

## The role and function of the dispute adjudication board (dab) in the fidic forms of contracts

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### Abstract

Dispute Adjudication Boards (DABs) can be categorized as form of alternative dispute resolution methods, or more specifically they can fall under the generic category of adjudication. They originate from the USA, presented for the large civil engineering projects in 1960s. At a later stage they were introduced as mandatory under the International Organization of Consulting Engineers (FIDIC) 1999 edition. Currently, the FIDIC forms of contracts provide for standing and *ad hoc* DABs, slowly shifting to standing by default, comprised of one or three members. The DAB member(s) have broad authorities, including the inquisitorial powers, the possibility to inspect and make insight of the construction site. The procedure in front of the DAB has many similarities with the arbitration procedure, especially in the preparation and filing of the written submissions. The same can be said for conducting the hearings, the order of presenting the arguments at the hearings, the proposal and questioning of witnesses. However, the DABs timeline is denser, and the DAB is free to determine its procedural rules and the parties are free to agree on certain procedural aspects. The benefit of the DABs can be described as a means of resolving disputes by avoiding cost, time and inflexibility. The main dilemma which will be addressed in this Article is whether the DABs are suitable for solving more complex construction disputes. In that respect the

DAB in more complex disputes is a “preface” of the arbitration to come, or as the new 2017 FIDIC edition states “condition precedent to arbitration”.

**Keywords:** alternative dispute resolution, arbitration, dispute adjudication agreement, dispute adjudication board, multi-tier clauses

## Introduction

The International Organization of Consulting Engineers (hereinafter: “FIDIC”) forms of contracts constitute an inclusive set of rules applied worldwide in complicated construction projects. In the Republic of North Macedonia, but also worldwide, the FIDIC forms of contracts are most associated with major infrastructure projects and are often used as the preferred method by the major financial institutions or donor organization.

From the outset of the FIDIC Books it is evident that they incline to avoiding disputes. This is also confirmed in the statistics of the FIDIC, even naming them as Dispute Avoidance Boards (<https://fidic.org/books/icc-dispute-resolution-bulletin-2015-issue-1-2014-statistics-dispute-adjudication-boards-under>). There are many examples demonstrating this tendency in the General Conditions of the FIDIC forms of contracts, such as the Sub – Clause 3.5 where it is provided that “*the Engineer shall consult with each of the parties in an endeavour to reach an agreement*” (Sub-Clause 3.5 of the FIDIC Red Book). Also, in projects which involve a standing DAB, there is a possibility of discussion of each claim and site inspections in order to avoid disputes (Stipanowich, 2014, p.9).

However, it cannot be concluded that all disputes are avoided in FIDIC projects. There has been considerable research undertaken to determine the causes of disputes in the construction industry. These disputes can be classified in several categories such as: Employer related, Contractor related, Design related, Contract related and External Factors related (Cakmak and Cakmak, 2014, p. 185). In practice, most of these disputes are associated with the following questions:

- Termination of the agreement;
- Claims for damages and extension of time by the Contractor due to impediments beyond Contractor’s control;
- Claims for damages and extension of time by the Contractor due to Contractor’s failure to perform;
- Calling upon the performance guarantee;

- Enforceable physical conditions;
- Delay in access to Site by the Employer;
- Discrepancies between the interpretation of the contractual provisions and the project documentation;
- Discrepancies in the measured and paid quantities and the actual performed works;
- Price of the additional works;
- Right of the Contractor to receive higher amounts than tendered due to changed circumstances on the market (Pepeljugoska, 2019, p.4-5).

The FIDIC forms of contracts contain a multi-tier dispute resolution mechanism. These clauses can also be called multi - step or escalation clauses (Deskoski, 2019, p. 4). The FIDIC forms of contracts comprise different steps, depending on the type of the FIDIC Book, which are covered by Clause 20 of the FIDIC form of contracts, each incorporating a form of alternative dispute resolution (Deskoski, 2019, p. 4). FIDIC has introduced the following consideration of disputes (1) by an Engineer (an Employer's agent managing the construction project), (2) Dispute Adjudication Board (DAB - a private independent panel consisting of one or three experts who consider a dispute and issue a decision binding for the parties under certain conditions), (3) through an amicable settlement, (4) and by an arbitral tribunal/court (<http://arbitrationblog.kluwerarbitration.com/2017/03/22/fidic-multi-tier-dispute-resolution-clauses-in-the-light-of-bulgarian-law/>).

