# FIDIC Multi-Tier Dispute Resolution Clauses in the Light of Bulgarian Law

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The FIDIC forms of contracts (FIDIC forms) constitute a comprehensive set of rules applied worldwide in complicated construction projects. The FIDIC forms contain a multi-tier dispute resolution mechanism – depending on the type of a Book, they provide for consideration of disputes (1) by an Engineer (an Employer's agent managing the construction project), (2) by an Engineer and a 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 (depending on the specific agreement between the parties, as stated in the Particular Conditions of the respective contract).

A widely-accepted view among scholars and practitioners is that all tiers should be exhausted, i.e. each of the steps is a precondition for admissibility to the other. So, normally the parties to FIDIC based contracts *use all the tiers as provided*. This being the case, normally a dispute resolution procedure takes a considerable amount of time. Therefore, for the parties involved in respective projects (and related disputes) it is crucial whether this multi-tier mechanism is compatible with the law governing the contract. In other words, are these multi-tier mechanism provisions enforceable and could arbitral awards resolving such disputes be enforced in the respective jurisdiction. As the number of FIDIC based contracts in Bulgaria increases, this question is a very much valid for the country.

Currently, there are two contradicting views in the Bulgarian court and arbitration practice on the FIDIC multi-tier dispute resolution mechanism and its enforceability.

*According to the first view, the referral of a dispute to an Engineer/DAB is a precondition for filing an admissible claim* (i.e. the mechanism is recognized as a valid agreement as well as its role as a precondition for approaching a court or arbitration). Such interpretation has its foundations in the party autonomy established in Article 9 of the Bulgarian Obligations and Contracts Act (OCA). Its only limitations are the mandatory rules of the legislation and good morals. Hence, the parties are free to agree on whatever procedure they deem suitable and subsequently should comply with it. At the same time, an arbitral tribunal is obligated to follow the procedure agreed by the parties, and if the tribunal does not give due consideration to this procedure, the award may be set aside or have its enforcement refused. Thus, arbitral tribunals should consider only disputes that were duly referred to an Engineer/DAB.

This interpretation was adopted by *an arbitral tribunal of the Bulgarian Chamber of Commerce and Industry in a case decided in 2012* (one of the very few cases related to FIDIC contracts). The case

concerned the FIDIC Yellow Book 1999 (providing for a 28-day term to refer disputes to an Engineer – Sub-Clause 20.1). The dispute related to the nature of the obligation for a timely referral of the dispute to an Engineer. The claimant argued that the term under Sub-Clause 20.1 constituted a preliminary waiver of rights, which is void under Bulgarian law. According to the respondent, the clause established a clear mechanism for avoidance of bad faith conduct and for timely referral of disputes for consideration. The arbitral tribunal sustained the respondent's interpretation – the mechanism under the FIDIC forms was not a waiver of rights, but a contractual provision for referral and timely consideration of disputes on major investment projects.

A similar approach was followed by some Bulgarian courts as well. In the *Decision No. 1966 of 13.10.2015 in the commercial case No. 4069/2014, Appellate Court – Sofia, Commercial Division*, affirmed a decision of the Sofia City Court [*Decision No. 867 of 11.06.2014 of the Sofia City Court, Commercial Division, 2nd Chamber under commercial case No. 6378/2012*] which granted enforcement of a foreign arbitration award rendered in an ICC arbitration proceeding under the FIDIC Red Book 1992. In the award, the arbitral tribunal refused to consider counterclaims filed by the Contractor directly before the tribunal, but not referred to an Engineer beforehand. The Contractor argued that Sub-Clause 67.3 (which is similar to Sub-Clause 20.1. cited above) contradicts Bulgarian mandatory procedural rules and Bulgarian public order, and is therefore void. Two instances rejected this argument and granted enforcement of the award. Two things should be noted regarding these decisions: First, both instances did not deal with the matter in detail, stating only that the Sub-Clause providing for a prior referral of a dispute to an Engineer was severable from the arbitration clause. Thus, even if the Sub-Clause was deemed void (which the courts did not examine), it does not lead to the voidness of the arbitration clause *per se*. Second, the decision of the Appellate Court was signed with a dissenting opinion enclosed.

