

# Will Dab in Fidic Red Book Sufficiently Resolve Disputes in Dubai

Dubai is expecting a large construction boom due to the recent win to host the EXPO 2020. Therefore, Sri Lankan Quantity Surveyors (SLQS) who have been employed in senior positions like contract administrators/managers/advisors or project control managers will shortly be busy with providing procurement advices to many leading UAE client's organizations.

In order to deliver large projects within a shorter time period clients and developers in Dubai will require major international constructors. As such projects will be delivered on the "Fast Track" basis dispute resolution mechanism available within the contract will play a decisive role. Especially in construction disputes, decisions depend perhaps 90 to 95% on the expressed terms and facts (including contractual and technical issues) and only 5 to 10% on the implied terms and law. Consequently, the facts and the terms of the contract are dominating in administering disputes. Therefore, quantity surveyors can attribute a significant value to the project delivery by providing correct procurement advices and drafting a "Claim Proof" contract document with an appropriate dispute resolution mechanism during the pre-contract stage.

Most of the forms of contracts used in Dubai are based on FIDIC Red Book Fourth Edition (1987). Its' dispute resolution mechanism (Clause 67) has some inherent deficiencies. It expects the Engineer to act as a quasi-arbitrator and make the Engineer's Decision under Clause 67. The Engineer should act the dual role of an agent of the employer and also as an independent and impartial decision maker. Although "Serving to the Public" is one of the common slogans of all professionals, there are sufficient industrial evidences where the Engineer (and even quantity surveyors) failed to discharge proper duties while wearing a dual-hat<sup>1</sup>.

FIDIC Red Book Fourth Edition (1987) Sub-Clause 67.1 unambiguously required the parties to comply with the Engineer's decision. The Arbitration Notice (notice of intention to commence arbitration) is a condition precedence to commence any subsequent arbitration proceedings. However; the claimant has no remedy if the other party who does not promptly comply with the Engineer's decision has not served the notice.

Therefore quantity surveyors may be prompt to recommend modern and advanced mechanisms in the industry to bridge such gaps. The Dispute Adjudication Board (DAB) is a mechanism to limit the drastic, one-sided nature to guarantee fair and reasonable rights of the Contractor without undermining the Employer's interest. The Dispute Adjudication Board (DAB) in the 1999 FIDIC Red Book Clause 20: Claims, Disputes and Arbitration, would have provided a decisive mechanism for its resolution.

