edition includes some specifications as to the tribunal's powers with respect to its cost determination. When dealing with costs of the arbitration, the arbitrator(s) may take account of the extent to which a party failed to cooperate with the other party in the constitution of the DAAB and/or the appointment the DAAB member(s). Although not provided in the contract terms, it would be interesting to understand, if arbitral tribunals in practice put weight on a party's failure to comply with a binding dispute board decision, when deciding the allocation of costs between the parties. It is not unusual that arbitral tribunals award costs against parties who act in bad faith and seek to delay or derail the arbitral proceedings.[83] Many institutional arbitration rules also include provisions allowing such cost allocation.[84] However, as Savola has noted: "when arbitral tribunals wish to use their discretionary powers to apportion the costs to sanction obstructive party behaviour, they should make that intention clear to the parties from the outset so that the sanction will have a proper pre-emptive effect".[85] This requirement of transparency has also been encouraged in the last ICC Commission Report *Techniques for Controlling Time and Costs in Arbitration,* which was published in March 2018 ("ICC Cost Report")[86]. Pursuant to the ICC Cost Report, tribunals should consider informing the parties at the outset of the arbitration (e.g. at the case management conference) that they intend to take into account the manner in which each party has conducted the proceedings and to sanction any unreasonable behavior by a party when deciding on costs. When it comes to dispute board proceedings, the failure to comply with the binding dispute board decision indeed delays the completion of the project – but not exactly the arbitration proceedings. In fact, a party's neglecting behavior with respect to a dispute board decision is often the very reason for the initiation of the arbitration to revise that dispute board determination, which is dissatisfying to that party. Therefore, it would perhaps be difficult for an arbitral tribunal to base its cost determination on party conduct, which occurred before the initiation of the arbitral proceedings – particularly given that the FIDIC terms do not currently expressly include such ground for the cost determination. Another question is, whether the FIDIC terms *should* include such ground to further encourage the compliance with binding decisions until they are finally revised in arbitration. In the author's opinion, this would seem an efficient tool to strengthen the implementation of *the pay now argue later* principle in the FIDIC Conditions of Contract.

[83] Savola 2017, 298.
[84] *Ibid*, 299.
[85] *Ibid*, 299-300.
[86] ICC 2018.

Finally, the 2017 edition also addresses the effect of payment orders in arbitral awards. The payment orders issued by an arbitral tribunal are enforceable as such. The ordered amount is immediately due and payable without any additional Statement or Notice pursuant to Sub-Clause 21.6(6) of the 2017 FIDIC Conditions of Contract. This clarification has perhaps been added to the 2017 edition to prevent any party from claiming that the payment ordered by the arbitral tribunals would be subject to the payment terms as provided under Clause 14 *Contract Price and Payment* of the FIDIC Conditions of Contract. For instance, under the 1999 FIDIC Conditions of Contract (Red Book), interim and final payments can be issued only subject to a procedure requiring the obtention of Interim Payment Certificate or Final Payment Certificate from the Engineer.[87] Yet, when such payment certificate has once been obtained with respect to a payment, which has later been referred to a dispute board proceeding and thereafter to arbitration, there is no obligation for the parties to again request a payment certificate for a payment obligation already confirmed by an arbitral award. This would water down the whole idea of arbitration as a final dispute resolution method, if the payment terms under FIDIC Conditions of Contract would be applicable to payment orders by an arbitral tribunal. The parties could prevent the immediate effect of the arbitral award by initiating the payment process under FIDIC Conditions of Contract, which would further prolong the proceedings. Therefore, this clarification is indeed necessary to crystallize the final and immediate effect of an arbitral award on parties' disputes. Any previous contractual payment terms are, hence, not applicable to payment orders by arbitral awards.

5.3.2 Requesting that a binding dispute board decision be enforced with interim effect

But what if a party fails to comply with a dispute board decision? The other party probably does not want to wait until the dispute board decision has been revised in – sometimes lengthy – arbitration proceedings and obtain a directly enforceable arbitral award. Further, even if the party would be patient enough to wait, it may well be that the arbitral tribunal comes to a different conclusion from what the dispute board has decided. If the binding effect of a dispute board decision cannot be immediately enforced against a party not willing to comply with such decision, the value of the whole dispute board determination risks to be zero. The parties could as well agree to use e.g. expedited or emergency arbitration proceedings every time a dispute arises between them to avoid the extra step in their dispute resolution clause requiring first recourse to a dispute board. Yet, no arbitration proceedings feature similar benefits associated with the use of dispute boards including the overall

[87] Kotb – Razik – Sabry 2017, 54.

supervision of the project, dispute avoidance, and perhaps most importantly in this context: the advancement of works in spite of disputes - also known as the *pay now argue later* -principle. We will now discuss parties' options to refer a failure to comply with a binding but not final dispute board decision immediately to arbitration without reviewing the merits of the decision.

According to both editions of the FIDIC Conditions of Contract, parties must promptly give effect to a binding decision. However, the wording of Sub-Clause 20.4.4 of 1999 FIDIC Conditions of Contract "unless and until it [dispute board decision] shall be revised" is arguably vague as to, *when exactly* parties should comply with the decision. Under 1999 FIDIC Conditions of Contract, the only route expressly available to arbitration in case of a binding but not final dispute board decision seems to be the above-mentioned Sub-Clause 20.6. Under Sub-Clause 20.6, a party may request the final revision of a dispute board decision. The 1999 edition does not expressly provide recourse to arbitration, in order to enforce a merely binding dispute board decision. FIDIC 2017 Conditions of Contract, in contrast, do provide this option.

Pursuant to Sub-Clause 21.7 *Failure to Comply with DAAB's Decision* of the 2017 FIDIC Conditions of Contract:

> "*In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.*
>
> *In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.*

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief."

Where the 2017 FIDIC Conditions of Contract have been revised to explicitly order compliance with dispute board decisions, even if they are only binding, the 1999 version seems to suggest (at least when read rapidly without putting the provision in the right context) that parties should only give effect to a dispute board decision unless they will be revised amicably or in arbitration. In other words, if a party has filed a NOD and initiates arbitration proceedings in order to revise the dispute board decision in arbitration, the dispute board decision would not be enforceable as contractually binding interim decision between the parties.

Such interpretation is at odds with the *pay now, argue later* -principle, which is the essence of the whole dispute board system. If parties cannot rely on the (merely) binding nature of the dispute board decisions as a means to smoothly advance the construction project as planned, would there be any sense to use the dispute board determination in the first place? It should also be added that Sub-Clause 20.4.4 of the 1999 FIDIC Conditions of Contract provides that the contractor must continue to proceed with the works in accordance with the contract. This obligation to proceed with the construction works seems to suggest that the rendering of a dispute board decision should not estop the progress of the works.

Persero saga

In this respect, two cases from Singapore are highly relevant and interesting. The *Persero* cases provide insight into the different interpretations on the enforcement of binding but not final dispute board decisions under the 1999 FIDIC Conditions of Contract. The cases have been discussed and criticised in legal literature and some critical comments regarding the Persero cases have also been included in this chapter.

Persero I

Let us start by discussing the case, which was rendered chronologically first, i.e. a decision of the Court of Appeal of Singapore in *CRW Joint Operation* v. *Perusahaan Gas Negara (Persero) TBK*

SGCA 33 in 2011 (hereinafter "**Persero I**"). The summary in this thesis on *Persero I* is largely based on Christopher R. Seppälä's article on the case from 2012.

The case concerned a contract between *PT Perusahaan Gas Negra (Persero) TBK (*"**PGN**"*)*, an Indonesian public company and *CRW Joint Operation* ("**CRW**"), under which CRW was to design, procure, install, test and pre-commission a pipeline in Indonesia. The contract between the parties incorporated 1999 FIDIC Conditions of Contract or the so-called *Red Book.*[88]

CRW submitted thirteen Variation Order Proposals during the performance of the contract without being able to agree on their valuation with PGN. The parties subsequently referred their dispute to a sole member DAB, which awarded USD 17,298,834.57 to CRW with respect to its Variation Order Proposals. PGN issued a timely NOD to the DAB's decision and rejected to pay CRW's invoice based on the DAB decision.[89]

In 2009, CRW filed a request for arbitration with the ICC pursuant to Sub-Clause 20.6 of the 1999 FIDIC Conditions of Contract and requested the arbitral tribunal to give prompt effect to the DAB's decision. In its answer to the CRW's request, PGN claimed that the DAB decision was not yet final and binding because PGN had issued a NOD, and hence was not obliged to make the payment. PGN also argued that pursuant to Sub-Clause 20.6, the DAB decision should be re-opened and CRW's request for payment be rejected but did not file a counterclaim with its answer.[90]

The arbitral tribunal comprising of a three-member panel identified the following two issues to be decided:

1. Whether CRW was entitled to immediate payment of the USD 17,298,834.57; and
2. Whether PGN was entitled to request the arbitral tribunal, pursuant to Sub-Clause 20.6, to open up, review and revise the DAB's decision or any certificate upon which it was based.[91]

The tribunal noted that the main issue concerned the meaning and effect of the following excerpt from Sub-Clause 20.4.4, i.e. "(*t)he (DAB) decision shall be binding on both parties, who*

[88] Persero I, par 2.

[89] Seppälä 2012, 1.
[90] *Ibid*, 2.
[91] *Ibid*, 2.

shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below." The tribunal held that notwithstanding the NOD, the DAB decision, although it may not be 'final', was nonetheless binding on the Respondent who was obliged, by the express terms of sub-clause 20.4, to comply promptly with the DAB decision to make immediate payment of the sum of USD 17,298,834.57 to the Claimants. Further, a majority of the arbitrators found that the service of a NOD did not alter the fact that the DAB's decision was binding on PNG and that it had an obligation to pay the amount to CRW immediately. The tribunal did not consider, whether PGN was entitled to request the Arbitral Tribunal to open up, review and revise the DAB decision, as PGN had not properly requested this by filing a counterclaim. The tribunal however reserved PGN's right to seek the revision of the DAB decision by commencing new arbitration proceedings. The form of the award rendered was a final award.[92]

PNG applied to the High Court of Singapore ("High Court") and requested that the arbitral award be set aside based on amongst other grounds Article 34(2)(a)(iii) of the UNCITRAL Model Law, which provides that awards dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration may be set aside. The High Court concluded that the arbitral tribunal had exceeded the scope of the arbitration clause for two reasons. The High Court first noted that the arbitrators had erred in issuing an award on a dispute, which had not been referred to the DAB first as required by Sub-Clause 20.6 in order to submit a dispute to arbitration. Accordingly, the High Court interpreted the dispute regarding the immediate enforceability of the DAB decision to constitute a separate dispute from the one submitted to the DAB. The High Court seems to have adopted a "two-dispute approach", requiring that before a failure to comply with a binding decision can be referred to arbitration, the failure itself must first be referred to the DAB as a "new dispute". As will be discussed later, such two-dispute approach constitutes an eternal loop, where the party not satisfied with the DAB's decision can prevent arbitral proceedings by filing a NOD to each DAB decision. It should be noted that CRW had itself characterised PGN's non-payment of the DAB decision as a "second" dispute, as distinguished from the first dispute concerning whether CRW was entitled to payment for the Variation Order Proposals. Secondly, the High Court concluded that Sub-Clause 20.6 would not allow the tribunal to make final a merely binding DAB decision without hearing the merits of that DAB decision.[93]

[92] Seppälä 2012, 2.
[93] *Ibid*, 2-3.

The High Court's decision to set aside the final award was appealed to Singapore Court of Appeal ("Court of Appeal"), which upheld the High Court's decision.[94] Interestingly in its decision rendered in 2011, the Court of Appeal based its decision on somewhat different grounds.

