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## Dispute Adjudication Board: Innovation in Georgia's Alternative Dispute Resolution System

### ABSTRACT

This article examines the Dispute Adjudication Board (DAB) as an innovative mechanism within Georgia's alternative dispute resolution (ADR) system. As large-scale infrastructure projects proliferate globally, effective and timely dispute resolution becomes essential. While ADR mechanisms like arbitration and mediation are well-established, the DAB has emerged as a crucial tool, especially in projects backed by international financial institutions. Despite its growing importance, the DAB remains underregulated in Georgia, leading to challenges in its application.

The study explores the evolution of the DAB, tracing its roots from the United States in the 1970s to its current international recognition, particularly within the FIDIC contract framework. It highlights how Georgia has begun integrating DABs into its legal landscape, despite the absence of a comprehensive regulatory framework. Through a comparative analysis of international and Georgian practices, the paper identifies key distinctions between the DAB and other ADR mechanisms, emphasizing the unique role of the DAB as a pre-arbitration step that ensures the continuation of project work while disputes are resolved.

The research also addresses the enforceability of DAB decisions, examining contractual obligations and the challenges of ensuring compliance. By analyzing case law and arbitration practices, both globally and within Georgia, the paper underscores the need for clearer guidelines, and the potential for judicial and arbitration support to solidify the DAB's role in the Georgian legal system.

In conclusion, the paper advocates for the broader adoption of DABs in Geor-

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gia, recommending the development of a legal framework aligned with international standards to enhance the effectiveness of this dispute resolution method. This will not only benefit the country's infrastructure development, but also strengthen its position in the global market by aligning with international best practices.

**Keywords:** Dispute Adjudication Board, ADR, FIDIC Contract Dispute resolution mechanisms, Enforceability of DAB decisions, DAB as a precondition of arbitration.

## I. Introduction

In the modern world, the swift and effective implementation of large infrastructure projects is crucial. In this context, effectively addressing disputes that arise during these projects is vital, as such issues are an inherent part of the process. This need has driven the growing popularity of alternative dispute resolution (ADR) methods and the introduction of innovations in this field. In addition to arbitration and mediation, the Dispute Adjudication Board<sup>1</sup> (DAB) is increasingly being adopted and widely used as an alternative method of dispute resolution.<sup>2</sup>

In Georgia, large projects of state importance are often implemented with the financial support of international financial institutions. These institutions often require the use of contract forms developed at the international level during project implementation. Examples of such contract forms include those from the World Bank, the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB), or those proposed by FIDIC (the International Federation of Consulting Engineers). These forms are based on their extensive experience and the best international practices. Such agreements include clauses for multi-level dispute resolution<sup>3</sup>, including the use of dispute resolution boards.<sup>4</sup> This dispute

<sup>1</sup> From a terminological perspective, this institution is referred to by explicit names such as Dispute Board (DB), Dispute Adjudication Board (DAB), or Dispute Avoidance Adjudicator Boards (DAAB). In the Georgian translation, especially in agreements, it is referred to as a conciliator. However, in Georgian practice, it is recommended to use the term "Dispute Board".

<sup>2</sup> Patterson L. QC, Higgs N., Dispute Boards, in: *The Guide to Construction Arbitration*, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

<sup>3</sup> Blackaby N., Partasides C., Redfern A., Hunter M., *Redfern and Hunter on International Arbitration*, 6<sup>th</sup> Edition, Oxford University Press, 2015, 101-102.

<sup>4</sup> Gould N., McCrea R., Dispute Boards, in: *Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World*, edited by R. Nazzini, London, 2022, 129.

resolution mechanism has been introduced in Georgia, and there have already been cases where the Georgian court<sup>5</sup> and local arbitration tribunals<sup>6</sup> had to discuss and resolve issues through the Dispute Resolution Board. However, considering the absence of a legal framework for its regulation in Georgia, as well as the lack of proper practical knowledge and experience within the legal community, ensuring the correct functioning of the Dispute Resolution Board and the proper resolution of related issues is a significant challenge.

