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DISPUTE ADJUDICATION BOARD (FIDIC 1999)

I. COMMONNESSES

FIDIC (**I**nternational **F**ederation of **C**onsulting **E**ngineers) is a professional European organization, with its registered office in Geneva, that reunites within it professional consulting engineers organizations.

FIDIC is a private supranational organization, bereaved of normative ability. Even do, the clarity and the simplicity of FIDIC contractual terms have transformed it into a genuine international customary law in the area.¹

Several years ago, during the deployment of the adhesion process to the European Union, the Romanian governmental authorities have contracted a PHARE project – The transposition of FIDIC contractual clauses in the Romanian legislation, in force to the present day.

The deployment of this conditions as well as the harmonization with the national legislation was realized thru the issuance of the *ORDER no. 915/465/415 from the 25th march 2008 regarding the approval of general and special contractual conditions concerning the closure of works contracts.*²

Article 2 of the specified Order previews the subjects that are duly obligated to apply and comply with the provisions of the law: the public authorities and the beneficiaries of European or public founds.

¹ “What FIDIC has to offer and plans for the future”, John Bowcock - Chairman, FIDIC Contracts Committee, 1997, <http://www1.fidic.org/resources/contracts/bowcock97.asp>.

² Published in the Official Monitor, Part I no. 424bis from 05.06.2008.

Thru article 20 of Order no. 915/2008 a new form of dispute solving was introduced, a form that constitutes itself in a liable procedure prior to arbitration: the Dispute Adjudication Board, DAB; the novelty and the problems that this procedure raises up in the Romanian's law system make up the subject of this article.

II. DAB'S SELECTION: the board's structure, designation, remuneration and countermand

The Board is established prior to the constructions' properly institution (both in the case of the ad-hoc or long term constitution) and it makes frequent visits to the site.

In the case of the *long term constitution of the DAB*, the Commission's structure will be attained throughout an arbitration clause in a certain amount of time (generally established in the Offer's annex), and in the case of the *ad-hoc constitution of DAB*, its institution is provided as soon as a dispute appears. Thus, one of the Parties can impose the DAB's constitution and can advance an adjudication notice.

Both Parties will continue to fulfill their contractual obligations with diligence even throughout the case solving by the DAB.³

In the Order no. 915/2008 regarding the approval of general and special contractual conditions concerning the closure of works contracts, at article no. 20.2. from the annex "Contract conditions regarding constructions, buildings and engineering works designed by the beneficiary" (FIDIC 1999), the legal setting for the DAB's designation (DAB) is found.

The Parties assign, by mutual agreement the DAB's members; if the number of persons is not specified and if the Parties do not convene otherwise, the DAB will be formed by a number of 3 persons, each Party will name an adjudicator for which the Party will receive the approval of the other. The Parties will consult the named adjudicators and will convene upon a third adjudicator that will be named as the DAB's president. The aim of this third designation is that of completing the experience of the first two adjudicators, but also that of ensuring the DAB's lead.

Each Party will be responsible for half the payment of the sum established as remuneration. When the Parties agree, they can subdue to the DAB's attention an issue so that the DAB can express an opinion. None of the Parties will consult the DAB for the resolving of an issue without the approval of the other Party.

The countermand of an adjudicator can only be made with the mutual agreement of both Parties.

The Urgency Orderly no 34 from the 19th of April 2006 regarding the assignment of public acquisition contracts, the lease of public works contracts and the lease of services

³ Guide Specifications- AAA -American Arbitrator's Association, 2000.

contracts specifies, at article 13, that the urgency orderly does not apply to the assignment of services contracts that refers to the performance of arbitration and conciliation services; in this case the DAB is equivalent both to conciliation and arbitration, throughout the activity finality and its structure, regulated in the Civil judicial proceeding Code , in chapter III, articles 344-345. Thus, **The Urgency Orderly no 34 from the 19th of April 2006 does not apply to the assignment of contracts between the contracting Parties and the Dispute Adjudication Board (its members can be any person, specialists in the constructions area, with experience in resolving disputes from hereby contracts⁴)⁵.**

III. THE DAB PROCEDURE

1) DAB procedural regulations are stipulated in Annex 1a of the Order no. 915/2008⁶.

Thus, DAB can conduct a hearing regarding the dispute, in which case the DAB will decide upon the hearing's date and place and can also require that the written documentation and the Parties arguments be presented before the meeting or during it.

With the exception of a different stipulation convened in writing, by the Parties, DAB will have the authority to adopt an interrogative procedure, to deny access at the hearings to any person, other than the Parties representatives, and to continue even in the absence of a Party upon which DAB is convinced that it has been properly announced about the meeting.

The Parties have the liberty to establish a procedure that will be applied in solving a dispute and to decide upon DAB's jurisdiction.

During the hearings, DAB will not express any opinion regarding the value of the Parties' arguments.

When DAB is made up of 3 persons, these will try to attain an unanimous decision; if this is not possible the applicable decision will be made by the adjudicators' majority.