The Court of Appeal first addressed the arbitral tribunal's jurisdiction by analyzing the Terms of Reference signed between the parties and the tribunal pursuant to the ICC Rules of Arbitration. Under the Terms of Reference, the Arbitral Tribunal had been conferred "an unfettered discretion to reopen and review each and every finding by the Adjudicator".[95] Seppälä has critised this conclusion, for neglecting to take into account Article 19 of the ICC Arbitration Rules, providing that a party may not make a new claim outside the limits of the Terms of Reference without authorisation from the arbitral tribunal. As PGN had not filed any counterclaim, the only claim in the arbitration was CRW's claim for an award to enforce the DAB decision. Therefore, Seppälä has noted that the tribunal was only empowered to enforce or deny that claim.[96]

The court then went on to analyse the dispute resolution procedure under the 1999 FIDIC Conditions of Contract, and particularly the wording of Sub-Clause 20.7. The Court of Appeal held that Sub-Clause 20.7 only deals with the situation where both parties are satisfied with the DAB decision. If not (i.e. if a notice of dissatisfaction has been served), then there is no immediate recourse for the aggrieved party to ensure the DAB decision can be enforced.[97] This would mean that binding (but not final) DAB decisions could not be enforced by an arbitral award. Bunni and Seppälä have for example agreed that the express interpretation of Sub-Clause 20.7 seems to establish a gap in Sub-Clause 20.7 to the extent that the clause does not confer an express right on the winning party to refer to arbitration a failure of the losing party to comply with a DAB decision, which is binding but not final.[98] As a member of FIDIC's Update Task Group preparing the three 1999 FIDIC conditions of contract for major works (the "Red", "Yellow" and "Silver" Books), Seppälä has however noted that the provision was not intended to be interpreted in this way.[99]

Further, the Court of Appeal concluded that Sub-Clause 20.6 would have required a full hearing on the merits. Seppälä has noted that the court erred in imposing an obligation on the tribunal to review

[94] *Ibid*, 3.
[95] Seppälä 2012, 3.
[96] *Ibid*, 4.
[97] *Ibid.*
[98] Seppälä 2012, 4; and Bunni 2005.
[99] Seppälä 2012, 4.

the merits of binding but not final DAB decision, whereas the wording of the second paragraph of Sub-Clause 20.6 in fact merely grants powers to the tribunal but does not impose duty to review the merits.[100]

The court also argued that Sub-Clause 20.6 requires the parties to finally settle their differences in the same arbitration, both in respect of the non-compliance with the DAB decision and in respect of the merits of that decision. In other words, the Sub-Clause 20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved. Seppälä has criticised the court's findings and noted that while no party is likely to want to bring more arbitrations than necessary, Sub-Clause 20.6 does not restrict the number of arbitrations that a party may bring in respect of any one dispute.[101]

Finally, the Court of Appeal problematised the effect of the award (i.e. final award) rendered. As the award was named a "Final Award", the court could not be assured that PGN's right to commence a separate arbitration had been adequately reserved. While recognizing that a binding but non-final decision of a DAB may be enforced by an interim or partial award, the court could not accept that such decision may be enforced by a final award even though the arbitral tribunal had expressly reserved PGN's right to commence an arbitration to open up, review and revise the award. In Seppälä's view, the court's conclusion in this respect is difficult to understand. Seppälä notes that the only difference between the final award in this case and the interim and partial awards in ICC cases referred to by the Court of Appeal is that, in this case, because it was a final award (as it would conclude the arbitration), PGN would have to begin a new arbitration in order to have the DAB decision opened up, reviewed and revised, whereas, in the other cases, the Engineer's decision or DAB decision could be opened up, reviewed and revised in the same arbitration. Seppälä further added that this difference was simply due to PGN's failure to file a counterclaim.[102]

It seems that in Persero I, the issues which led to the Court of Appeal's decision not to enforce the dispute board decision relate to the unfortunate procedural tactic to request final award instead of interim or partial award. Due to the "gap" in Sub-Clause 20.7 of the 1999 edition of the FIDIC Conditions of Contract, the court was not innovative enough to overcome this gap in its interpretation. Further, perhaps also the parties' submissions did not facilitate more innovative approached for the

[100] *Ibid*, 7.
[101] Seppälä 2012, 8.
[102] *Ibid,* 9.

court's determination. The court's decision ignored the *pay now argue later* -principle in the context of dispute board proceedings, which appropriate application in Persero I would probably have caused a different outcome. This could be explained by the novelty of this instrument to the parties and the court and the lack of existing case law on the enforcement issue before national courts.

Persero II

In the aftermath, CRW initiated a second ICC arbitration against PGN in 2011 concerning the same DAB decision ("Persero II"). The summary in this thesis on *Persero II* is largely based on Rupert Coldwell and Eugene Tan's blog post on the case from 2015 (page numbers not available).

In the second arbitration proceedings, CRW requested the tribunal to enforce the DAB decision through an interim or partial award, and a final award on the merits of the DAB decision. CRW successfully obtained an interim award compelling PGN to comply with the DAB decision.[103]

Both parties applied again to High Court, CRW requesting that the court enforce the interim award, while PGN applied to the court to set aside the award. This time, the High Court did enforce the interim award in its decision rendered in 2014. The court held that the interim award was final and binding on the subject matter of the secondary dispute between the parties, i.e. CRW's undisputed substantive right to be "paid now" and PGN's substantive obligation to "argue later". Consequently, the interim award acknowledged that CRW's substantive, but provisional, right to be paid promptly, was final, and did not require that other aspects of the dispute be resolved with finality.[104]

In contrast to the earlier High Court's decision in Persero I, the High Court understood the paradox related to the two-disputes approach it had earlier adopted:

> *"[…] On the two-dispute approach, so long as an employer serves successive notices of dissatisfaction – whether for tactical or genuine reasons – the contractor has an obligation to refer the successive secondary disputes which arise once again to the DAB. The result of adopting the two-dispute approach therefore is to compel the contractor to secure an infinite series of DAB decisions, each of which is not complied*

[103] Coldwell – Tan 2015.
[104] *Ibid.*

with, but none of which gets the contractor any closer actually to commencing an arbitration to compel the employer to "pay now". "[105]

Also, the Court of Appeal confirmed this view in its decision rendered in 2015.[106] In conclusion, the Singapore courts seem to find decisive, which type of award was used in the enforcement of a binding but not final DAB decision: final award or interim award, the latter being successful. Further, in Persero II the court seems to have understood the *pay now argue later* -principle and applies it in spite of the proposed gap in Sub-Clause 20.7.

FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract

What should be born in mind is that between Persero I and Persero II cases, FIDIC issued a FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1 April 2013 ("FIDIC Guidance Memorandum")[107]. The purpose of the brief memorandum was to make explicit the intentions of FIDIC in relation to the enforcement of the DAB decisions that are binding and not yet final under 1999 edition of FIDIC Conditions of Contract. It is noteworthy that the Singapore Court of Appeal also made extensive references to the FIDIC Guidance Memorandum in its Persero II decision rendered in January 2015.[108]

Pursuant to the FIDIC Guidance Memorandum, in case of a failure to comply with binding but not yet final decisions, the failure itself should be capable of being referred to arbitration under Sub-Clause 20.6 [Arbitration], without Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] being applicable to the reference. The memorandum proposes amongst other issues changes to the wording of dispute resolution Clause 20 and in particular to Sub-Clause 20.7 of the FIDIC Conditions of Contract for Construction, 1999 (the 'Red Book'), the FIDIC Conditions of Contract for Plant and Design-Build, 1999 ('Yellow Book'), and the EPC/Turnkey Projects, 1999 ('Silver Book').

Pursuant to the FIDIC Guidance Memorandum's recommendations, the Clause 20 of the 1999 FIDIC Conditions of Contract was proposed to be amended as follows:

[105] Persero II HC, par 47.
[106] Coldwell – Tan 2015, see also Persero II CA.
[107] FIDIC 2013.
[108] Persero II CA, par 67.

"Clause 20:

a. Sub-Clause 20.4 - Insert the following as a new penultimate paragraph:

'If the decision of the DAB requires a payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment'

b. Replace Sub-Clause 20.7 in its entirety with:

'In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.'

In essence, the FIDIC Guidance Memorandum's recommendations reflect the key changes included in 2017 FIDIC Conditions of Contract, which remove the "gap" in the previous edition in the enforcement of binding but not final dispute board decisions. The possibility to refer the failure to comply with a (merely) binding dispute board decision directly to arbitration has been mentioned expressly to remove the ambiguity of the Sub-Clause 20.7, which only mentioned the failure to comply with (both) binding and final decisions as referable directly to arbitration. Further, the two-disputes approach adopted by the Singapore Court of Appeal in Persero I has been expressly abandoned: Sub-Clause 20.5 would not apply in case the revised Sub-Clause 20.7 applies. In other words, the party requesting interim enforcement of dispute board's determination does not first need to refer the failure to comply with a dispute board decision to the dispute board but can directly recourse to arbitration. Hence, the issue of non-compliance is attached to the underlying issue, which was subject to the dispute board decision - and it is not considered as separate dispute. The 2017 FIDIC Conditions of Contract follow this logic (with some additional elements as explained above) in Sub-Clause 21.7.

Some still argue that the FIDIC Guidance Memorandum does not completely solve the problem related to enforcement of non-final dispute board decisions pursuant to 1999 FIDIC Conditions of Contract. Tweeddale has argued that when arbitral tribunal is asked to enforce a binding but non-final dispute board decision, the tribunal cannot improve the contract and apply the FIDIC Guidance Memorandum to cure the 1999 FIDIC Contracts' failure to deal with the enforcement of binding but

non-final decisions at all.[109] He justifies this with a reference to a principle of legal interpretation established in common law stipulating that "*when an instrument does not expressly provide for what happens when some event occurs, the most usual inference in such a case is that nothing is to happen*".[110] Tweeddale concludes that if the FIDIC Guidance Memorandum has not been expressly incorporated in the contract, the arbitral tribunal should not interpret the contract in the way that the memorandum suggests. Such interpretation would in effect be rewriting of the parties' contract.[111]

Tweeddale's criticism seems justified. It is arguable that there was a deficiency in the drafting of the Sub-Clause 20.7, and to quote Tweeddale the FIDIC Guidance Memorandum is only a 'half-baked' solution to tackle this deficiency. Yet, for a person coming from a Nordic legal system, which adopts common sense and pragmatism amongst sources for legal reasoning in contract law,[112] it would seem far-fetched to ignore the *pay now argue later* -principle behind the FIDIC Contracts. That principle speaks strongly for the enforcement of non-final binding dispute board decisions. It would be difficult to justify the deviation from that principle, which serves one purpose of the contract – continuation of works regardless of disputes. An interpretation against this principle would water down one important objective for the contract.

Another proposal in the FIDIC Guidance Memorandum regarding the Clause 20 of the 1999 FIDIC Conditions of Contract concerns the provision of security in dispute board proceedings. If a dispute board decision orders a party to make a payment to the other Party, the dispute board may require the payee to provide an appropriate security in respect of such payment. This is very interesting addition. The 2017 edition includes similar provision allowing the dispute board to order provision of security but it is more detailed: Sub-Clause 21.4.3 provides that the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 [*Arbitration*], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.

The new power of the dispute boards to order appropriate security to reserve assets in case their decision be reversed in arbitration has potential to strengthen the parties' trust in efficient dispute

[109] Tweeddale 2014, 25.
[110] Tweeddale 2014, 25, see also *Attorney General of Belize* v. *Belize Telecom Ltd* (2009) UKPC 10 per Lord Hoffman, par 17.
[111] Tweeddale 2014, 27.
[112] Letto-Vanamo – Tamm –Mortensen, 116.

board determination. While complying with the dispute board's decision, the paying party can be reassured about the repayment in case the paid amounts are not approved in arbitration. Logically, this should also encourage parties to voluntarily comply with dispute board decisions as monetary risks are smaller through the provision of security.