The aim of this paper is to present and critically analyze the function and role of the Dispute Resolution Board (DRB) within the broader framework of alternative dispute resolution (ADR). The paper seeks to elucidate the distinctions between the DRB and other ADR mechanisms, as well as their interrelationships. Specifically, it examines the DRB's function as a mandatory pre-arbitration or pre-litigation stage and assesses the mechanisms available for enforcing the decisions issued by the DAB. This study employs analytical and comparative legal research methods.

## II. Development Trends of the Dispute Resolution Board

### 1. International Development Trends

The formation of the Dispute Resolution Board in its current form began in the USA in the 1970s, when it was used as a means of dispute resolution within the Eisenhower Tunnel project in Colorado.<sup>7</sup> Later, it was employed in the World Bank-funded El Cajon Dam hydroelectric project in the 1980s<sup>8</sup> and in the Channel Tunnel and Hong Kong Airport projects in the 1990s.<sup>9</sup> Since 1995, the Dispute Resolution Board has been introduced in the contracts of projects financed by the World Bank and FIDIC,

<sup>5</sup> Decision No. 2b/9284-19 of the Tbilisi Court of Appeal, 19 November 2021; Judgement No. AS-1665-2019 of the Supreme Court of Georgia, 10 February 2020.

<sup>6</sup> Decision No. 8865 of the Arbitration Tribunal of the Dispute Resolution Center, 12 August 2022.

<sup>7</sup> Patterson L. QC, Higgs N., Dispute Boards, in: *The Guide to Construction Arbitration*, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

<sup>8</sup> Ibid.

<sup>9</sup> Gould N., McCrea R., Dispute Boards, in: *Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World*, edited by R. Nazzini, London, 2022, 129. See also: Dispute Resolution Board, Foundation Fostering Best Practices in Dispute Avoidance and Resolution Worldwide: [https://appn-racop.org/upidrots/2023/11/231024-Introduction-to-DBs\\_APPN\\_Final\\_R2-1.pdf](https://appn-racop.org/upidrots/2023/11/231024-Introduction-to-DBs_APPN_Final_R2-1.pdf) [22.03.2024].

in the Orange Book, and since 1999 in the Red, Yellow, and Silver Books of FIDIC.<sup>10</sup> Today, this mechanism is used not only in construction and infrastructure projects, but also in various other fields, including information technology.<sup>11</sup>

The implementation of the Dispute Resolution Board by FIDIC has significantly advanced the development of this dispute resolution mechanism. Internationally recognized dispute resolution centers have also started to adopt, and have developed, specific rules for dispute resolution boards. For example, the American Arbitrators Association (AAA) has developed special rules<sup>12</sup> for dispute resolution boards that have been in effect since 2000. CIArb in 2014<sup>13</sup> and the International Chamber of Commerce (ICC) in 2015 published the relevant rules and today offer this service to their parties.<sup>14</sup> In some countries, the Dispute Resolution Board, as a dispute resolution mechanism, is recognized and strengthened at the legislative level.<sup>15</sup> The United Nations Commission on International Trade Law (UNCITRAL) is also actively considering the issue of Dispute Resolution Board regulation<sup>16</sup>, and it may not be long before UNCITRAL proposes rules governing the Dispute Resolution Board and/or a model law, which will be an important step toward the global introduction of this mechanism.

## 2. Development Trends in Georgia

The international trend of the Dispute Resolution Board has also found a response in Georgia, seeing the private sector attempting to implement this means of dispute resolution. This is clearly confirmed by the development of the rules of the Dispute

<sup>10</sup> Ibid.; Regarding FIDIC see: <<https://www.fidic.org/sites/default/files/FIDIC-rainbow-suite-2012.pdf>> [22.03.2024].

<sup>11</sup> Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 130.