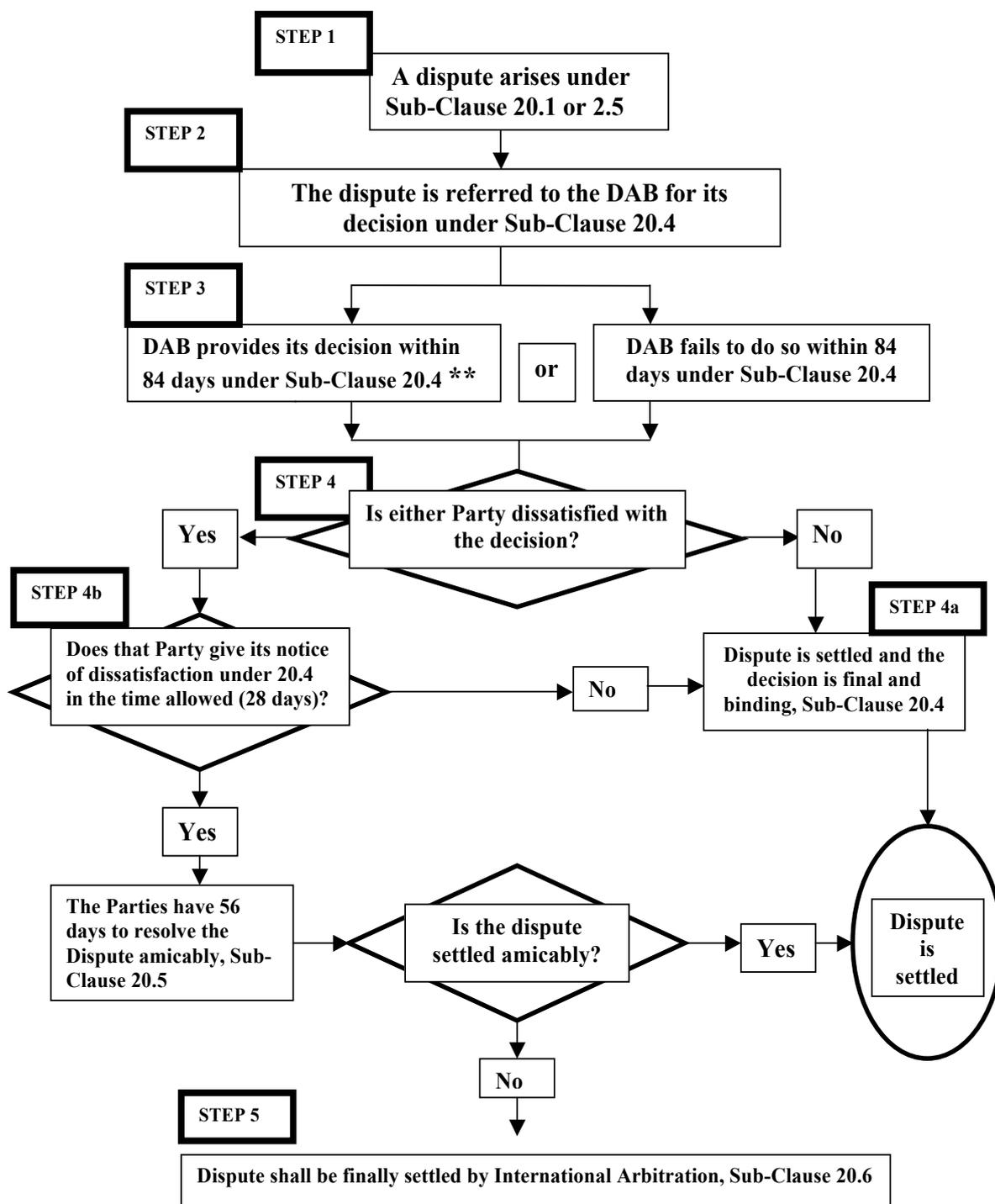
In 2003 French lawyer Christopher R. Seppala, (Legal Advisor, FIDIC Contracts Committee) described the dispute resolution procedure setout in 1999 FIDIC Red Book in six (06) steps by writing his famous article on "FIDIC Conditions of Contract and the Dispute Adjudication Procedure". Subsequently Professor Dr. Nael G. Bunni explained the same in "Five Essential Steps" (Refer to Figure No. 1) by his "The Gap in Sub-Clause 20.7 of The 1999 FIDIC Contracts for Major Works". The main difference between these two processes is the combination of Sappala's two steps (i.e. possible responses of the Parties to the decision of the DAB) to a single step due to the practical scenario that only one response could apply, but not both.

## Five Essential Steps

1. Step 1: A dispute arises.
2. Step 2: the dispute is referred to the DAB in writing for its decision, under Sub-Clause 20.4.
3. Step 3: The DAB gives notice of its decision within 84 days or it fails to give a decision within that period.
4. Step 4: the Parties react to the decision of the DAB, which could be one of two possibilities:
  - (a) Both Parties are satisfied with that decision, the dispute is resolved and such decision becomes final and binding; or
  - (b) At least one of the Parties is dissatisfied with the decision of the DAB, or with its lack of decision, and thus notifies the other Party of its dissatisfaction within 28 days.<sup>2</sup> In this case, the Parties are given 56 days to attempt resolving their dispute by amicable settlement, under Sub-Clause 20.5. If the attempt is successful, the dispute is resolved. If not, step 5 applies.
5. Step 5: If the attempt to amicably resolve the dispute fails, such dispute is to be finally settled by international arbitration, under Sub-Clause 20.6.