A separate question in this respect is the provision of security during the enforcement phase in arbitration. Can an arbitral tribunal order security for its decision to enforce an interim binding dispute board decision if the dispute board has not ordered a party to provide security for its decision? FIDIC Conditions of Contract are silent on the arbitral tribunals' powers in this respect. If the arbitral tribunal renders its decision in the form of a conservatory or interim measure, for instance ICC Arbitration Rules allow the ordering of security for such decision.[113] But in case of other type of awards (i.e. partial or interim award) it would be interesting to see arbitral tribunals' practice for requests for security in proceedings concerning enforcement of a dispute board decision. This discussion will continue in Chapter 6.

5.4 Conclusions: 2 routes to arbitration

Dispute board determination and arbitration constitute only two tiers of the arguably complex multi-tier dispute resolution clause incorporated in the FIDIC Conditions of Contract. Arbitration is however not a mandatory step. It comes into picture only, if a party is dissatisfied with the dispute board determination, and either i) fails to comply with the decision, or ii) wishes to revise the decision in arbitration.

In principle, the recourse to arbitration after obtaining a dispute board decision can take two routes pursuant to both editions of the FIDIC Conditions of Contract:

I. Enforcement of a (binding and/or final and binding) dispute board decision without reviewing its merits due to a party's failure to comply with the decision; and
II. Final revision of the dispute board decision by opening up, reviewing and revising the decision.

[113] Article 28(1) of ICC Arbitration Rules.

After comparing the 1999 and 2017 editions of the FIDIC Conditions of Contract, it can be concluded that both editions establish a link between dispute board determination and consequent arbitration proceedings. The 2017 edition adopts more detailed regulation in this respect, whereas the 1999 FIDIC Conditions of Contract include somewhat more vague terms.

First Route - Enforcement of dispute board determination

In this context the term 'enforcement' refers to a request for an arbitral tribunal to confirm the binding and/or final effect of the dispute board decision pursuant to the parties' contract terms.[114]

In the 1999 edition, certain severe obstacles in the wording of the Sub-Clause 20.7 make the recourse to arbitration through the first route much more difficult compared to the 2017 edition of the FIDIC Conditions of Contract. Sub-Clause 20.7 of the 1999 edition only mentions final and binding dispute board decisions as capable of being enforced without reviewing their merits. As opposed to this, Sub-Clause 20.4.4 provides that parties should also promptly give effect to *merely* binding decisions. This is why some argue that the Sub-Clause 20.7 includes a gap, as it does not expressly provide the enforcement of non-final dispute board decisions.

It should be noted, that while it is arguable that there was a deficiency in the drafting of the Sub-Clause 20.7 the 1999 FIDIC Conditions of Contract, the provision can also be interpreted differently to allow the enforcement of non-final dispute board decisions. It would seem far-fetched to ignore the *pay now argue later* -principle behind the FIDIC Contracts. That principle speaks strongly for the enforcement of non-final binding dispute board decisions. In particular, for a person coming from a Nordic legal system, which adopts common sense and pragmatism amongst sources for legal reasoning in contract law, it would be difficult to justify the deviation from that principle, which serves one purpose of the contract – continuation of works regardless of disputes.

This gap has been removed from the 2017 FIDIC Conditions of Contract: Sub-Clause 21.7 expressly allows enforcement of both binding and final and binding dispute board decisions. This modification indeed clarifies the first route to arbitration with respect to merely binding dispute board decisions.

[114] It should not be confused to enforcement proceedings in national courts, which are regulated by international and domestic laws. There is currently no international legal framework for recognition and enforcement of dispute board decisions before national courts similar to New York Convention (1958) applicable to arbitral awards.

Further, the 2017 edition includes more detailed guidance, how the tribunal can order such enforcement. The tribunal may order the enforcement by way of summary or other expedited procedure, an interim or provisional measure or an award, depending on the appropriate way under the applicable law. Further, the 2017 edition grants the tribunal the power to include an order or award of damages or other relief in its enforcement decision. It is questionable, whether this long list of different available measures/awards as available enforcement instrument make the choice any clearer for the parties and the arbitral tribunal, as the appropriate instrument seems to strongly depend on the underlying jurisdiction, where the enforcement of the arbitral tribunal's decision is sought. It is noteworthy that on the first route, the enforceability of the arbitral tribunal's decision is of paramount importance, because there is high risk that where a party does not voluntarily comply with the dispute board's determination, it will not either voluntarily comply with the arbitral tribunal's decision.

Second Route - Final revision of dispute board determination

The second route allows a party to request that an arbitral tribunal opens up, reviews and revises the binding dispute board decision with a final effect.

Both editions of the FIDIC Conditions of Contract adopt the same main principle that final revision of a dispute board decision is only possible, if a party has filed a NOD. [115] The 2017 FIDIC Conditions of Contract expressly provide that a party can also file a NOD on a part(s) of a dispute board decision, while the 1999 edition is silent on this option. As will be seen in the Chapter 6, which analyses some ICC Awards, the dissatisfaction on part(s) of a dispute board' decision has been discussed in case law also before the 2017 edition of the FIDIC Conditions of Contract were introduced. The new edition expressly provides this option, which establishes more clarity in this respect.

Further, although there are no significant changes in the 2017 edition concerning the arbitral tribunals' powers compared to the 1999 FIDIC Conditions of Contract, some novel elements have been added to the 2017 edition. Firstly, the tribunal may take account of the extent to which a party failed to cooperate with the other party in the constitution of the DAAB and/or the appointment the DAAB member(s) in the costs determination. What has not been expressly mentioned, is the arbitral tribunals' power to put weight on a party's failure to comply with a binding dispute board decision, when deciding the allocation of costs between the parties. It was proposed that adding such power

[115] It should be noted that in case no NOD has been filed, the dispute board decision can only be enforced in arbitration through the first route.

expressly in the contract terms would seem an efficient tool to strengthen the implementation of the pay now argue later principle in the FIDIC Conditions of Contract.

Secondly, the 2017 edition also addresses the effect of payment orders in arbitral awards. The payment orders issued by an arbitral tribunal are enforceable as such. This addition prevents any party from claiming that the payment ordered by the arbitral tribunals would be subject to the full procedure on payment terms in the FIDIC Conditions of Contract. This clarification is indeed necessary to crystallise the final and immediate effect of an arbitral award on parties' disputes.

The above summarised findings have also been illustrated in the charts below. The chart 1 visualises the two routes to arbitration under 1999 FIDIC Conditions of Contract, and the chart 2 under the 2017 FIDIC Conditions of Contract.

Chart 1: 2 Routes to Arbitration under 1999 FIDIC Conditions of Contract

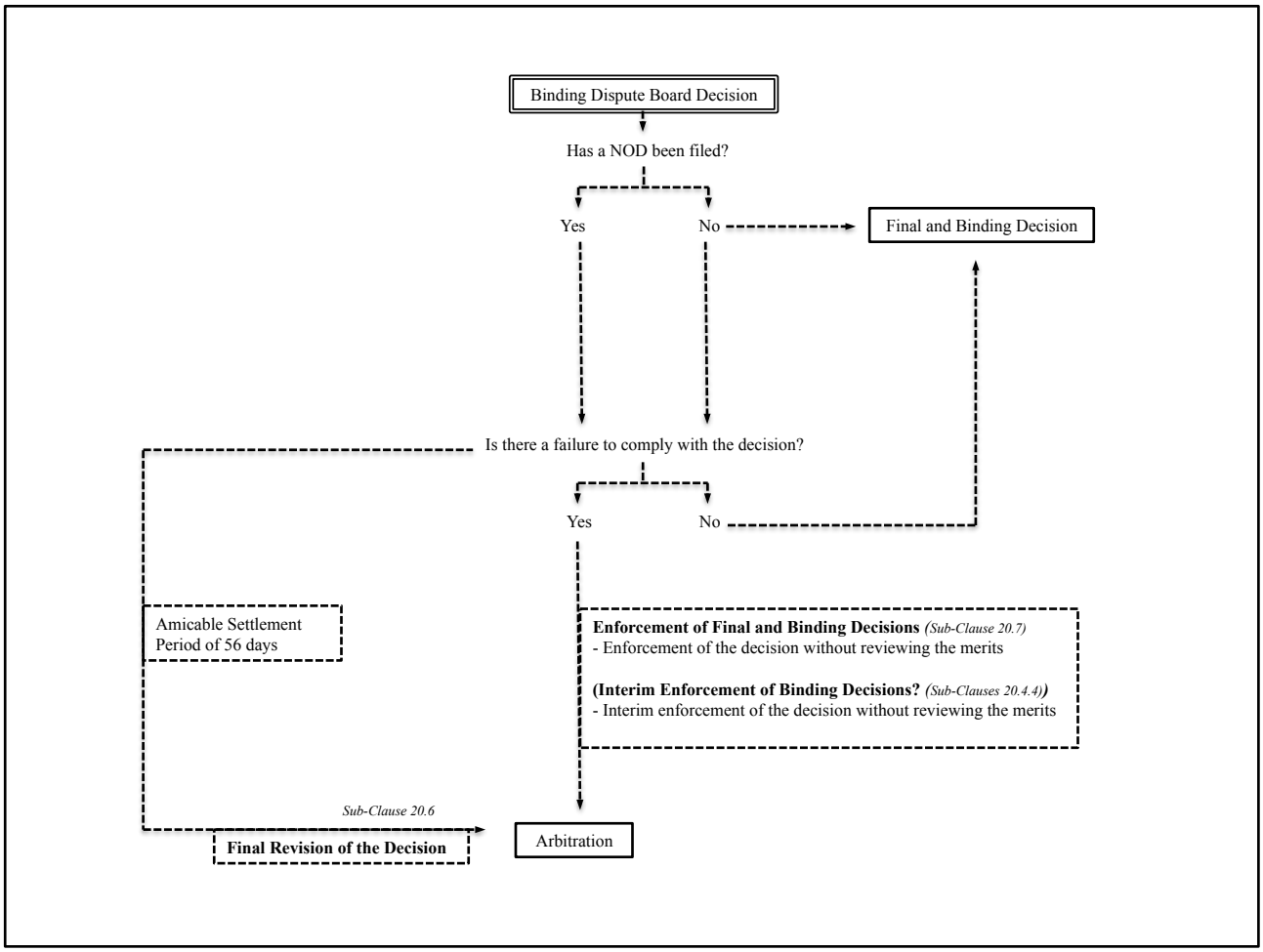
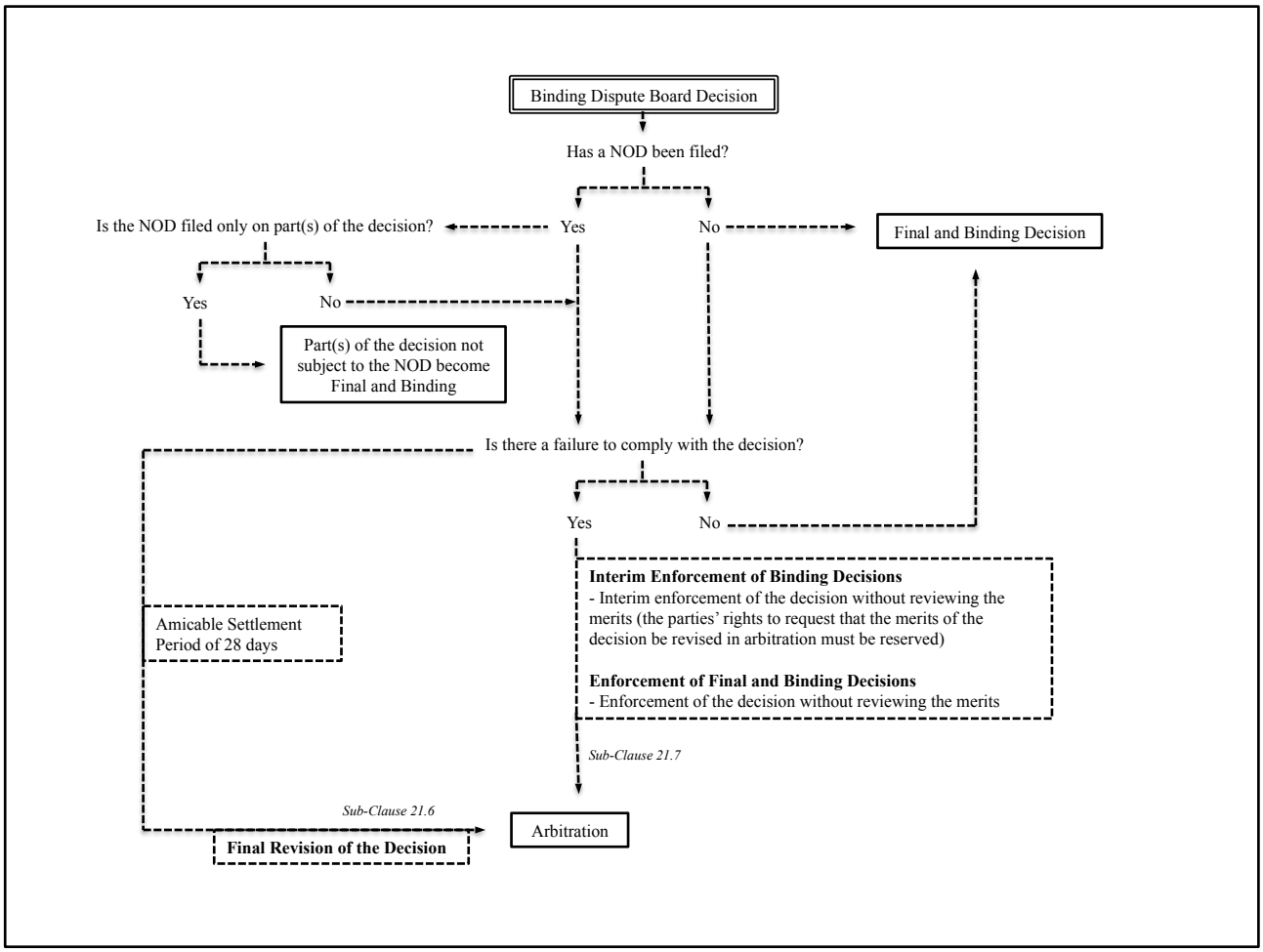