The necessity of using the DAB as one of the steps in the multi-tier dispute resolution clause in the FIDIC forms of contracts is also confirmed in the case law. Namely, in 2014 the Federal Supreme Court of Switzerland ruled that the requirement in FIDIC Conditions to submit a dispute to a dispute adjudication board was a mandatory precondition for arbitration (4A\_124/2014). In another recent case the Federal Supreme Court of Switzerland ruled that an arbitral tribunal should suspend arbitration to allow the parties to comply with the pre-arbitral condition (4A\_628/2015).

It can be established that, the dispute adjudication is the most recent form of alternative dispute resolution but likely to be the most successful and satisfactory one at the same time, because it is very effective. The dispute adjudication mechanism leads to a decision of the adjudicator on the merits of the case which becomes temporarily binding until revised by either an arbitral or a state court (Axel- Volkmar and Gutz, 2010, p. 398).

In summary, if a dispute arises between the parties in connection with, or arising out of, the Contract or the execution of the Works either party may (and should) refer the dispute in writing to the DAB under Sub-Clause 20.4. However, this mechanism is not only provided in the FIDIC forms of contracts, but it is also accepted by the domestic legal systems, as valid one.

### 1. Defining the DAB

The FIDIC forms of contracts provide that all disputes in the first instance will be adjudicated by a dispute board. It is widely-accepted view among scholars and practitioners that all tiers provided in the FIDIC forms of contracts should be exhausted, respectively each of the steps is a precondition for admissibility to the other (<http://arbitrationblog.kluwerarbitration.com/2017/03/22/fidic-multi-tier-dispute-resolution-clauses-in-the-light-of-bulgarian-law/>). Referring a dispute to the DAB is obligatory step under the Macedonian law, but also under the vast majority legal systems in the Balkans, prior to resort to arbitration, should the construction contract provide such multi-tier mechanism.

It is however important to note that that this multi-tier dispute resolution mechanism provided nowadays by the FIDIC forms of contracts was not always present. Namely, the major landmark in the development of the FIDIC dispute resolution mechanism occurred with the introduction of the dispute adjudication board in the Orange Book and it was further developed in the later editions of the other books (Baker *et. al*, 2009, p. 506).

The term “dispute board” is a generic term used to describe a variety of different arrangements whereby the parties to a contract jointly appoint one or more independent and impartial persons to act in some form of dispute resolution capacity. Originating in the United States, the essence of what can be described as the ‘classic’ dispute board concept is that of a body commanding the respect of the contracting parties, which is appointed at the outset of the contract, by regular visits to the project maintains awareness of progress and potential problems, and can offer resolution of disputes at an early stage (Baker *et. al*, p. 506-508)

Therefore, it is very important to develop a good definition the DAB as the first tier of the dispute resolution mechanism provided by the FIDIC forms of contracts.

Essentially, the principal features of the DAB, in all the FIDIC forms of contracts, as an adjudicator of disputes are the same:

- There is an express duty of independence and impartiality on members of the DAB;
- The DAB's decision on a dispute is obtainable within a relatively short time. Crucially, the decision of the DAB is binding on the Parties for the time being, and binding and final if neither Party gives a notice of dissatisfaction within 28 days after receiving the decision (Clause 3 of the General Conditions of Dispute Adjudication Agreement (Dispute Board Agreement)).

By exercising its powers, prior to commencement of the procedure, the DAB must verify whether a dispute has already become apparent. If not, the DAB shall reject the referral. In addition, the DAB must examine whether it has jurisdiction to decide the dispute. As dispute adjudication is usually a purely contractual dispute resolution method, the test is, whether there is a contract and whether the dispute has arisen from the contract or in connection with the contract (Axel- Volkmar and Gutz, 2010, p. 400).

The function and role of the DAB, according to the Sub-Clauses 20.2 *et seq.* of the FIDIC forms of contract and the Dispute Adjudication Agreement is that the DAB acts in a judicial capacity. The purpose of the aforementioned Sub-Clauses, is to provide the machinery for arriving at a fair decision which shall be derived from the submitted and ascertained facts in accordance with the contract and the applicable law when a dispute arises (Axel- Volkmar and Gutz, 2010, p. 400).