<sup>12</sup> See: Dispute Resolution Boards Hearing Rules and Procedures, American Arbitration Association, 2000, <[https://www.adr.org/sites/default/files/AAA\\_Dispute\\_Resolution\\_Board\\_Hearing\\_Rules\\_and\\_Procedures.pdf](https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Hearing_Rules_and_Procedures.pdf)> [22.03.2024].

<sup>13</sup> See: Dispute Board Rules, Chartered Institute of Arbitrators, 2014, <<https://www.ciarb.org/media/31vf-c1x0/ciarb-dispute-board-rules-practice-standards-committee-august-2014.pdf>> [22.03.2024].

<sup>14</sup> ICC Dispute Board Rules, International Chamber of Commerce, 2015, <<https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/>> [22.03.2024].

<sup>15</sup> Housing Grants, Construction and Regeneration Act of the UK, 1996, Art. 108; New Zealand Construction Contracts Act, 2002.

<sup>16</sup> See: Report of Working Group II (Dispute Settlement) on the Work of Its Seventy-Seventh Session, United Nations Commission on International Trade Law, New York, 6–10 February 2023, <<https://docs.un.org/en/A/CN.9/1129>> [22.03.2024].

Resolution Board by the European Business Association Mediation and Arbitration Center, and the offering of this service to interested parties in Georgia from 2021 onward.<sup>17</sup>

The Georgian court's approach to the Dispute Resolution Board is inconsistent. In this regard, the decision of the Tbilisi Court of Appeals on November 19, 2021 is worth mentioning. The court explained in the mentioned case that alternative dispute resolution methods and implementing institutions (arbitration, mediation, simplified enforcement proceedings, writ of execution issued by notary), as well as the rules of dispute resolution established by them, are regulated by the legislation of Georgia. However, the Dispute Resolution Board and the rules governing dispute resolution are not defined and are unfamiliar to the legislation of Georgia.<sup>18</sup>

The court additionally indicated that "as mentioned above, it is unfamiliar to the legislation of Georgia, and, therefore, the court lacks the ability to determine the legality of a dispute decided by the Dispute Resolution Board."<sup>19</sup> The appellate court's indication that Georgian law does not regulate the Dispute Resolution Board as a dispute resolution mechanism is correct. However, considering that this mechanism is widely recognized at the international level and has become an integral part of the standard contracts of international financial institutions and FIDIC, as well as in Georgia, where various state bodies are party to such agreements<sup>20</sup>, it is not advisable to completely ignore it. Having a contractual basis,<sup>21</sup> such as through an agreement of the parties, falls fully under the principle of freedom of contract recognized and strengthened by Georgian legislation, according to which parties can conclude agreements that are not provided for by the law, but which do not contradict it.<sup>22</sup>

In contrast to the decision of the Court of Appeals, it is interesting that the decision of the Supreme Court of Georgia in 2020, while not directly addressing the legality of the clause on the Dispute Resolution Board, can be seen as implicitly recognizing the Dispute Resolution Board as a means of dispute resolution through the

<sup>17</sup> Dispute Board Rules, EBA-MAC, 2021, <<https://eba-mac.com/uploads/DB-rules-eng.pdf>> [22.03.2024].

<sup>18</sup> Decision N 2b/9384-19 of the Tbilisi Court of Appeal, 19 November 2021.

<sup>19</sup> Ibid.

<sup>20</sup> Judgment No. AS-1665-2019 of the Supreme Court of Georgia, 10 February, 2020.

<sup>21</sup> Gould N., McCrea R., Dispute Boards, in: *Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World*, edited by R. Nazzini, London, 2022, 130.