Chart 2: 2 Routes to Arbitration under 2017 FIDIC Conditions of Contract



PART III

6 DISPUTE BOARD DECISIONS IN ICC PRACTICE

We will now turn to evaluate the link between dispute board determination and recourse to arbitration in light of some selected ICC Awards. ICC practice was chosen for the reason that the default arbitration rules pursuant to the FIDIC Conditions of Contract are ICC Arbitration Rules.[116]

6.1 ICC Arbitration

ICC Arbitration Rules are the most commonly used institutional arbitration rules in the construction sector[117], and therefore ICC as an institute has arguably potential to provide most extensive practice on the topic. The International Court of Arbitration of the ICC (the ”Court”) administers the resolution of disputes by arbitral tribunals, in accordance with the ICC Arbitration Rules (“ICC Arbitration”). The Court is the only body authorised to administer ICC Arbitrations, including the scrutiny and approval of awards rendered in accordance with the ICC Arbitration Rules.[118]

A special feature in ICC Arbitration Rules compared to other institutional arbitration rules, is the mandatory scrutiny process before the signing of any award. Pursuant to Article 34 of the ICC Arbitration Rules, the arbitral tribunal must submit the draft award to the Court before signing of the award. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal’s liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form. The scrutiny and approval process of the awards concerns final awards as well as interim or partial awards.[119] When the award has been approved by the Court, and signed, an original of the award must be deposited with the ICC Secretariat[120]. Therefore, the ICC Secretariat has an exhaustive record of the awards issued in accordance with the ICC Arbitration Rules (“ICC Awards”).

[116] See Sub-Clause 21.6(1)(a) of the 2017 FIDIC Contracts and Sub-Clause 20.6(1)(a) of 1999 FIDIC Contracts.
[117] Pinsent Masons – Queen Mary University of London 2019, 11. In construction sector, 71% of the international arbitrations are administered by the ICC.
[118] Article 1(2) of the ICC Arbitration Rules.
[119] Article 2(v) of the ICC Arbitration Rules includes interim, partial or final awards in the definition of an ”award”.
[120] Article 35(4) of the ICC Arbitration Rules.

6.2 Selected ICC Awards

This analysis seeks to evaluate how smoothly the recourse to arbitration works in practice. The purpose is to understand, what are the issues and possible obstacles that arbitral tribunals consider when they either i) enforce a dispute board decision, or ii) finally revise a dispute board decision. All ICC Awards discussed in this thesis are awards, which have either been published in ICC Dispute Resolution Bulletin[121] and/or been summarised in literature. The selected ICC Awards concern the 1999 FIDIC Conditions of Contract or older editions, as no awards concerning the 2017 edition have been published yet, and were hence not available. It should be stressed that it has not been possible to review all ICC Awards related to the topic exhaustively. The selected awards may only present a fraction of all ICC Awards on the topic as no information is publicly available on how many ICC Award in fact discuss this topic. Therefore, the analysis on the selected arbitration practice by no means produces statistically reliable results, but the idea has been to discuss selected cases by way of example to describe approaches adopted by some arbitral tribunals. The evaluation of ICC practice will also include some observations as to how the 2017 edition of the FIDIC Conditions of Contract may answer to the obstacles identified in the selected ICC Awards, and whether the 2017 edition still remains unclear in some respects.

6.3 ICC Awards concerning Interim Enforcement

In ICC practice, the arbitral tribunals have adopted decisions pro and against enforcing non-final dispute board decisions. There have been several cases, where the tribunal has declined to enforce non-final dispute board decisions due to lack of sufficient contractual basis.[122] This approach was adopted at least in *ICC 11813* and *ICC 16949*.[123] The next chapter will discuss some ICC Awards, where the arbitral tribunal decided to enforce a binding but not final dispute board decision. Particular attention will be paid to the type of award/measure by which the decision was enforced.

Types of Award/Measure selected to Enforce a binding Dispute Board decision

The type of award selected to enforce a binding dispute board decision varies in arbitral tribunals' practice. As was described earlier, in *Persero I* the arbitral tribunal enforced a dispute board decision

[121] ICC Dispute Resolution Bulletin only publishes excerpts of the awards. Therefore, this thesis has been drafted based on the excerpts without reviewing the awards in full.
[122] Tweeddale 2014, 26.
[123] Tweeddale 2014, 26. See Chapter 6 for more detailed description of *ICC 11813*.

with a Final Award. In *Persero II,* the type of award selected for the enforcement was Partial Award.[124]

In *ICC 10619 (Interim Award)*[125]*,* the arbitral tribunal enforced a binding but not final decision of the Engineer under Sub-Clause 67 of the FIDIC Conditions of Contract, Fourth Edition (1987) by way of an interim award.[126] The case concerned an Italian claimant (Contractor), who entered into contracts with a public authority in an African State (Employer) for the construction of roads in that State. A German engineer was appointed for the work and his role included rendering interim binding decisions for disputes arising in the execution of the project. The claimant initiated an arbitration for damages for various matters for which it alleged the respondent to be responsible. What is relevant to point out as well is that the place of arbitration was Paris, France.[127] Further, in *ICC 10619*, the arbitral tribunal was also requested to revise the Engineer's decision.

The Claimant requested immediate enforcement, by way of an interim award (and the provisional enforcement of such award, as permitted under French law), of certain decisions of the Engineer under Clause 67 with which the Respondent failed to comply. The decisions had been subject to *a notice of intention to commence arbitration* from the claimant, which has similar effect as a NOD under 1999 and 2017 edition of the FIDIC Conditions of Contracting, i.e. making the Engineer's decision merely binding.[128]

The arbitral tribunal held that:

> *"If the above Engineer's decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the arbitral tribunal should refrain from an immediate judgment giving the Engineer's decisions their full force and effect. This simply is the law of the contract. (…) (t)he judgement [sic] to be hereby made is not one of a conservatory or interim measure, stricto sensu, but rather one [of] giving full immediate effect to a right that a party enjoys without discussion on the basis of the Contract and which the*

[124] Both *Persero* cases were ICC Arbitrations.
[125] Seppälä 2008, 52-54.
[126] The Sub-Clause 67.1 of the 1987 edition of FIDIC Contracts provides almost in identical terms to the Sub-Clause 20.4 of the 1999 edition that: "*the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award*". The most significant change between 1987 edition and 1999 edition of the FIDIC Contracts is that in the 1999 edition the Engineer has been replaced by the DAB.
[127] Seppälä 2008, 52.
[128] *Ibid*, 53.

> *parties have agreed shall extend at least until the end of the arbitration. For the second thing, the will of the parties shall prevail over any consideration of urgency or irreparable harm or fumus boni juris which are among the basics of the French référé provision,*[129] (emphasis added)

The tribunal came to the conclusion that the issuing of an intention to commence arbitration would not abolish the binding effect of the Engineer's decision. The wording of Sub-Clause 67.1 clearly provides that the decisions can be given effect to by interim award.

What should also be noted is that in addition to basing its case on the wording of Sub-Clause 67.1, the claimant also relied on the ICC Arbitration Rules relating to conservatory and interim measures and on certain related French legal doctrines (the place of arbitration being France). However, in the interim award, the tribunal emphasised that its decision was not based on these provisions but on the contract itself.[130] The failure to comply with the binding dispute board decision was considered a breach of contract. Therefore, the tribunal seems to constitute its power based on this breach of the contract to order immediate effect to a right of the party, whose right to enjoy the effect of the binding dispute board decision is being deprived.

In *ICC 16119 (Partial Award)*[131]*,* a Sole Arbitrator enforced a binding but not final DAB decisions issued pursuant to 1999 FIDIC Contracts by way of a Partial Award. The DAB decisions concerned payment obligations of the respondent. Both parties issued NODs with respect to the DAB decisions.

The Sole Arbitrator held that:

> *"The Parties have agreed, as reflected in the Terms of Reference, section 6, to a bifurcation of the proceedings. They have also agreed and therefore empowered the Sole Arbitrator to decide on certain issues in this preliminary phase of the proceedings. This empowerment includes the issuance of this Partial Award." (...) "The binding force of the DAB's decisions from the moment in which they are rendered until revised by an arbitral award is a conclusion that is not subject to subsequent revision in the Final Award and, therefore, it can be declared in a final partial award. On the other hand, the DAB's decisions are not final and any payment awarded by those decisions may be revised and reversed. Therefore, the Sole Arbitrator cannot issue any final award ordering the payment of the sums decided by the DAB. By necessity, the payment ordered should be provisional or temporary. The partial award cannot definitely determine the payment issues and, consequently, any order for payment at this stage must be provisional." (...) "The Sole Arbitrator could render an interim award ordering the payment subject to subsequent revision and, thus only of temporary or provisional character.*

[129] Seppälä 2008, 53 and par 22 of the award.
[130] *Ibid.*
[131] ICC Dispute Resolution Bulletin 2015 No. 1(67).