However, the DAB's function should not only be that of deciding disputes. In any case, the standing DAB should also attempt to avoid disputes or to settle them at an early stage. The FIDIC Books therefore allow the DAB to give opinions and recommendations, if both of the parties jointly require the DAB to do so (Axel- Volkmar and Gutz, 2010, p. 400).

### **1.1 Models of DABs under the FIDIC forms of contracts**

There are two different models of the DAB which can be found in the FIDIC forms of contracts, namely the possibility for the DAB to be either standing or "*ad hoc*".

The DAB shall be appointed and agreed jointly by the Parties and set up at the commencement of the Contract - standing DAB (Pepeljgoska, 2019, p. 6). This DAB remains in place until the end of the project regardless if there are disputes or not and is often referred to as the "classic DAB".

This standing or full-term appointment brings with it many advantages:

- The DAB's active involvement in the project, presence on Site during site visits and discussions with the Parties at regular meetings often means that potential disputes are resolved amicably prior to becoming disputes that require a decision of the DAB. The Parties are also able to request jointly opinions from the DAB on matters relating to the Contract.
- If a dispute arises, the referral to the DAB for its decision can be made immediately, without having first to appoint the DAB (which appointment is potentially prone to delay). The DAB will also have read the Contract and have been kept up to date on progress and thus will both require less time to familiarize itself with the issues in the dispute and will, for example, often be able to draw upon actual knowledge of conditions on the Site (Chern, 2015, p. 14).

Unlike the standing DAB, the "*ad hoc*" DAB is appointed as and when a dispute arises and is disbanded as soon as it has given its decision on that dispute.

One advantage of an "*ad hoc*" DAB over a standing DAB is that, given that it is appointed only when a dispute arises, it allows the Parties to choose member(s) with the particular expertise most suited to the issues involved in the dispute.<sup>30</sup> Conversely, it may be objected that this *ad hoc* appointment deprives the DAB of the principal benefit of the dispute board concept, namely ongoing involvement during the course of the contract (Seppala, 2000, p. 250)

The appointment of the DAB is regulated in the Sub-Clause 20.2 [*Appointment of the Dispute Board*] and 20.3 [*Failure to Agree Dispute Adjudication Board*] of the FIDIC Red Book.

The DAB can be comprised of one or three members. Although it is very rare, it is much preferable if the parties agree on the names of the DAB members in the Contract, in order to avoid the discrepancies between themselves in the process of later appointment (Pepeljugska, 2019, p. 7).

In the FIDIC Contracts Guide, FIDIC expresses the opinion that a one-member DAB may be suitable for a project where the average monthly certificate is valued at USD 1.0 million or less. Consideration should also be given to the complexity of the project (Robinson, 2011, p. 99).

In the cases of where the DAB is comprised of one person, the Parties are required to jointly appoint the sole member. Where the DAB comprises three members, each Party is required to nominate one member for the approval of the other Party, such approval not to be unreasonably withheld

or delayed under Sub-Clause 1.3. The Parties are then required to consult with these two approved members and then agree upon the third member, the chairman. The FIDIC forms also make provision for the circumstances where agreement or approval is not possible. In this case, the nomination is made by an appointed entity, which is usually the President of FIDIC, agreed by the Parties in the Contract (Pepeljgoska, 2019, p.7).

In all the Books, it is implicit that there is a right for one Party to object to the other Party's nomination, although neither the right nor the procedure for approval/rejection is expressly made. This can nevertheless be deduced from the requirement that the member is to be nominated "for the approval of the other Party". However, under the Red Book, if a Party fails to approve the other Party's nomination, neither Party has the express right to request the appointing entity to make a binding appointment. Unless the Parties agree jointly to make a request and agree to be bound by the appointment, the only option available would be for the Party to make a further nomination for approval of the other Party. This could potentially enable one Party to frustrate the appointment of the DAB (Baker *et. al*, 2009, p. 518-519). It is our opinion that than if a dispute arises where no DAB is in place, either Party may refer the dispute directly to arbitration under Sub-Clause 20.8.