*This dissenting opinion introduces the second view on FIDIC's multi-tier mechanism: referral of a dispute to an Engineer/DAB as a precondition for filing an admissible claim is void due to contradiction with mandatory Bulgarian legislation*. This interpretation derives from the requirement for ensuring equality and competitive conditions for parties in judicial proceedings (Article 121, Paragraph 1 of the Bulgarian Constitution). In addition, the court should provide the parties with an equal opportunity to exercise the rights conferred on them (Article 9 of the Bulgarian Civil Procedure Code). The court (and by analogy, an arbitral tribunal) should apply the law equally in respect of all parties concerned. Therefore, by creating contractual preconditions for filing a claim, the parties violate these mandatory rules as they limit their contractual freedom. According to the dissenting judge, the non-consideration of a claim due to the non-referral to an Engineer constituted impossibility for the aggrieved party to present its case and violated Bulgarian public order.

The decision on the case was appealed before the Bulgarian Supreme Court of Cassation, which rejected the admissibility of the appeal [*Court Ruling No. 59 of 03.02.2017 under case No. 788/2016 of the Supreme Court of Cassation, I Commercial Division*]. The cassation appeal in Bulgaria is restricted and it is subject to special criteria for admissibility. The Supreme Court of Cassation found that the questions concerning the Engineer's role in the dispute resolution mechanism do not justify the admissibility of the appeal. According to the court, the Engineer's decision is not *per se* enforceable if a party refuses to voluntarily perform it. If a party does not agree to the decision, it is entitled to file a claim before an arbitral tribunal/state court under Sub-Clause 67.3. In such a case, Sub-Clauses 67.1 and 67.2 shall not apply. Thus, according to the Supreme Court of Cassation, Sub-Clause 67, which regulates the procedure for handling claims and disputes by the Engineer, is not void. The Supreme Court of Cassation, however, did not examine in detail whether the Engineer's decision is a pre-condition for filing a claim. This is unfortunate considering the limited court and arbitration practice on the matter. The eventual interpretation on FIDIC dispute-resolution mechanism given by the highest court in Bulgaria would have created predictability and legal certainty for all

stakeholders using FIDIC forms. Unfortunately, the Supreme Court did not admit the appeal.

*In conclusion*, the lack of clear view on the compatibility of the FIDIC mechanism with Bulgarian legislation creates serious uncertainties for domestic and foreign investors in Bulgaria. Moreover, if it is accepted that the FIDIC mechanism is void under Bulgarian law, the enforceability of awards on sometimes multimillion disputes could be seriously jeopardized.

Bulgarian legislation provides sufficient grounds for making an in-depth analysis of the matter and justifying each of the respective positions. For example, the currently prevailing position that recognizes the mechanism could be further elaborated: if the freedom of contract is not a convincing basis for the FIDIC mechanism to be recognized, other possibilities could also be used. An Engineer/DAB decision can be qualified, for example, as a third-party determination. Under Article 299 of the Bulgarian Commercial Act it is recognized that if the parties agree that a third party shall determine certain terms and conditions of the contract, such determination shall become binding only in case the third party has determined them in compliance with *(1) the objectives of the contract, (2) the other provisions of the contract, and (3) the commercial custom*. Courts should examine any decision of the Engineer/DAB in the light of the said criteria. Should the decision contradict the latter, either of the parties is entitled to contest it before a court, and thus it has a mechanism available to defend its rights. This qualification has already been supported by some scholars, but has not been confirmed in practice thus far.

Considering the fact that some jurisdictions have already introduced specific legislation regarding the mandatory use of dispute boards, it is about time for both Bulgarian legal doctrine and the Supreme Court to intervene on that matter (regardless of which view will be adopted and on what grounds) in order to create legal certainty for all stakeholders willing to use the FIDIC forms in Bulgaria.

*The views and opinions expressed herein are those of the authors and do not necessarily reflect those of Dimitrov. Petrov & Co., its affiliates, or its employees.*