However, the Claimant expressly requests a partial award which is final on the matters decided and excludes an interim award."[132] *(emphasis added)*

In this case, the Sole Arbitrator concluded that, based on the Terms of Reference in the arbitration, it had the power to make an interim order under Article 23 of the ICC Arbitration Rules[133] but not an Interim Award.[134] The partial award hence finally decided only the binding force of the DAB decisions until their final revision in arbitration. The payment obligations ordered by the Sole Arbitrator were only of temporary or provisional character. Pursuant to the published excerpt on this award, the Sole Arbitrator did not order the claimant to provide security for the provisional payment obligations by the respondent. Pursuant to the ICC Arbitration Rules, the granting of such provisional measure can be subject to the provision of appropriate security being furnished by the requesting party.[135] The request for security is in the arbitral tribunal's discretion. It could be a useful addition to the FIDIC Conditions of Contract to expressly provide that the arbitral tribunal may request provision of security when they enforce DAB decisions concerning payment obligations. If this power had been agreed upon between the parties already in the project contract, there would be a lower threshold for the arbitral tribunals to order security.

It has not been explained, why the requesting party in this case requested Partial Award and not Interim Award. Further, the difference between these two award types is not clear. Seppälä has argued that the ICC Arbitration Rules do not distinguish between interim or partial awards as they both result in final decisions as to the matters decided by them.[136] If the reason for requesting Partial Award relates to enforceability issues, the problem related to difficulties regarding the enforcement of certain types of (provisional) awards in certain jurisdictions could be perhaps circumvented with the provision of appropriate security. If the claimant provides security for the arbitral tribunal's decision to order provisional payment obligations, which may be dismissed at later stage in the Final Award, the respondent should have higher incentive to immediately comply with the arbitral tribunal's provisional decision. Then there would be perhaps no need to seek enforcement of the provisionary measure or Partial/Interim Award from the national courts, which in some jurisdiction is not accepted.

[132] ICC Dispute Resolution Bulletin 2015 No. 1(67), par 99-107.
[133] This reference to ICC Arbitration Rules concerns the Rules of Arbitration of the International Chamber of Commerce in force as of 1 January 1998 (1998 ICC Arbitration Rules), and their Article 23 on Conservatory and Interim Measures.
[134] See also Tweeddale 2014, 25.
[135] Article 28(1) of the 2017 ICC Arbitration Rules and Article 23(1) of the 1998 ICC Arbitration Rules.
[136] Seppälä 2008, 53. See also Article 2(v) of the 2017 ICC ARBITRATION Rules and Article 2(iii) of the 1998 ICC Arbitration Rules.

In the cases described above, the arbitral tribunal was also requested to revise the dispute board decision (in addition to its enforcement). If a tribunal is requested to only enforce a binding decision (and no claims or counterclaims are filed to revise the decision), then the only type of award available seems to be final award.[137]

In *ICC 16948 (Final Award)*[138]*,* a Sole Arbitrator enforced a binding dispute board decision obtained pursuant to 1999 FIDIC Conditions of Contract by way of a Final Award. The DAB's decision subject to arbitration (DAB Decision No. 4) concerned the respondent's failure to comply with earlier DAB's decisions No. 2 and 3. Both parties had filed NODs with regard to the DAB Decision No. 4.

The Sole Arbitrator held that:

> *"(a) failure to comply with a DAB decision is a breach of contract, and thus a new dispute, that can be referred to arbitration. If, however, such failure is related to a DAB decision that has not become final (due to the existence of a notice of dissatisfaction) then the other party may refer this dispute to arbitration only after having again requested a further DAB decision (20.4 of the GCC) and after another attempt of an amicable settlement or elapse of the cooling-off period, whatever occurs earlier (20.5 of the GCC). Otherwise, the Sole Arbitrator would have no jurisdiction to deal with a new dispute arising out of or relating to the breach of contract by non-compliance of the previous DAB-decisions."*[139] *(...) "Neither the Claimant nor the Respondent have requested in this arbitration to reverse the DAB Decisions No. 2 and 3. Failing such request, the Sole Arbitrator, unlike the arbitral tribunal in the ICC Case No. 10619, does not have to "open up, review and revise" the DAB Decisions No. 2 and 3. The Sole Arbitrator, consequently, sees no room for rendering an "interim award" but shall render a final award, however, limited to the issue of the consequence of the Respondent's breach of the Contract by not giving effect to the DAB Decisions No. 2 and 3 (Sub-Clause 20.4 of the GCC)."*[140]
>
> (emphasis added)

The Sole Arbitrator seems to agree with the "two-dispute approach", requiring that before a failure to comply with a binding decision can be referred to arbitration, the failure itself must first be referred to the DAB as a "new dispute". Hence, the Sole Arbitrator would not have been willing to enforce directly DAB Decisions No. 2 and 3, which concerned payment obligations of the respondent and which had been subject to NODs. The Sole Arbitrator's reasoning is problematic in light of the case *Persero II,* which abolished the two-dispute approach, because such two-dispute approach constitutes

[137] Scheffer da Silveira 2019, 354.
[138] ICC Dispute Resolution Bulletin 2015 No. 1(107).
[139] *Ibid.*, par 108.
[140] *Ibid,* par 131.

an eternal loop, where the party not satisfied with the DAB's decision can prevent arbitral proceedings by filing a NOD to each DAB decision.

The Sole Arbitrator's conclusion to enforce the DAB Decision No. 4 by way of Final Award was however logical as in the absence of claims or counterclaims to revise the decision, then the only type of award available is final award. The Sole Arbitrator rendered the award with the reservation that the decision was strictly limited to the issue of the consequence of the Respondent's breach of the Contract by not giving effect to the DAB Decisions No. 2 and 3.

This reservation is in line with the Sub-Clause 21.7(2) of the 2017 FIDIC Conditions of Contract stipulating that in the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award. Hence, the arbitral tribunals have already applied this reservation before its express introduction in the 2017 edition of the FIDIC Contracts.

Yet, to allow some speculations, let us think of a case, where this tribunal would only have been requested to enforce a dispute board decision concerning e.g. a party's payment obligations. Such dispute would not be a 'new dispute' in accordance with the two-disputes approach on the failure to comply with the dispute board decision ordering the payment obligation. Could the tribunal in such case order the enforcement by way of a final award, if it has not been requested to revise the decision? The Sole Arbitrator in *ICC 16948* would probably answer 'no'. However, it is arguable that if the tribunal would reserve the parties' right to challenge such dispute board decision in later arbitration, final award could be used as a measure to enforce all kinds of non-final dispute board decisions. The Final Award would only decide finally the party's breach of contract to comply with a binding dispute board decision pursuant to Sub-Clause 20.4. Luckily, the 2017 edition of FIDIC Contracts has provided clarity in this respect – although the possibility to enforce non-final dispute board decisions with a Final Award arguably has existed already under the 1999 edition.

Concluding remarks

It is clear that the selected ICC Awards on interim enforcement of binding (but not final) dispute board decisions include contradicting results. Most importantly, there are several arbitral awards,

where the interim enforcement has been declined, whereas in many cases the tribunal has decided to enforce a merely binding decision without reviewing its merits.

The arbitral tribunals' deliberations on how they have decided to enforce a binding dispute board decision is different in each case. In *ICC 10619 (Interim Award),* the claimant also relied on conservatory and interim measures under the ICC Arbitration Rules and on certain related French legal doctrines. However, in the Interim Award, the tribunal emphasised that its decision was not based on these provisions but on the contract itself stipulating that a failure to comply with a binding dispute board decision is a breach of the contract, which can be resolved finally. In *ICC 16119 (Partial Award)*, the Sole Arbitrator held that the Partial Award finally decided the binding force of the DAB decisions until their final revision in arbitration. Yet, the payment obligations ordered by the Sole Arbitrator were only of temporary or provisional character. Perhaps most strikingly, in *ICC 16948 (Final Award)*, the tribunal reasoned that before a failure to comply with a binding decision can be referred to arbitration, the failure itself must first be referred to the DAB as a "new dispute" (as had been done this case). The tribunal adopted the so called two-disputes approach, which has been argued to cause an eternal loop of NODs, preventing the recourse to arbitration.

As all three cases concerned older editions of the FIDIC Contracts (1999 or 1987), the tribunals were faced with the gap in Sub-Clause 20.7: the contract terms only expressly mention the enforcement of final and binding dispute board decisions (but are silent on the interim enforcement of merely binding decisions). In 2017 edition of the FIDIC Conditions of Contract this gap has been removed by expressly allowing the enforcement of binding decisions under Sub-Clause 21.7. It is arguable that as long as the application of the 1999 edition of the FIDIC Conditions of Contract continues, there will be discrepancy in the arbitral tribunals' deliberations in this respect. As was noted above, the FIDIC Guidance Memorandum should direct the tribunals to enforce also non-final dispute board decisions in the spirit of the pay now, argue later -principle. However, some tribunals may not be willing to deviate from the parties' express contract terms.

Further, it seems that at least in ICC Arbitration, the parties can request the relief by way of many types of available instruments (Interim or Conservatory Measures, Interim of Partial Award, or Final Award). The arbitral tribunals must navigate in a technically challenging procedural framework, when they are requested to enforce of binding dispute board decisions with interim effect. The underlying reason for the varying practice in the choice of the instrument requested for this relief seems to lie in the difference between jurisdictions, how interim or partial awards can be enforced

before national courts. The issues related to enforcement of Interim and Partial Awards has been further discussed in Chapters 4.2.1 and 5.2.

Finally, it was proposed that a useful addition to the FIDIC Conditions of Contract could be to expressly provide that the arbitral tribunals may request provision of appropriate security when they enforce dispute board decisions concerning payment obligations. If the claimant would provide security for the arbitral tribunal's decision to order provisional payment obligations, which may be dismissed at later stage in the Final Award, the respondent should have higher incentive to voluntarily comply with the arbitral tribunal's provisional decision. Then there would perhaps be no need to seek enforcement of the provisionary measure or Partial/Interim Award from the national courts, which in some jurisdiction is not accepted.

6.4 ICC Awards concerning Final Revision

The ICC Awards identified, which provide insight into the practice of revision of dispute board decisions in arbitration, will be discussed now in turn. This chapter will discuss some relevant ICC Awards to get closer understanding of some aspects that the arbitral tribunals have considered when deciding on the revision of dispute board decisions.

Arbitral Tribunal's Jurisdiction

The cases include some adopted approaches on arbitral tribunals' jurisdiction to decide on the revision of dispute board decisions. In *ICC 19858 (Final Award)*[141], the Sole Arbitrator expressly confirmed that there is no legal restriction, which would prevent the Sole Arbitrator from opening, reviewing and revising a DAB decision. It should be noted that in *ICC 16948 (Final Award)*[142] as well as in the ICC Arbitration concerning *Persero I*[143], the tribunals refused to open up, review and revise dispute board decisions because it had not been requested by the parties. In *Persero I*, the respondent only argued as a defense that the decision by the dispute board was erroneous – the respondent did not file a counterclaim.[144] Scheffer da Silveira has concluded that arbitral tribunals cannot decide *ex officio* to open up, review and revise dispute board decisions, if no party has requested such revision.[145]

[141] The award has not been published, see Scheffer da Silveira 2019, 358 for a summary of the decision.
[142] ICC Dispute Resolution Bulletin 2015 No.1 (107), par 130 jo. 131.
[143] See Scheffer da Silveira 2019, 358 for a summary of the decision.
[144] *Ibid.*
[145] Scheffer da Silveira 2019, 359.