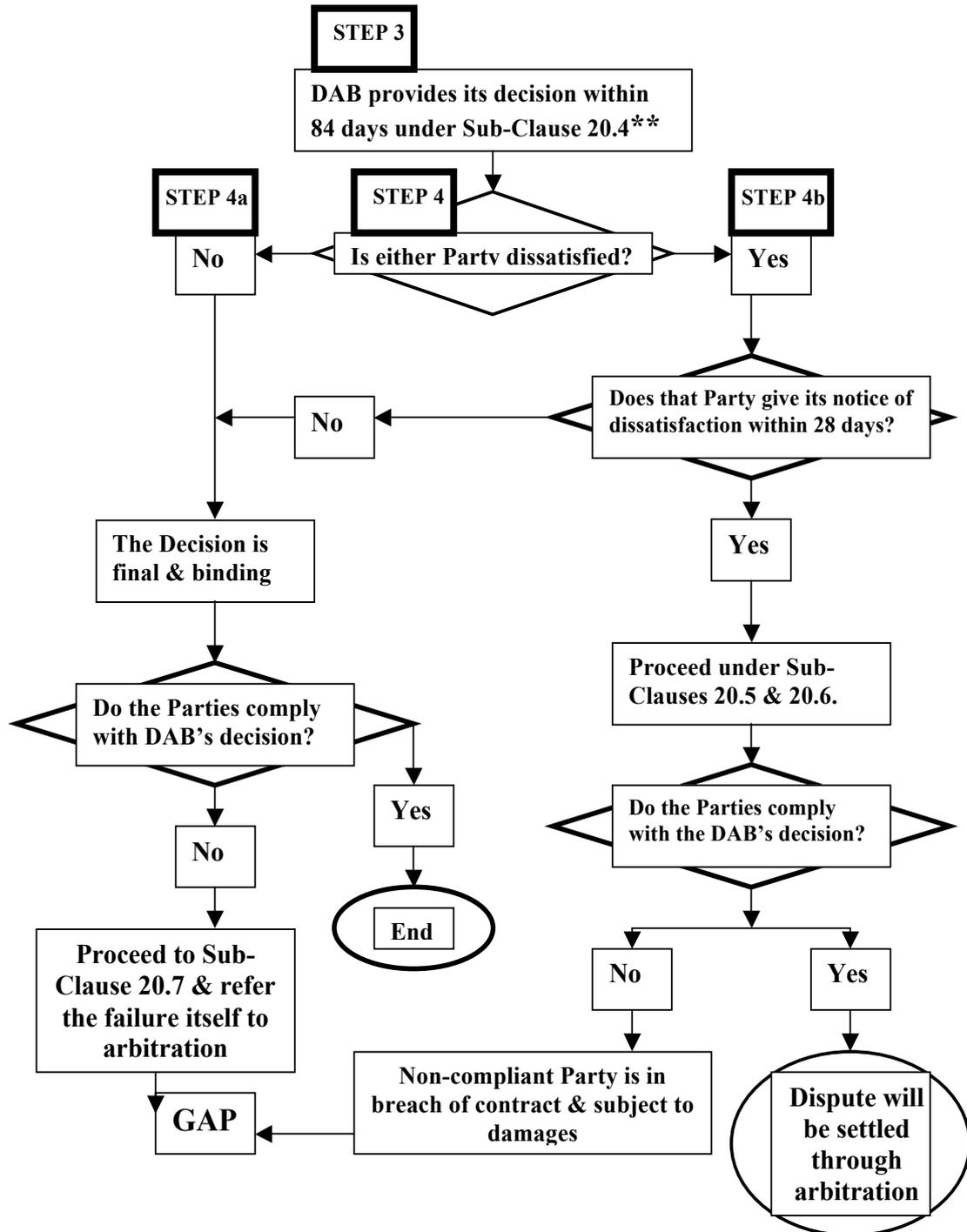
<sup>1</sup> Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2000]CA BLR247 and [1999]TCC BLR123

<sup>2</sup> If the notice of dissatisfaction is not given within the required 28 days, the decision of the DAB will become final and binding and the provisions relating to Step 4(a) will apply.