The choice of the nomination should be governed essentially by his professional suitability for the task ahead. The nominee should be suitably qualified, with appropriate experience of the type of construction to be executed. It is likely that the Parties are of different nationalities. Consequently, it may be appropriate that the DAB members are of nationalities different from those of the Parties. The DAB members are required to be proficient in the language of the Contract (Robinson, 2011, p. 101)

The duration of the appointment of the DAB varies from the type of the chosen DAB. In cases of standing DAB it is usually to be constituted in a period of "28 days from the Commencement Date". In cases of "ad hoc" DAB "by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4" (Baker *et. al*, 2009, p. 516).

## 1.2 Dispute Adjudication Agreement

The appointment of the member(s) of the DAB is formalized in the Dispute Adjudication Agreement. The Dispute Adjudication Agreement is

a tripartite agreement the form of which is given as a template in the FIDIC Books. It needs to be signed by the Employer, the Contractor and the DAB, whether it is a sole member or a panel of three.

By signing of the tripartite Dispute Adjudication Agreement, the Contractor and the Employer empower the DAB to: Set the Procedural Rules; Decide on its own jurisdiction and the scope of the dispute that it is brought to the DAB; Conduct the hearing as it seems appropriate in accordance with the Procedural Rules (Pepeljgoska, 2019, p.9).

The tripartite agreement shall comprise the Dispute Adjudication Agreement, the General Conditions of Dispute Adjudication Agreement and the Procedural Rules (<http://arbitrationblog.kluwerarbitration.com/2015/04/20/appointing-the-dispute-board-why-it-differs-from-arbitration-appointments/>).

Only by means of the tripartite agreement the parties agree on the so-called Procedural Rules which are intended to be binding on the DAB and to which the parties and the DAB tend to comply with. However, the General Conditions of each of the Books do not directly refer to the Procedural Rules but only to the General Conditions of Dispute Adjudication (Axel- Volkmar and Gutz, 2010, p. 401).

In practice, the Procedural Rules are suggested and drafted by the DAB and given to the parties by the DAB in order for them to be able to give their remarks. It is important to note that the remarks to the Procedural Rules are to be accepted by each party and the DAB (Pepeljgoska, 2019, p. 9).

The Dispute Adjudication Agreement provides a whole and comprehensive set of rules for dispute adjudication process and establishes a contractual relationship between the members of the DAB and the parties to the contract (Axel-Volkmar and Gutz, 2010, p. 402).

The Dispute Adjudication Agreement as tripartite agreement contains rights and obligations for the DAB, the Employer and the Contractor.

The most common obligations of the DAB and its members are the following:

*“(i) under Clause 3 of the General Conditions of the Dispute Adjudication Agreement, the member warrants and agrees that he is and shall be “impartial and independent” of the Employer, the Contractor and the Engineer; (ii) the DAB should comply with the Procedural Rules; (iii) the DAB should not give informal advice to the Employer, Contractor or their respective Personnel on the operation of the Contract, other than in accordance with the Procedural Rules; (iv) the DAB*



members should ensure availability for site visits and hearings as are necessary; (v) the DAB member is bound by the duty of confidentiality as to details of the Contract and the operation of the DAB” (Baker et.al, 2009, p. 523).

The obligations of the Employer and Contractor under the General Conditions of Dispute Adjudication Agreement are more limited and, in addition to the obligations for payment are primarily set out in Clause 5. The Clause 5 of the General Conditions of the Dispute Adjudication Agreement template generally contains various undertakings by the Parties to protect the member and an indemnity against breach of these undertakings. The major obligations contained therein are: (i) prohibition of seeking advice from the DAB unless it is a clarification issue which relates to the procedure; (ii) limitations of liability of the DAB members; (iii) enabling site visit and oral hearing; (iv) deposition of funds for extra expenses of the DAB.

## **2. Procedure in front of the DAB**

Upon adoption of the Procedural Rules set out by the DAB and accepted by the parties, the parties are obliged to follow the procedure. It is important to note that under the domestic legal systems, such for example the Macedonian legal system, there is complete discretion of setting out the Procedural Rules by the DAB and the parties, as long as they are not in contradiction with the *order public*.