It seems that although the FIDIC Conditions of Contract provide the arbitral tribunals the power to open up, review and revise non-final dispute board decisions, parties should understand to expressly request the revision. Hence, when planning the procedural tactic, the party dissatisfied with a dispute board decision should request its revision in the form of a claim or counterclaim. The mentioning of dissatisfaction in a party's submission for defense may not be sufficient to invoke the application of Sub-Clause 20.6 (or Sub-Clause 21.6).[146]

What is also related to the question above is a requesting party's right to present counterclaims in arbitration. Can the requesting party raise a counterclaim if it has not submitted the topic of the counterclaim first to the dispute board? In *ICC 14079*[147], the arbitral tribunal hold that the obligation to refer disputes first to the expert (adjudicator) before arbitration also applies to counterclaims and set-off claims presented in the arbitration. The arbitral tribunal noted that although it was not expressly mentioned in the parties' dispute resolution clause, it would be strange to interpret the clause so that it would make a difference between claims submitted by the claimant and those of the respondent. It has been noted, however, that a reference to dispute board is not necessary with counterclaim, if the respondent can demonstrate that the counterclaim was effectively included in a dispute that had already been referred to the dispute board for a decision.[148] According to Seppälä, a test of whether a counterclaim raised by the respondent must first be submitted to a dispute board should be whether the claimant had previously requested the dispute board to decide a dispute that necessarily would have resulted in a decision on that counterclaim. In case of such a request, then the respondent should be able to raise the counterclaim in the arbitration without having to make an independent referral of the matter to the dispute board. An example of a dispute that the claimant could refer to a dispute board and which includes another dispute might be where the contractor claims that it has been wrongfully denied an extension of time by the engineer. Such a dispute may be considered to include the Employer's claim (or potential claim) for liquidated damages for the same time period.[149]

[146] As an example, one could think of an arbitration, where the claimant requests interim enforcement of a dispute board decision, and in its defense the respondent expresses dissatisfaction for the dispute board decision, but does not formally file a counterclaim.
[147] See Scheffer da Silveira 2019, 330 for a summary on the decision.
[148] Seppälä 2006, 58; Scheffer da Silveira 2019, 331-332.
[149] Seppälä 2006, 58.

A contrary view was adopted in *ICC 11813*[150] with respect to set-off claims. The claimants (two Contractors) in this case sought an interim or provisional award in respect of certain unpaid certified sums due to one of them. In response, the respondent (the Employer) asserted claims for liquidated damages for delay and argued that it was entitled to set off the amount of these claims against any amount due to the claimants. The claimants insisted that any right of set-off by the respondent was effectively excluded by numerous provisions in the parties' contract (i.e. 1999 Yellow Book, Test Edition, 1998).[151] In its deliberation, the arbitral tribunal did recognize that the respondent might have breached the parties' contract. However, the tribunal held that no provision in the parties' contract amounted to an exclusion of the Employer's right of set-off (under English law), which would have required words of sanction such as the following: 'unless the Employer complies with this clause, it shall have no right to deduct or set-off'.[152] Further, the tribunal concluded that the requirement of Sub-Clause 20.6 to refer all disputes to a DAB would not concern set-off rights[153]:

> *"This does not require that a claim asserted as a set-off first be submitted to the DAB. It merely indicates that if a DAB's decision does become final and binding, then the dispute might not be subject to arbitration. By its express terms (i.e., the reference to a DAB decision 'if any'), Article 20.6 encompasses 'disputes' and therefore claims – as to which no DAB decisions [sic] has been made."*[154]

Seppälä has found this conclusion by the arbitral tribunal to accept the Employer's right of set-off against certified sums due to the Contractor as surprising. As a member of the FIDIC Update Task Group, which prepared the 1999 FIDIC Conditions of Contract, he believes that it was not the intention of FIDIC that the Employer should be able to have rights of set-off.[155] This approach to excluding set-off would be in line with the pay now, argue later -principle as well. If the enforcement of binding dispute board decisions can be estopped with asserting set-off claim, the efficiency of the interim binding decisions would be watered down. It is easy to agree with Seppälä, who has proposed expressly excluding each party's right of set-off in the FIDIC Contracts.[156] Yet, the 2017 FIDIC Conditions of Contract, and the corresponding Sub-Clause 21.6 does not include such express exclusion of set-off rights. Hence, the parties' set-off rights under Sub-Clause 20.6 of the 1999 edition and Sub-Clause 21.6 of the 2017 edition of FIDIC Contractions continue to be ambiguous.

[150] Seppälä 2013, 57.
[151] Seppälä 2013, 57.
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*

The Effects of a NOD

The effects of a NOD have been discussed in *ICC 19346 (Final Award)*[157]. In this case, the DAB gave a decision on four issues: i) the contractor failed to submit all detailed designs by the stipulated deadline, ii) the employer's claim for liquidated damages for delay in respect of the late provision of the contractor's detailed design documents is valid and well-grounded, iii) the employer's claim for liquidated damages for delay in respect of late submission by the contractor of detailed designs was settled by the parties by execution of Addendum No. 3 to the Contract signed on 24 August 2010, and iv) the contractor is not liable to pay liquidated damages to the employer in respect of late submission of detailed drawings. The claimant issued a valid NOD challenging the determination on issues iii) and iv). The respondent also issued a NOD challenging the determination on issues i) and ii), but the NOD was filed beyond the time limit for submitting a NOD. The claimant contended that because the respondent failed to issue its NOD in time, the DAB's determination on issues i) and ii) have become final, and the tribunal would therefore lack jurisdiction to examine those issues. The Sole Arbitrator disagreed with the claimant's position and concluded that although the respondent failed to give a timely NOD against the DAB's decision, the claimant successfully did. Since the claimant successfully challenged the DAB's decision on the dispute that has arisen between the two parties, the Sole Arbitrator has jurisdiction to examine and finally decide on all issues that are relevant to the dispute between the parties.

This decision is interesting, when compared with the amendment introduced in Sub-Clause 21.4.4 of the 2017 FIDIC Conditions of Contract. The Sub-Clause 21.4.4 provides that it is possible to give a NOD concerning only part(s) of the DAAB's decision and that the remainder of the decision shall become final and binding on the parties. Scheffer da Silveira has however noted that the case *ICC 19346* is not necessarily in contradiction with the revised Sub-Clause 21.4.4. If the issues i) and ii) are also essential for deciding on issues iii) and iv), then the NOD filed with respect to issues iii) and iv) also implies dissatisfaction with issues i) and ii).[158] Scheffer da Silveira seems to suggest that the application of Sub-Clause 21.4.4 is only possible in such DAAB decisions, where the issues can be effectively disassociated from each other. In other words, if the dispute board decision concerns issues, which are interlinked in a way that some issues are essential also for the resolution of other issues, then it is not possible to file a NOD on part(s) of a dispute board decision. This would apply to both editions of the FIDIC Conditions of Contract.

[157] ICC Dispute Resolution Bulletin 2015 No. 1 (142).
[158] Scheffer da Silveira 2019, 326.

The global effect of filing a NOD was also confirmed in *ICC 18320 (Final Award)*[159], where the Sole Arbitrator concluded that a DAB decision cannot become final and binding for one party only. The finality of a DAB decision becomes effective simultaneously for both parties – and also a NOD's effect to prevent a DAB decision from becoming final applies to both parties, even if only one of the parties files the NOD.

Evidentiary Value of Dispute Board Decisions

Another aspect discussed is the weight of dispute board decision in arbitral tribunals' deliberation. In *ICC 19858*[160], the Sole Arbitrator discussed the probative value of dispute board decisions in the arbitration. The Sole Arbitrator found that the probative value would depend on i) the rigour of the dispute board's analysis, and ii) the submitted evidence. The second aspect was found particularly important due to Sub-Clause 20.6(3) of the 1999 FIDIC Red Book, which provides that parties may submit also such evidence to the arbitral tribunal that has not been submitted to the DAB. This worried the Sole Arbitrator, who could not have any guarantee that the arguments and evidence submitted to the DAB for its deliberation would be equivalent in terms of extent, substance and profoundness of analysis to those submitted to the arbitration. The Sole Arbitrator then made a detailed analysis on how the two disputes had been presented before the DAB in order to decide those decisions' probative value in the arbitration.

The first DAB decision concerned contractor's five requests for additional payments amounting to EUR 29,00,000 in total. In response to these requests, the employer replied with a 17-pages long submission which included few arguments on the merits and was mainly limited to indicate the contractor's position. Further, there had been no hearing. The Sole Arbitrator concluded that due to the modest content of the parties' submissions and the absence of cross-examination in hearing (procedure was limited to written submissions), the probative value of the DAB decision was limited.

With regard to the second DAB decision, the Sole Arbitrator noted that the employer's submission was even more superficial, and that the DAB decision was practically a default decision. The Sole Arbitrator concluded that as an arbitrator (s)he does not have power to give a default decision and therefore (s)he cannot either base her decision on default DAB decision. Therefore, the Sole

[159] ICC Dispute Resolution Bulletin 2015 No. 1 (132).
[160] The award has not been published, see Scheffer da Silveira 2019, 362 for a summary on the decision.

Arbitrator was obliged to revise the DAB decision. Due to the limited information available on this case, the outcome of the Sole Arbitrator's decision has unfortunately not been published.

Scheffer da Silveira has commented this decision and noted that even if a dispute board decision can well be an influential evidence before the arbitral tribunal, its evidentiary value depends on the manner how the dispute was presented before the dispute board.[161] The arbitral tribunals are in no way bound by dispute board decisions and they have full power to revise the decisions. The probative value of the dispute board decisions depends on how much weight the tribunals put on those decisions. Pursuant to *ICC 19858*, the arbitral tribunal can take due process requirements into account. It should be noted that modern dispute board proceedings have a tendency to develop into mini-arbitrations, which may positively affect the evidentiary value of dispute board decisions before arbitral tribunals. Further, often dispute board members are experts in the relevant field and have become familiar (and perhaps also more familiar than the arbitrators) with the project. It would be interesting to review more arbitral tribunals' practice in this respect to understand, whether dispute board decisions are treated like Expert reports in some cases, where the arbitral tribunal lacks the technical experience to assess the correctness of a dispute board decision.

Concluding remarks

The cases include some adopted approaches on arbitral tribunals' jurisdiction to decide on the revision of dispute board decisions. It seems that although both editions of the FIDIC Conditions of Contract expressly provide the arbitral tribunals the power to open up, review and revise non-final dispute board decisions, parties should understand to expressly request the revision (*ICC 16948 Final Award* and *Persero I*). Arbitral tribunals cannot decide *ex officio* to open up, review and revise dispute board decisions. Further, it may not be sufficient to merely express dissatisfaction in a party's submission for defense to invoke the application of Sub-Clause 20.6 (or Sub-Clause 21.6).

Further, in *ICC 14079*, the arbitral tribunal hold that the obligation to refer disputes first to the expert (adjudicator) before arbitration also applies to counterclaims and set-off claims presented in the arbitration. Yet, and quite surprisingly a contrary view was adopted in *ICC 11813* with respect to set-off claims, where the tribunal concluded that the requirement of Sub-Clause 20.6 to refer all disputes to a dispute board would not concern set-off rights (because the parties had not expressly excluded

[161] Scheffer da Silveira 2019, 363.

the right of set-off from their contract terms). In light of this precedent, the parties' set-off rights under Sub-Clause 20.6 of the 1999 edition and Sub-Clause 21.6 of the 2017 edition of FIDIC Contractions continue to be ambiguous. It was proposed that a useful addition to the FIDIC Conditions of Contract could be the express exclusion of each party's right of set-off, which would also be in line with the pay now, argue later -principle.

The ICC Awards also discussed the effects of a NOD. In light of *ICC 19346,* if the dispute board decision concerns issues, which are interlinked in a way that some issues are essential also for the resolution of other issues, then it is not possible to file a NOD on part(s) of a dispute board decision. This approach seems to apply to both editions of the FIDIC Conditions of Contract. Further, in *ICC 18320 (Final Award)*, the Sole Arbitrator concluded that a DAB decision cannot become final and binding for one party only. Hence, the finality of a DAB decision becomes effective simultaneously for both parties – and also a NOD's effect to prevent a DAB decision from becoming final applies to both parties, even if only one of the parties files the NOD.