\*\* 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, see 4<sup>th</sup> paragraph of Sub-Clause 20.4.

Figure No. 1. Dispute Resolution Procedure under Clause 20



\*\* 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, see 4<sup>th</sup> paragraph of Sub-Clause 20.4.

**Figure No. 2. Compliance with the Decision of the DAB under the 1999 FIDIC Major Contracts**

Sub-Clause 20.5 and 20.6 explain remedial measure adopted by any disappointed Party who shall serve a notice to this effect to the other Party within 28 days of the DAB's decision. Sub-Clause 20.7 allow the clement to refer the failure itself to arbitration under Sub-Clause 20.6 when the decision of the DAB has become final and binding.

The possibility of non-compliance with the DAB's decision is explained in Sub-Clause 20.7. The FIDIC has given a due regards to the common law requirements by compelling the dissatisfied party to serve the "notice of dissatisfaction" (Notice of Arbitration) within 28 days, and to stay of legal proceedings until a reasonable attempt is made for amicable settlement under Sub-Clauses 20.7 and 20.8.

However, it will be worthy to check the sufficiency of DAB due to some probable practical difficulties.

Despite the usage of above stated steps 4(a) or 4(b), pursuant to Sub-Clause 20.4 the DAB's decision will be promptly "temporarily final & binding" contractual obligation on the Parties until one of the followings;

1. be revised in an amicable settlement or
2. an arbitral award

In the event of a breach of such obligation by the defendant the claimant's right for damages is subject to self imposed limitations such as;

1. insufficient authority to ensure a prompt response;
2. inability to impose an instant remedy;<sup>3</sup> and
3. inability to ensure the successful completion of the Works

Therefore such remedy can be taken at some future date will add a very little value and nullify the requirement to "promptly give effect" to the DAB's decision itself.

However, FIDIC has not provided a mechanism to promptly impose the DAB's decision which may not become final and binding where one of the Parties is dissatisfied with the decision.

The Singapore Court of Appeal held that an Arbitral Tribunal had, by summarily enforcing a binding but non-final DAB decision by way of a final award without a hearing on the merits, acted in a way which was: "unprecedented and more crucially, entirely unwarranted under the 1999 FIDIC Conditions of Contract"<sup>4</sup>. The Ar-

bitral Tribunal had assumed that they should not open up, review and revise a DAB decision which was the subject of a notice of dissatisfaction. The court examined the challenged arbitration awards in construction-related disputes. If, either party gives a notice of dissatisfaction to the other party within 28 days after receiving a DAB'S decision, the decision will be binding but not final. If a party does not comply with the DAB decision, the DAB decision itself cannot mere be enforced as an arbitral award, without arbitration, or litigation. This will not give any relief to the winning party.

Therefore FIDIC Red Book 1999 has also failed to purposefully bridge the gap exist in 1987 Red Book, 4th edition. Accordingly, DAB in FIDIC 1999 Red Book will not be sufficient for future disputes in Dubai. However, this gap can be bridged by including suitable amendments in Part II; Particular Conditions.



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#### The writer was;

- Awarded with the Fellowship of the Australian Institute of Quantity Surveyors by invitation (2013)
- A founder Board Member (2003), former Chair of LLL Committee (2003-2011) & former Hon. Treasurer (2009) of RICS-UAE National Board,
- Awarded with the "RICS APC Counsellor Commitment Award -2010" (for producing the highest number of successful APC candidates),
- One of the long served SLQS-UAE Committee Member (1998-2003 & 2007-2011), and who was awarded with the "Contribution Award-2007",
- Winner of the "Best Outstanding Student Prize" from the College of Estate Management (UK),

<sup>3</sup> Failure to comply with a Notice to Correct under Sub-Clause 15.1 entitles the Employer to terminate the Contract under Sub-Clause 15.2 with all of its serious consequences.

<sup>4</sup> CRW Joint Operation v PT Perusahaan Gas Legara (Persero) TBK [2011] SGCA 33