In the Procedural Rules, the DAB will issue directions concerning the procedure and a time schedule. Both parties will make available to the DAB any further or complementary information or facilities which it may require. The DAB may decide to conduct a hearing to obtain evidence, to consider submissions on the dispute from the Parties and also to make site visit. All documents are submitted electronically and in hard copy via courier to the DAB and the parties. The entire correspondence between the DAB and one party will be submitted to the other party as well (Pepeljgoska, 2019, p.11).

The DAB is empowered to allow or not legal submission by advocates of the parties. However, usually the DAB procedure, similar to arbitration, is also based on submission. The parties will be entitled to submit written argumentation in the following order:

1. Statement of Claim (SoC) – Submitted by the Claimant;

2. Response to the Statement of Claim (RSoC) – Submitted by the Respondent;
3. Rebuttal to the Response to the Statement of Claim (RRSoC) – Submitted by the Claimant;
4. Rejoinder to the Rebuttal to the Response to the Statement of Claim (Rejoinder) – Submitted by the Respondent (Pepeljgoska, 2019, p.10).

No matter can be referred to the DAB unless it is a dispute. FIDIC lists four criteria to be applied to establish the existence of a dispute:

- after rejection of a final determination;
- when discussions have been discontinued without agreement;
- when a Party declines to participate in discussions or reach agreement under Sub - Clause 3.5 “*Determinations*”;
- when so little progress is being achieved after protracted discussions. (Robinson, 2011, p. 102).

In *Fastrack Contractors Ltd v. Morrison Construction Ltd*, HHJ Thornton QC stated that: “A “*dispute*” can only arise once the subject matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion. In order to constitute a dispute, a claim must have been made which has been rejected” (*Fastrack Contractors Ltd v. Morrison Construction Ltd*, 2000, BLR 168, p. 27-29)

The DAB, much like an arbitral tribunal, has the authority to decide on its own jurisdiction, thus the DAB itself must confirm its jurisdiction or to dismiss the dispute in the event of lack of jurisdiction. This is usually the first question that is accessed in any DAB procedure.

The jurisdictional issues are often complicated and once arising will lead into intense discussions. The first issue can be the objection that no dispute exists. The second issue may lie in a wrongful appointment of DAB members. The third issue can be that there is no contract or that the dispute falls beyond the scope of the contract (International Court of Arbitration Bulletin 74).

Most adjudications relate to payment and extension of time claims. However, the DAB is empowered to open, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer (Rule 8 Procedural Rules). If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the

Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the matter in writing to the DAB for its decision (Sub-Clause 20.4). Thus, the right to refer a dispute to the DAB is not limited to claims (Totterdill, 2006, p. 301).

Upon assessment of the entire written submitted argumentation the DAB may present written questions and request for supplements of the evidence, clarifications, explanations to the parties. The parties are obliged to answer any additional DAB questions prior to the hearing.

In most of the cases, the DAB procedure does not end without an oral hearing. The DAB will schedule the hearing usually at the place where the performance of the Works is done. The hearing will begin by the presentation of the DAB and the parties. The Claimant will then have the chance to argue the case, followed by Respondent. The DAB is entitled to ask questions during the hearing but is not allowed to express any opinions for the merits of the dispute. The DAB will question all proposed witnesses at the hearing and the Engineer, respectively its representative staff assigned for the specific project, if necessary. Each party is entitled to have its closing argument, followed by the closing remarks of the DAB. If there are additional clarifications necessary, the DAB will explain the parties the deadlines for their submission. The entire hearing is either recorded via electronic means or there is a stenographer. The DAB may refuse presence of any person at the hearing that is not being timely disclosed to the DAB (Pepeljuga, 2019, p.12-14).

The DAB usually renders its decision within 84 days, from the date of the dispute reference is received by the chairman of DAB. Before receiving the Decision, the parties must pay in full the costs of the DAB in accordance with an enclosed invoice. Usually under the Sub-Clause 20.3 the parties are each responsible for one half of the costs (<http://arbitrationblog.kluwerarbitration.com/2015/04/20/appointing-the-dispute-board-why-it-differs-from-arbitration-appointments/>). The Decision of the DAB will be delivered to the parties electronically and in hard copy via courier on the official receipt addresses.

