

Arbitration & ADR - Switzerland

Supreme Court rules on FIDIC pre-arbitration steps

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Introduction

The Supreme Court recently held that the pre-arbitration procedure before the dispute adjudication board (DAB), as per Article 20 of the General Conditions of the International Federation of Consulting Engineers (FIDIC) 1999, qualifies as a mandatory pre-arbitration step. However, such a mandatory step cannot be relied on in case of an excessive delay in the constitution of the DAB and if insisting on this duty would violate the principle of good faith.⁽¹⁾

Facts

The dispute arose out of two contracts for work entered into between a construction company and a state company for the restoration of a national road. The contracts incorporated the FIDIC General Conditions. Article 20 of the FIDIC General Conditions, in its relevant parts, provides as follows:

"20.2 – Appointment of the Dispute Adjudication Board

(1) Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4...

20.6 – Arbitration

(1) 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...

20.8 – Expiry of Dispute Adjudication Board's Appointment

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...

b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration]."

The Supreme Court's summary does not indicate the law governing the contracts.

Five years after conclusion of the contracts, the construction company communicated to the state company its intention to refer a claim to a DAB in accordance with the FIDIC General Conditions.

Sixteen months after this communication, the DAB still was not operative. The construction company then filed a request for arbitration with the International Chamber of Commerce and a three-member arbitral tribunal was appointed, with its seat in Geneva. The state company objected to the arbitral tribunal's jurisdiction on the grounds that the construction company had not complied with the pre-arbitration step provided by the FIDIC General Conditions.

In a partial award issued by majority, the arbitral tribunal found that it had jurisdiction to decide the construction company's claim, declared this claim admissible and rejected the state company's objection to jurisdiction.

The state company challenged this decision before the Supreme Court on the grounds that the arbitral tribunal had no jurisdiction.

Decision

The Supreme Court first confirmed that in the absence of any other ground for challenge that could encompass the violation of a pre-arbitration step, such a violation must be assessed in light of Article 190(2)(b) of the Private International Law Act (ie, lack of jurisdiction). However, in doing so, the Supreme Court did not intend to give any indication as to the nature of the sanction that the violation of a mandatory pre-arbitration step should trigger (for further details please see ["Supreme Court confirms benchmarks on pre-arbitration conciliation duties"](#)).⁽²⁾

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The Supreme Court made clear that Article 178(2) of the Private International Law Act, which governs the validity of arbitration agreements by reference to the law chosen by the parties, to the law governing the subject matter of the dispute or to Swiss law, also applies to pre-arbitration dispute resolution mechanisms.⁽³⁾ The Supreme Court considered that it would be inappropriate and would unnecessarily complicate the resolution of the parties' dispute to submit the pre-arbitration phase and subsequent arbitration to different laws.⁽⁴⁾

The Supreme Court then turned to the question of whether the DAB procedure was a mandatory pre-arbitration step. It made clear that this question must be solved by applying the principles governing contract interpretation *mutatis mutandis*.⁽⁵⁾ Relying on the meaning of the term 'shall' in Article 20.2(1) of the FIDIC General Conditions and the conclusion that it should not suffice that a DAB is not operative to bypass the pre-arbitration step, the Supreme Court found that the DAB procedure is indeed a mandatory pre-arbitration step.⁽⁶⁾ The Supreme Court further found that it must not be inferred from the absence of any specific deadline for the referral to the DAB in the general conditions that the pre-arbitration procedure before this board is only an option at the parties' discretion.⁽⁷⁾

However, the Supreme Court found that the arbitral tribunal's decision to deny jurisdiction was right, based on the principle of good faith. According to the Supreme Court, the DAB system was conceived mainly for the constitution of a permanent DAB to resolve disputes in the course of a project. Therefore, the plaintiff's insistence in obtaining a decision from an *ad hoc* DAB, which would have been operative after the end of the works, was at least questionable.⁽⁸⁾ Further, based on the principle of good faith and considering the delay in the DAB's constitution, the Supreme Court found that the defendant could not be blamed for having initiated arbitration proceedings, notwithstanding the mandatory DAB procedure.⁽⁹⁾

Comment

This decision provides guidance to parties bound by the FIDIC General Conditions in respect of the DAB pre-arbitration step. It also provides guidance to arbitrators required to interpret Article 20 of the FIDIC General Conditions.

However, as in its previous decisions on pre-arbitration conciliation steps,⁽¹⁰⁾ the Supreme Court did not resolve the question of whether non-compliance with a pre-arbitration step is an issue of jurisdiction or admissibility. More particularly, it did not specify whether an arbitral tribunal facing an objection based on a mandatory pre-arbitration step should:

- stay the arbitration until the parties comply with this step;
- deny jurisdiction; or
- consider a liability claim for violation of the mandatory pre-arbitration step.

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Endnotes

(1) Supreme Court, 4A_124/2014, July 7 2014 (in French).

(2) Ground 3.2. See also Supreme Court, 4A_46/2011, May 16 2011 and 4A_18/2007, June 6 2007.

(3) Ground 3.3.

(4) *Ibid.*

(5) Ground 3.4.1.

(6) Grounds 3.4.3.1, 3.4.3.2 and 3.4.3.3.

(7) Ground 3.4.3.4. In this respect, the Supreme Court referred to a previous decision in which it had found that the absence of any time limit for conciliation was an indication of its optional nature (Supreme Court, 4A_18/2007, June 6 2007). The Supreme Court made clear that this finding was made in the context of a much less restrictive pre-arbitration conciliation obligation and that it must be relativised in the context of the sophisticated DAB procedure.

(8) Ground 3.5.

(9) *Ibid.*

(10) Supreme Court, 4A_18/2007, June 6 2007 and Supreme Court, 4A_46/2011, May 16 2011.

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