Finally, the evidentiary value of dispute board decisions was discussed in *ICC 19858*. Their evidentiary value in arbitration depends on the manner how the dispute was presented before the dispute board. The arbitral tribunals are in no way bound by dispute board decisions and they have full power to revise the decisions. The probative value of the dispute board decisions depends on how much weight the tribunals put on those decisions. The tribunal can e.g. consider how carefully the dispute board followed due process requirements.

It was also noted that modern dispute board proceedings have a tendency to develop into mini-arbitrations, which may positively affect the evidentiary value of dispute board decisions before arbitral tribunals. Further, often dispute board members are experts in the relevant field and have become familiar (and perhaps also more familiar than the arbitrators) with the project. It would be interesting to review more precedents in this respect to understand, whether dispute board decisions are treated like Expert reports in some cases, where the arbitral tribunal lacks the technical experience to assess the correctness of a dispute board decision. These observations could explain to some extent the statistics, which prove that in most cases the arbitral tribunals follow the dispute board's determination.

CONCLUSIONS

The purpose of this thesis was to evaluate the clarity of the link between dispute board determination and arbitration under FIDIC Conditions of Contract. This link is important, because it connects *merely* contractually binding dispute board decisions to arbitration, which is a final dispute resolution method backed-up by the international legal framework on the recognition and enforcement of arbitral awards. FIDIC Contracts have received some criticism due to confusion around this link, and in particular, with respect to their provisions on binding but not final dispute board decisions. The discussion in this thesis has been structured into two methods that were adopted to analyse the clarity of this link. On the one hand, the clarity of this link has been analysed by evaluating the modifications introduced in 2017 FIDIC Conditions of Contract compared to the 1999 edition. On the other hand, the application of these provisions of FIDIC Conditions of Contract in ICC practice has been analysed.

FIDIC Contracts incorporate a complex multi-tier dispute resolution clause. Pursuant to FIDIC Conditions of Contract, there exist two routes to arbitration after obtaining a dispute board decision:

I. Enforcement of a (binding and/or final and binding) dispute board decision in arbitration without reviewing its merits due to a party's failure to comply with the decision; and
II. Final revision of the dispute board decision in arbitration by opening up, reviewing and revising the decision.

The first route is more rocky. In the 1999 FIDIC Contracts, certain severe obstacles in the wording of the Sub-Clause 20.7 make the recourse to arbitration through the first route more difficult in comparison to the 2017 edition. This is due to the alleged unintentional gap in the Sub-Clause 20.7, which does not *expressly* provide the enforcement of non-final dispute board decisions. It should be noted, that while it is arguable that there was a deficiency in the drafting of the Sub-Clause 20.7, in practice this gap can be cured when putting the provision in its appropriate context. *Pay now argue later* -principle in the background of the FIDIC Contracts speaks strongly for the enforcement of also non-final binding dispute board decisions. In particular, for a person coming from a Nordic legal system, which adopts common sense and pragmatism amongst sources for legal reasoning in contract law, it would be difficult to justify the deviation from that principle, which serves one purpose of the contract – continuation of works regardless of disputes.

In ICC practice, both approaches have been adopted. In some arbitral awards, the interim enforcement has been declined, whereas in many cases the tribunal has decided to enforce a merely binding decision. Furthermore, the arbitral tribunals' deliberations on how they have decided to enforce a binding dispute board decision differ in each selected case. An approach, which seems most pragmatic, would be to treat a failure to comply with a binding dispute board decision as a breach of contract, which can be resolved finally.

The gap has been removed from the 2017 FIDIC Conditions of Contract: Sub-Clause 21.7 expressly allows enforcement of both binding and final and binding dispute board decisions. This modification indeed clarifies the first route to arbitration with respect to *merely* binding dispute board decisions.

Further, the 2017 FIDIC Contracts include more detailed guidance on the instruments (interim or provisional measure or an award) that are available for the arbitral tribunal to order such enforcement. It is questionable, whether this lengthy list of available instruments make the choice any clearer for the parties and the arbitral tribunal, as the appropriate instrument seems to strongly depend on the underlying jurisdiction, where the final enforcement of the arbitral tribunal's decision is sought. Also, pursuant to ICC practice, the parties and arbitral tribunals have navigated in this technical procedural framework already successfully, before the 2017 edition of FIDIC Contracts was introduced.

A useful new addition to the FIDIC Contracts, by which the extra step of national enforcement proceedings could perhaps be avoided, would be to expressly provide that the arbitral tribunals may request provision of appropriate security when they enforce interim binding dispute board decisions concerning payment obligations. If the claimant would provide security for the arbitral tribunal's decision to enforce interim payment obligations, which may be dismissed at later stage in the arbitration, the respondent should have higher incentive to voluntarily comply with the arbitral tribunal's interim/partial decision.

The second route to arbitration has been more mildly updated in the 2017 FIDIC Contracts when compared to the 1999 edition. The 2017 FIDIC Conditions of Contract expressly provide that a party can also file a NOD on a part(s) of a dispute board decision, while the 1999 edition is silent on this option. ICC practice clarifies this issue further by constituting that this option seems not to apply to decisions concerning issues, which are interlinked in a way that some issues are essential also for the resolution of other issues.

Further, 2017 edition of FIDIC Contracts provides also clarity on the immediate effect of payment orders by arbitral tribunals as well as on the tribunals' power in costs determination. What has not been expressly mentioned, is the arbitral tribunals' power to put weight on a party's failure to comply with a binding dispute board decision, when deciding on the allocation of costs between the parties. It would perhaps be useful to grant such power expressly in the contract terms. This would further strengthen the parties' incentives to comply voluntarily with dispute board determination.

An issue, which both editions of the FIDIC Contracts fail to expressly address and which is subject to contradicting interpretation in ICC practice, is the parties' set-off rights in arbitration. They are proposed to be expressly excluded from the contract terms. This clarification would prevent a party from estopping the enforcement of a binding dispute board decision in arbitration by asserting set-off rights.

The 2017 FIDIC Conditions of Contract indeed provide clarification for the link between dispute board determination and subsequent recourse to arbitration. The clarifications introduced in the 2017 FIDIC Conditions of Contract as well as the interpretations adopted in ICC practice also reinforce the stronger adoption of *pay now, argue later* -principle in the contract terms.

What is noteworthy, is that many on-going and future projects are still based on the 1999 FIDIC Contracts. Further, there are some risks related to the recourse to arbitration in dispute board proceedings, even if the 2017 FIDIC Contracts have managed to reduce many of those risks. This reduces the predictability of the outcome in dispute board process. The inclusion of the complete original dispute resolution clause of the FIDIC Contracts in a contract requires carefulness and deep understanding of the complexities related to this multi-tier clause. Further, the application of the 1999 edition can only be recommended subject to certain modifications in the contract terms.

