

Seminar For 9th Annual DRBF International Conference

*Christopher R. Seppälä
Sunday, May 17, 2009
London, United Kingdom*

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DAB Decisions: Bound to pay? How enforceable are DAB decisions? How enforceable should they be? How should they be enforced?

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1. As a DAB's decision is not an arbitral award, it is not enforceable internationally like such an award. Thus, the 1958 New York Convention relating to the international enforcement of arbitral awards will not apply.
2. But there are reported arbitration cases where “final and binding” Engineer's decisions have been enforced by an arbitral award, see e.g. ICC Case Nos. 3790 / 3902 / 4050 / 4051 / 4054.
3. There is also a recently reported arbitration case where a merely “binding” but not “final” Engineer's decision has been enforced by an arbitral award, see e.g. ICC Case No. 10619.
4. Accordingly, there is no reason why “final and binding”, or “binding” but not “final”, DAB decisions could not, where appropriate, be enforced by an arbitral award. Once enforced by an arbitral award, they could then be enforced internationally.
5. In the case of the FIDIC's new Design, Build And Operate form of contract (2008), this conclusion is reinforced by Sub-Clause 20.9 which provides as follows:

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“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 20.8 [*Arbitration*] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board’s Decision*] and Sub-Clause 20.7 [*Amicable Settlement*] shall not apply to this reference.”

The FIDIC 1999 Books (Red, Yellow and Silver) contain a similar provision [Sub-Clause 20.7].

6. It may also be possible to ask a national court to enforce such a decision as an interim or a conservatory measure as permitted by Article 23 of the ICC Arbitration Rules [see e.g. Sub-Clause 5.4 of the ICC’s Dispute Board Rules which recognizes court enforcement].