2) DRBF (DISPUTE RESOLUTION BOARD FOUNDATION) is a non-profit international organization (that has a series of international entities affiliated, such as the International Monetary Found, the International World Bank) that promote, thru an alternative method to arbitration the dispute solving within constructions'

⁴ Necessary attributes: Complete objectivity, neutrality, impartiality and freedom from bias and conflict of interest for the duration of the contract. The Parties must evaluate the experience and qualifications of the prospective members for the specific project (**from the recommendations of the DISPUTE RESOLUTION BOARD FOUNDATION www.drb.org**).

⁵ "DAB's designation in the context of the Urgency Orderly no. 34 from the 19th of April 2006", Alina Valentina Oprea, Representative for Romania of the Dispute Resolution Board Foundation.

⁶ Points 5-9 of the Annex "Procedural regulations".

contracts. *In order to cover FIDIC's procedural shortages,* DRBF has framed up a series of recommendations. Insomuch as these recommendations are introduced in the Parties concluded contract, these acquire the attribute of conventional usage, becoming thus mandatory for the Parties.

Hereinafter, a part of these recommendations are briefly presented:

a) Scheduling the Hearing (CRD- Common Reference Document)

- Upon receipt of the dispute referral letter, the Chair consults with the other two Board members and both Parties to establish a date for the hearing.
- To facilitate the DAB's review of the issues and preparation of the report, the DAB operating procedures frequently require the Parties to prepare a joint statement of dispute and a common reference document (CRD), comprised of materials such as correspondence, reports, and other records, that they believe will help the Board members understand the dispute.
- In order to minimize the volume of material the CRD should only include copies of pertinent portions of the contract documents for easy reference and it should be arranged in a logical manner.

b) Position Paper

Each Party also prepares a paper describing its position and submits it to the other Party and the DAB in advance of the hearing. Position papers should concisely summarize the Party's position, explain relevant factual information, and give the contractual justification for their position, all referenced to specific pages in the CRD.

It is critically important that all facts and arguments a Party intends to put forth during the hearing be included so the other Party has the opportunity to provide a considered response at the hearing.

It is also beneficial for each Party to include their understanding of the other Party's position and explain why they believe the other Party's position is without merit. To avoid giving one Party an advantage, the deadline for submittal of each Party's position paper must be the same.

c) Location

Hearings may be conducted at any mutually acceptable location that provides all the required facilities and access to any additional reference documents that might be needed, the job site being generally preferred.

d) Participation

Participation should be limited to the decision makers from each of the contracting Parties and those with first-hand familiarity with the facts of the dispute, such as inspectors, superintendents and foremen. The Parties' attorneys may attend the hearings (at the request of both Parties), but they will exert an active role only on DAB's demand. The DAB's operating procedures usually provide for each Party to submit a list of the people who will participate, as well as those who will attend as observers⁷.

e) The Hearing

- Typically, the claimant makes its presentation first, followed by the other Party. Rebuttals are then heard, followed by questions from the Board members and further rebuttals by the Parties. Each Party must be given ample opportunity to present its case and to rebut information presented by the other Party.
- Direct questioning of one Party by the other Party, as well as video or audio recordings is not permitted.
- All those present at the hearings will have to sign an attendance sheet every day.
- If additional information has been developed after submittal of the position papers, and the DAB decides to permit this information to be introduced at the hearing, the other Party will be given ample time to consider and respond to it.
- During or after the hearing, the DAB may request further documents or information that would assist the DAB in making its findings and recommendations. The request may necessitate additional hearings in order for the DAB to ask questions in order to fully understand such additional material.

In the case of one Party refusing to attend the hearing, the DAB must decide whether to proceed with the hearing without that Party's presence, to postpone the hearing, or to cancel it. One of the factors that should be considered in making this decision is whether the refusing Party simply needs additional time to prepare, or is unwilling to participate for reasons directed at obstructing the process⁸.

f) DAB's decisions. Arbitration

⁷ "DRBF Practices and Procedures Manual", User Guide, Preparation for the Hearing, Jan., 2007, http://www.drb.org/manual_access.htm.

⁸ "DRBF Practices and Procedures Manual", Member Guide, Conducting Hearings, Jan. 2007, http://www.drb.org/manual_access.htm.

The Dispute Adjudication Board's decisions are confidential.

However, the decision's format is not standard, but it must have a logical presentation:

- Cover page
 - Table of content
 - Introduction and background
 - DAB appointment
 - The dispute
 - Procedure adopted
 - DAB jurisdiction
 - The issues to be determined- the description of the issue, the Party positions and DAB decision on the issue
 - DAB decision
 - Directions of DAB.
- DAB- Dispute Adjudication Board**

The DAB decision is not mandatory for the Parties; thus, it only has the value of a substantiation document.

If one of the Parties is not content with the DAB's decision, then that Party can render a notice to the other Party, within a 28 days term from the decision's reception, concerning its discontent.

In the discontent notice there will be mentioned that it is issued according to the provisions of sub-clause no 20.7., and it will specify the dispute's object and the discontent's reasons.

Neither Party will be entitled to start the arbitration unless a discontent notice was issued.

If a discontent notice is issued, according to the provisions of sub-clause no 20.4., both Parties will try to solve the dispute amicably before the arbitration's overture. With the exception of disputes solved amicably, any other dispute for which the DAB's decision has not become final and mandatory will be solved throughout international arbitration if the Parties do not decide otherwise.

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