The Decision of the DAB is comprised of the following headings:

- The introduction;
- The referral;
- The issues to be decided;
- Decisions sought by the parties;

- Summary of the written submissions;
- The Hearing;
- The DAB deliberations and findings;
- The Decision of the DAB (Pepeļjugoska, 2019, p. 16).

According to this contractual framework the DAB shall comply with rules of natural justice and fairness. Thus, the DAB shall hear the parties, take evidence if necessary and inform the parties concerning the proper investigations and methods which are intended to be applied. It is inherent to the concept of dispute adjudication that in the event of failure to comply with the rules of jurisdiction and natural justice, such a DAB decision should not be enforced (Axel-Volkmar and Gutz, 2010, p. 399).

If either party is dissatisfied with the Decision of the DAB or if the DAB fails to give its Decision within the period, it can issue a notice of dissatisfaction within 28 days. Upon receipt of the Notice of Dissatisfaction the contracting parties are obliged to amicably settle the dispute in the period of 56 days. If there no amicable settlement is reached in this period than the case will finally be solved by Arbitration (Sub-Clause 20.6). If the parties do not issue the Notice of dissatisfaction, then the Decision becomes final and binding.

### **3. Advantages and Disadvantages of the DAB Procedure**

Construction disputes represent a large share of the arbitration market. According to the International Chamber of Commerce, the construction and engineering disputes accounted for almost 17% of the total case load (Klee and Novy, 2014, p. 173).

One of the key perceived advantages of FIDIC forms of contract is that contracting parties are generally familiar with their standardized terms and value the legal certainty which their anticipated uniform application across jurisdictions offers. With respect to the DAB mechanism, it is generally considered by market players as a success story in terms of promoting the efficient and cost-effective resolution of disputes (<http://arbitrationblog.kluwerarbitration.com/2017/09/26/fidic-construction-contracts-arbitration-role-dispute-adjudication-boards-importance-governing-law/>)

The successful implementation of a DAB requires cost and effort, but the overwhelming consensus is that DABs have positive influence in prevention and resolution of disputes and at a significantly lower cost than full arbitration proceedings (Robinson, 2011, p. 100).

There is a consistent opinion among scholars that the introduction of a standing DAB is a very good approach. The essence of an effective DAB is a decision making process, in real time, by people who can see and view the project and fully understand the issues ([http://arbitrationblog.kluwerarbitration.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-a-lot-now-rides-on-success-of-the-dab-system/?doing\\_wp\\_cron=1587314352.1322059631347656250000](http://arbitrationblog.kluwerarbitration.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-a-lot-now-rides-on-success-of-the-dab-system/?doing_wp_cron=1587314352.1322059631347656250000)). The statistics show that if there is standing DAB in existence on a project, close to 99% of all disputes referred to it will be successfully resolved within less than 90 days and at a cost of about 2% of the amount of the dispute (Klee and Novy, 2014, p. 172). This is one of the reasons why the 2017 editions provide for mandatory standing DAB.

Moreover, the DAB members are meant to be the subject expert and thus a dispute could be addressed in an efficient manner (<http://ieslslen.blogspot.com/2013/07/advantages-and-disadvantages-of-dispute.html>). Active on these boards are experts who need not be lawyers, which is why they are more efficient. If lawyers are on the boards, they are lawyers with extensive practical backgrounds in the field of construction projects. The boards can also be made up of suitable combinations of personalities with varied experience and specializations (Klee and Novy, 2014, p. 173).

The disputes are resolved outside the courts in a manner determined by the parties. This means that the procedure is highly flexible, and it lowered the entry level to formal dispute resolution (Pepeljugoska, 2019, p. 19).

The DAB mechanism provided in the FIDIC forms of contracts provides each party with the possibility of having its dispute resolved by an independent third party. In action, either the Employer or the Contractor could seek clarification, opinion or advice from the DAB with the knowledge of the other party (<http://ieslslen.blogspot.com/2013/07/advantages-and-disadvantages-of-dispute.html>). The DAB much like the arbitrators is/are bound by the duties of impartiality and independence.

Following the principles of arbitration, the DAB procedure is also strictly confidential. It is commonly accepted that the DAB is one of the best options to resolve dispute between the parties because the parties could maintain the confidentiality at desired level.