ANNEXES

Picture 1: Dispute Boards in a Nutshell

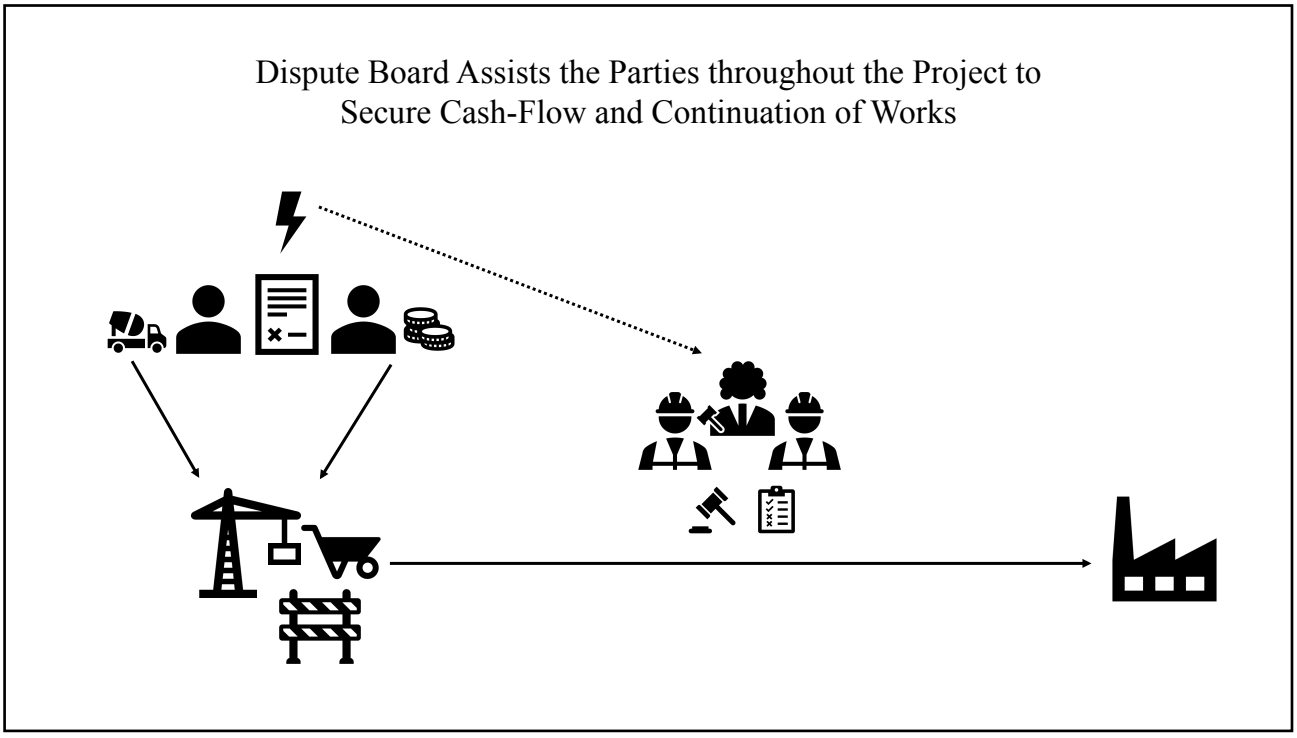


Chart 1: 2 Routes to Arbitration under 1999 FIDIC Conditions of Contract

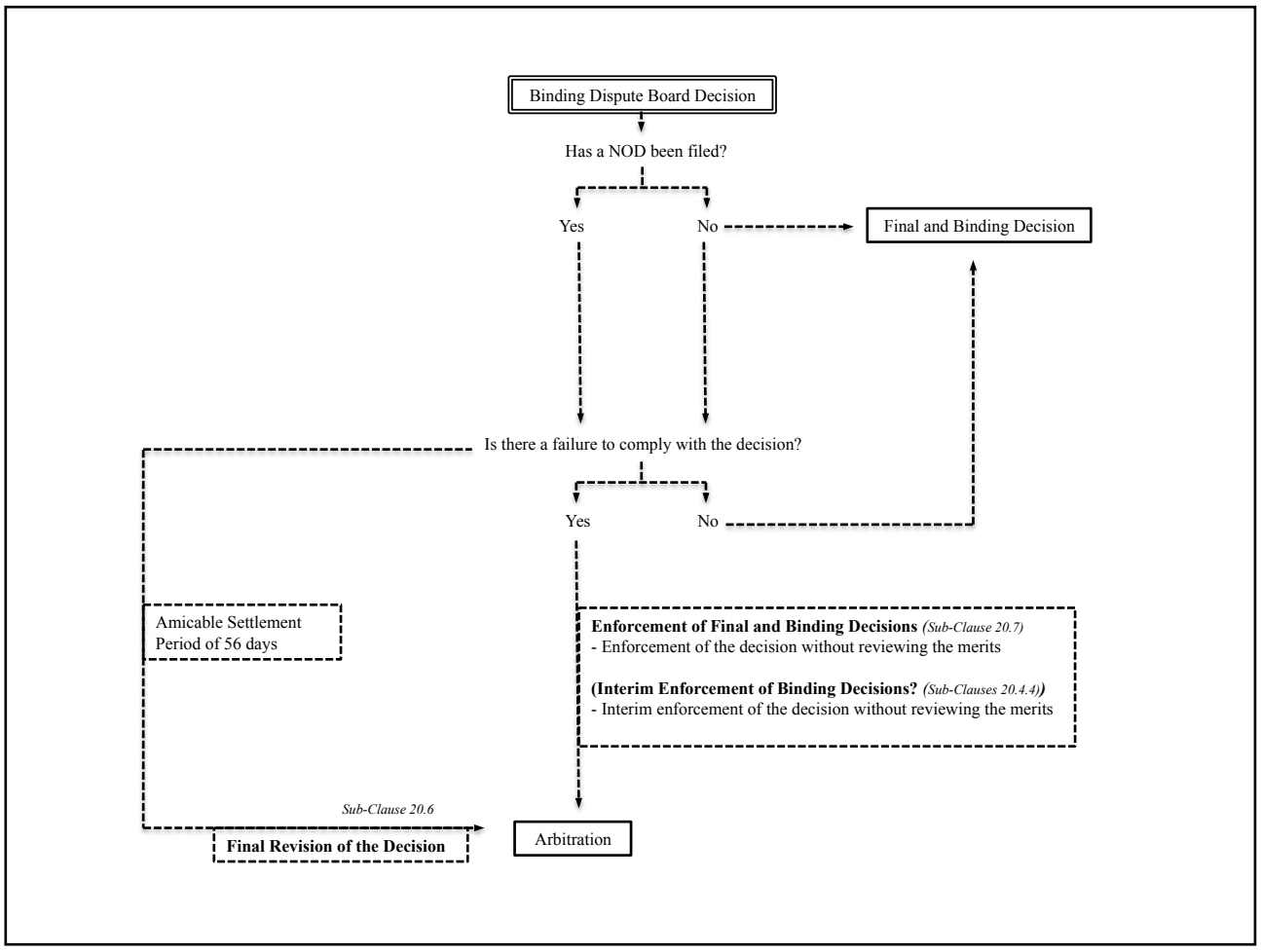
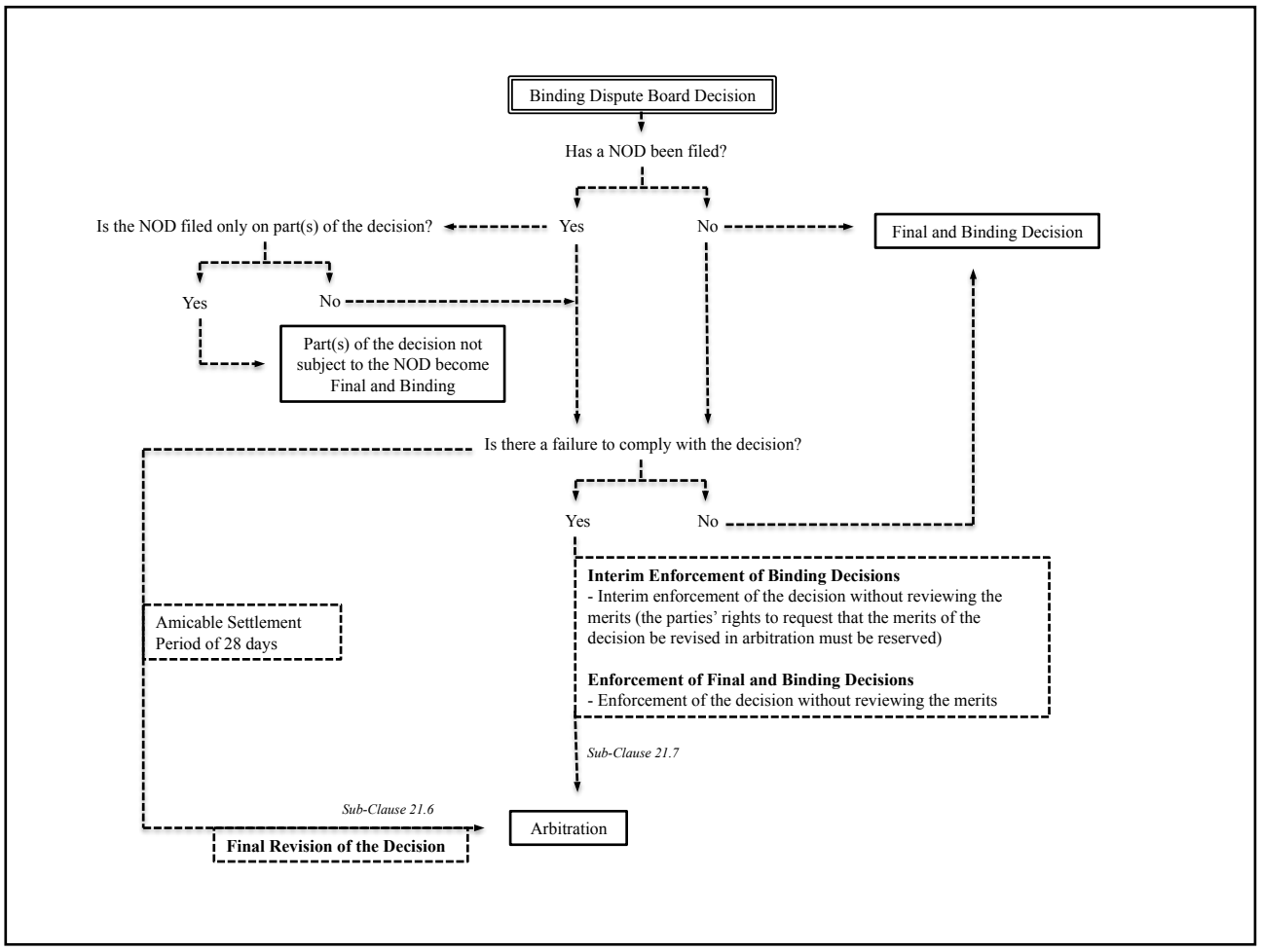


Chart 2: 2 Routes to Arbitration under 2017 FIDIC Conditions of Contract



FIDIC CONDITIONS OF CONTRACT

- Most relevant provisions in 1999 and 2017 Editions -

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1999 FIDIC Conditions of Contract

According to Sub-Clause 20.4 *Obtaining Dispute Adjudication Board's Decision* of the 1999 FIDIC Conditions of Contract:

> "*(...) Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with Works in accordance with the Contract.*
>
> *If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.*
>
> *In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.*
>
> *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 final and binding upon both Parties."*

According to Sub-Clause 20.5 *Amicable Settlement* of the 1999 FIDIC Conditions of Contract:

"Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made." (emphasis added)

According to Sub-Clause 20.6 *Arbitration* of the 1999 FIDIC Conditions of Contract:

"*Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*

a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works."

According to Sub-Clause 20.7 *Failure to Comply with Dispute Adjudication Board's Decision* of the 1999 FIDIC Conditions of Contract:

> "*In the event that:*
>
> *a)* neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 *[Obtaining Dispute Adjudication Board's Decision],*
> *b) the DAB's related decision (if any) has become final and binding, and*
> *c) a Party fails to comply with this decision,*
>
> *then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration], Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.*"

According to Sub-Clause 20.8 *Expiry of Dispute Adjudication Board's Appointment* of the 1999 FIDIC Conditions of Contract:

> "*If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:*
>
> *a)* Sub-Clause 20.4 *[Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and*
> *b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].*"

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2017 FIDIC Conditions of Contract

According to Sub-Clause 21.4.3 *The DAAB's decision* of the 2017 FIDIC Conditions of Contract:

> "*The DAAB shall complete and give its decision within:*
>
> *a) 84 days after receiving the reference; or*
> *b) such period as may be proposed by the DAAB and agreed by both Parties.*
> *However, if at the end of this period, the due date(s) for payment of any DAAB member's invoice(s) has passed but such invoice(s) remains/remain unpaid, the DAAB shall not be obliged to give its decision until such outstanding invoice(s) has/have been paid in full, in which case the DAAB shall give its decision as soon as practicable after payment has been received.*
>
> *The decision shall be given in writing to both Parties, shall be reasoned, and shall state that it is given under this Sub-Clause.*
>
> *The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause.*
>
> *If the decision of the DAAB required a payment of an amount by one Party to the other Party*
>
> *i) subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any Statement or Notice; and*
> *ii) the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 [Arbitration], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.*

The DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s)."

According to Sub-Clause 21.4.4 *Dissatisfaction with DAAB's decision* of the 2017 FIDIC Conditions of Contract:

"*If either Party is dissatisfied with the DAAB's decision:*

a) such Party may give a NOD to the other Party, with a copy to the DAAB;
b) this NOD shall state that it is a "Notice of Dissatisfaction with the DAAB's decision" and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and
c) this NOD shall be given within 28 days after receiving the DAAB's decision.

If the DAAB fails to give its decision within the period stated in Sub-Clause 21.4.3 [The DAAB's decision], then either Party may, within 28 days after this period has expired, give a NOD to the other Party in accordance with sub-paragraphs (a) and (b) above.

Except as stated in the last paragraph of Sub-Clause 3.5.5 [Dissatisfaction with Employer's Representative's determination], in Sub-Clause 21.7 [Failure to comply with DAAB's Decision] and in Sub-Clause 21.8 [No DAAB In Place], neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

If the DAAB has given its decision as to a matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DAAB's decision, then the decision shall become final and binding on both Parties.

If the dissatisfied Party is dissatisfied with only part(s) of the DAAB's decision:

i) this part(s) shall be clearly identified in the NOD;

ii) this part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and

iii) the remainder of the decision shall become final and binding on both Parties as if the NOD had not been given."

According to Sub-Clause 21.5 *Amicable Settlement* of the 2017 FIDIC Conditions of Contract:

"*Where a NOD has been given under Sub-Clause 21.4 [Obtaining DAAB's Decision], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eight (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.*"

According to Sub-Clause 21.6 *Arbitration* of the 2017 FIDIC Conditions of Contract:

"*Unless settled amicably, and subject to Sub-Clause 3.5.5 [Dissatisfaction with Employer's Representative's determination], Sub-Clause 21.4.4 [Dissatisfaction with DAAB's decision], Sub-Clause 21.7 [Failure to comply with DAAB's Decision] and Sub-Clause 21.8 [No DAAB In Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*

a) the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;

b) the Dispute shall be settled by one or three arbitrators appointed in accordance with these Rules; and

c) the arbitration shall be conducted in the ruling language defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Employer and/or of the Employer's Representative, and any decision

of the DAAB (other than a final and binding decision) relevant to the Dispute. Nothing shall disqualify the natural person(s) who has/have acted on behalf of the Employer under the Contract from being called as witness(es) and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in consulting a DAAB under Sub-Clause 21.1 [Constitutiona of the DAAB] and/or Sub-Clause 21.2 [Failure to Appoint DAAB Member(s)].

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [Obtaining DAAB's Decision]. Any decision of the DAAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced before or after completion of the Works. The obligations of the Parties and the DAAB shall not be altered by reasons of any arbitration being conducted during the progress of the Works.

If an award requires a payment of an amount by one Party to the other Party, this amount shall be immediately due and payable without any Statement or Notice."

According to Sub-Clause 21.7 *Failure to Comply with DAAB's Decision* of the 2017 FIDIC Conditions of Contract:

"*In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or*

provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.

In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief."

According to Sub-Clause 21.8 *No DAAB In Place* of the 2017 FIDIC Conditions of Contract:

"If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAAB in place (or no DAAB is being constituted), whether by reason of the expiry of the DAAB's appointment or otherwise:

a) *Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply; and*
b) *the Dispute may be referred by either Party directly to arbitration under Sub-Clause 21.6 [Arbitration] without prejudice to any other rights the Party may have."*

***