<sup>22</sup> Civil Code of Georgia, 1997, Art. 319; Commentary on the Civil Code, Book III, Art. 319, 2019, 54.

analysis performed.<sup>23</sup> The Supreme Court also referred to the decision of the Dispute Resolution Board:

*“In its decision, the Board, first of all, discussed jurisdiction, and indicated that the wording of Articles 20.4, 20.5, and 20.6 of the contract between the parties is clear, but to the contractor’s question as to whether the terms of these provisions were violated when the arbitration proceedings were commenced before the conditions precedent were met, the answer cannot be provided under Georgia law, which may include exceptions. Ultimately, the Dispute Resolution Board refused to grant the contractor’s application on the grounds that it lacks the relevant jurisdiction.”<sup>24</sup>*

The Court of Cassation also indicated that “it focused solely on the decision made by the Disputes Resolution Board regarding the use of the opportunity granted by law to secure the claim. As for the authority to consider the content of the arbitration agreement, including researching and checking the validity of the procedures stipulated by the parties’ agreement before arbitration, this does not fall within the jurisdiction of the general courts, in this case, the Court of Appeals.<sup>25</sup>

This decision states that the Supreme Court considered the dispute resolution procedure provided for in the agreement concluded between the parties. This procedure included the review of the dispute by the Dispute Resolution Board before the commencement of arbitration. The court allowed the possibility that the parties could also agree to a pre-arbitration procedure, which could be expressed, among other things, in the agreement on the Dispute Resolution Board. In contrast to the above-mentioned decision of the Court of Appeals,<sup>26</sup> the Supreme Court did not find that the mechanism for resolving such a dispute was unfamiliar or contrary to Georgian legislation, which should be considered a step forward. In light of this, the decision of the local arbitration tribunal confirmed and supported the parties’ consideration of the dispute by the Dispute Resolution Board prior to the commencement of the arbitration.<sup>27</sup>

Undoubtedly, the Dispute Resolution Board is gaining recognition globally and is becoming part of the modern alternative dispute resolution system. It is vital for it

<sup>23</sup> Judgment No. AS-1665-2019 of the Supreme Court of Georgia, 10 February, 2020.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Decision No. 2b/9384-19 of the Tbilisi Court of Appeal, 19 November 2021.

<sup>27</sup> Decision No. 8865 of the Arbitration Tribunal of the Dispute Resolution Center, 12 August 2022.

to be established in Georgia, considering international practices and standards. Creating a legal framework for this is not mandatory, as in many countries around the world, this mechanism can be supported by court/arbitration practice as a contractual dispute resolution mechanism.

### III. The Dispute Resolution Board and other Mechanisms of Dispute Resolution

The Dispute Resolution Board is a tribunal created based on the agreement of the parties, with the purpose of resolving any disputes and disagreements<sup>28</sup> arising between them during the course of the project as quickly and efficiently as possible, preventing the escalation of disputes and avoiding arbitration or court proceedings.<sup>29</sup>

The Dispute Resolution Board may consist, as agreed upon by the parties, of one, three, or more persons who make recommendations to the parties or make decisions enforceable by the parties.<sup>30</sup> The decision of the Dispute Resolution Board shall be enforced immediately, although such decision may be reversed by arbitration or court,<sup>31</sup> with the aim of ensuring that the project and the progress of the contract are not violated.

The Dispute Resolution Board operates on the concept of “*Pay now, argue later*”<sup>32</sup>/“*Comply now, argue later*”,<sup>33</sup> Accordingly, the parties are given the opportunity to quickly, and at lower cost, make an enforceable interim decision, which can become final if the parties agree to it, and thus agree to no longer continue the dispute.<sup>34</sup>

<sup>28</sup> Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 220.

<sup>29</sup> Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 130.

<sup>30</sup> Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, Fourth Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 20.

<sup>31</sup> Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: The Guide to Construction Arbitration, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

<sup>32</sup> Ibid.

<sup>33</sup> Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

<sup>34</sup> Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: The Guide to Construction Arbitration, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

In situations where mediation and arbitration play significant roles in the alternative dispute resolution system, skeptical questions are often raised about the Dispute Resolution Board. Yet there are fundamental differences in Dispute Resolution Board mediation and arbitration.