Furthermore, in many cases it is proven that the DAB may be the only, and therefore final dispute resolution mechanism for solving disputes in a construction project (Pepeljugoska, 2019, p. 19).

However, the DAB procedure and the DAB as a dispute resolution mechanism also has certain disadvantages.

Namely, the estimated annual cost of a three - member DAB in Euros are (per member):

- monthly retainer 12 months x 2000 = 24.000 EUR
- 20 days at site x 1000 = 20.000 EUR
- travel, accommodation, miscellaneous = 6.000 EUR
- Total annual cost per member = 50.000 EUR
- Total annual cost 3 - member DAB = 150.000 EUR (Robinson, 2011, p. 99)

This means that each party should bear approximately 75.000 EUR in costs. It is therefore logical that the DAB is not preferred method of dispute resolution in smaller construction projects.

On the other hand, it can also be argued that the DAB is not suitable dispute resolution mechanism for more complicated projects due to the fact that they usually require more experienced adjudicators and should be handled in more complexed procedure such as arbitration or litigation.

Some scholars believe that the DAB procedure may be found to be "quick and dirty". This is since the DAB procedure may be abused by the parties and the parties may use ambush tactics or even try to introduce discovery of evidence.

The fact that the adjudicators are selected by the parties, often brings into question their impartiality and independence in the process of adjudication. What can be more concerning is the fact that the adjudicators are usually engineers and not legal professions, thus, when needing to decide legal questions (such as for example termination of the agreement), they might need further clarification (Pepeljgoska, 2019, p. 19).

Finally, the biggest concern is the enforceability of the DAB decision. There is an open debate whether the DAB decisions can and should be enforced in the same manner as the decisions of the arbitral tribunals. This is especially linked with the national legislation on enforcement in every state, since there is no international legal instrument like the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958).

In this respect there is a standpoint adopted by some Eastern European court that the *"the only value the DAB decision can have in the arbitral proceedings is that of a piece of evidence similarly to an expert report which will be corroborated with the other expert reports and pieces of evidence taken by the tribunal during the arbitration"* (<https://rlw.juridice.ro/13617/the-force-of->

a-dab-decision-in-arbitration-recent-jurisprudence-under-the-romanian-law.html).

#### **4. Conclusion**

The FIDIC forms of contracts are and will undoubtedly continue to be a very useful tool for parties of different nationalities seeking familiar and business friendly contractual environment regulating construction projects (<http://arbitrationblog.kluwerarbitration.com/2017/09/26/fidic-construction-contracts-arbitration-role-dispute-adjudication-boards-importance-governing-law/>).

One of the most favourably commented aspect of FIDIC contracts relates to its dispute settlement process. As explained above, the multi-tier dispute resolution mechanism provides that at each level of the alternative dispute resolution, the parties can get off the escalator and reach a satisfactory settlement of the dispute. Should the alternative dispute resolution process fail, the final decision can and will be solved in front of arbitration (Deskoski, 2019, p. 5).

It is undisputed that one of the advantages of the multi-tier dispute resolution mechanism is the process of settling the disputes through the DAB. The procedure as laid out in the FIDIC 1999 Editions has its many advantages, but also some obvious disadvantages. However, it is fair to conclude that this is one of the most efficient and cost-effective methods of resolving disputes, using means of which are alternative to the classic litigation (and even arbitration) procedure. The statistics show that most of the cases handled by a DAB are successfully solved in this stage of the multi-tier clause.

The 2017 FIDIC Edition, maintains the same core structure of the DAB as alternative dispute resolution mechanism. One of the key novelties in the FIDIC 2017 Editions it that the DAB is clearly defined as a condition precedent to arbitration, albeit it is now referred to as Dispute Avoidance, rather than Dispute Adjudication Board (Deskoski, 2019, p. 13).

Furthermore, the new 2017 FIDIC Edition puts emphasis on the requirement of implementation of a standing DAB, from the commencement to the finalization of the project. In such manner the importance of the DAB is expanded, and the DAB will function as an advisory body to the parties. This can also contribute to minimization of the number of disputes but will

also enable the DAB to be suitable dispute resolution mechanism for more complexed construction disputes.

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