Regarding mediation, the Dispute Resolution Board is authorized to issue a recommendation or a binding decision for the parties to follow when the mediator does not issue a decision, and its main function is to help the parties reach an agreement.<sup>35</sup>

Unlike arbitration, the Dispute Resolution Board can handle not only legal disputes, but also conflicts<sup>36</sup> In many cases, a Dispute Resolution Board is set up upon contract conclusion, and is a vital part of the project. An arbitral tribunal is established only after a dispute arises between the parties. However, there is a great difference in how their decisions are enforced.

The enforcement of the decision of a Dispute Resolution Board is a contractual obligation<sup>37</sup> of the parties, while the enforcement of the arbitration decision is ensured by national legislation<sup>38</sup> or international convention.<sup>39</sup>

#### IV. Forms and Types of Dispute Resolution Boards

Today, the types and structures of the Dispute Resolution Board vary. The authority granted to the Dispute Resolution Board is entirely determined by the agreement of the parties involved.

##### **Standing DB**

One type of Dispute Resolution Board is represented by the so-called “Standing DB,” which is established immediately after concluding the contract between the parties. It operates throughout the entire duration of the contract,<sup>40</sup> fully monitoring the progress of the contract, paying visits to the construction site, and, in many cases, offering recommendations to avoid potential disputes. As such, the Dispute Resolu-

<sup>35</sup> Law of Georgia “On Mediation”, 18 September 2019, Art. 2(a).

<sup>36</sup> Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 130.

<sup>37</sup> Ibid., 131.

<sup>38</sup> Law of Georgia “On Arbitration”, 2 July 2009, Art. 44.

<sup>39</sup> 1958 New York Convention “On the Recognition and Enforcement of Foreign Arbitral Awards”.

<sup>40</sup> Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 220.



tion Board is a vital part of the entire project, serving the dual function of providing recommendations and making decisions in case of disputes.<sup>41</sup> This format is unique to the Dispute Avoidance/Adjudication Board (DAAB).

### **Ad-hoc DAB**

Unlike a Standing DB, an ad-hoc Dispute Adjudication Board (DAB) is formed after specific disputes arise, with the purpose of resolving those disputes only<sup>42</sup>, and stops functioning as soon as the dispute is decided.<sup>43</sup> Therefore, the ad-hoc DAB service is more cost-efficient, and in many cases parties prefer it due to this factor.

### **DRB (Dispute Review/Resolution Board)**

The Dispute Review/Resolution Board (DRB) is a dispute review board with authority limited to making recommendations to the parties.<sup>44</sup> It does not render a decision binding on them.<sup>45</sup> The formulation of this format is associated with the US construction industry, and the American Arbitrators Association Disputes Board Rules expressly state that the Disputes Resolution Board shall, within 14 days of hearing the parties, issue a confidential recommendation sent solely to the employer and the contractor, outlining the resolution process for disputes between the parties.<sup>46</sup>

The Dispute Resolution Board model is also outlined in the ICC Rules, wherein the DRB offers informal assistance to parties to prevent disputes, and provides recommendations accordingly.<sup>47</sup>

According to the same rules, a party may choose to agree with and follow the recommendation given, although it is not obligated to do so – this decision is not binding. If a party disagrees and therefore does not plan to implement the recommendation, it is required to inform the other party and issue a Notice of Dissatisfaction (NoD); otherwise, the recommendation becomes mandatory.<sup>48</sup>

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Patterson L. QC, Higgs N., Dispute Boards, in: *The Guide to Construction Arbitration*, 4<sup>th</sup> Edition, Edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 122.

<sup>44</sup> Patterson L. QC, Higgs N., Dispute Boards, in: *The Guide to Construction Arbitration*, 4<sup>th</sup> Edition, Edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 122.

<sup>45</sup> Dispute Resolution Boards Hearing Rules and Procedures, Art. 17 American Arbitration Association, 2000, <[https://www.adr.org/sites/default/files/AAA\\_Dispute\\_Resolution\\_Board\\_Hearing\\_Rules\\_and\\_Procedures.pdf](https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Hearing_Rules_and_Procedures.pdf)> [22.03.2024].

<sup>46</sup> Ibid., Art. 17

<sup>47</sup> ICC Dispute Board Rules, International Chamber of Commerce, 2015, Art. 4, <<https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/>> [22.03.2024].

<sup>48</sup> Ibid.

## DAB

The Dispute Adjudication Board (DAB) represents the Dispute Resolution Board, also known as the “classic” form, which is the most widely used and was introduced based on the 1999 World Bank and FIDIC forms of contracts.<sup>49</sup> It is generally created after a dispute arises, and makes a decision regarding a specific dispute.<sup>50</sup> The DAB issues a binding decision that must be complied with by the parties. If a party disagrees, they can issue a NoD within the time limit stipulated in the agreement/rules. Even if a NoD is issued, the party must still comply with the decision, yet maintains the right to challenge.<sup>51</sup> It is at this time that the Dispute Resolution Board concept of “*Pay now, argue later*”<sup>52</sup> or “*Comply now, argue later*” comes into play.<sup>53</sup>

## DAAB

The 2017 FIDIC Forms of Contract introduced the Dispute Avoidance/Adjudication Board (DAAB) form, which serves the purpose of not only resolving disputes, but also preventing them from arising.<sup>54</sup> This form presents the parties with the “All-Inclusive” mechanism of the Dispute Board. On one hand, the classic function of the DAB is to issue a binding decision when a dispute arises, while, on the other, the parties are afforded the opportunity, at any stage of the project, to turn to the DAAB for an informal review to prevent any disagreements.<sup>55</sup>

## CDB

The ICC Dispute Board Rules provide for Combined Dispute Boards<sup>56</sup>, which merge aspects of both the DRB and DAB. They are empowered to issue recommenda-

<sup>49</sup> Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 131.

<sup>50</sup> Conditions of Contract for Plant and Design-Build Contract (Yellow Book), 1<sup>st</sup> Edition, International Federation of Consulting Engineers (FIDIC), 1999, GCC 20.

<sup>51</sup> ICC Dispute Board Rules, International Chamber of Commerce, 2015, Art. 5, <<https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/>> [22.03.2024].

<sup>52</sup> Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: The Guide to Construction Arbitration, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

<sup>53</sup> Patterson L. QC, Higgs N., Dispute Boards, in: The Guide to Construction Arbitration, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

<sup>54</sup> Conditions of Contract for Plant and Design-Build Contract (Yellow Book), 1<sup>st</sup> Edition, International Federation of Consulting Engineers (FIDIC), 1999, GCC 21.

<sup>55</sup> Gould N., McCrea R., Dispute Boards, in: Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World, edited by R. Nazzini, London, 2022, 131.

<sup>56</sup> ICC Dispute Board Rules, International Chamber of Commerce, 2015, Art. 4-6, <<https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/dispute-boards/dispute-board-rules/>> [22.03.2024].

tions or decisions regarding disputes between the parties.<sup>57</sup> According to these rules, if one party requests a decision and the other party agrees or does not make a claim, the CDB issues a decision. If one party requests a decision and the other party believes that a recommendation rather than a decision should be issued, the CDB itself decides whether to issue a recommendation or make a decision.<sup>58</sup>

## V. Enforcement of a Decision Made by a Dispute Board

One of the main criteria for assessing the effectiveness of any dispute resolution mechanism is the enforceability of the decision. If a party cannot achieve a final outcome, the effectiveness of any dispute resolution mechanism is called under question. The issue of enforcing the decision poses a significant challenge for disputes boards—how to ensure compliance when the party against whom the decision is made does not voluntarily comply. Regarding this matter, there is no unified approach, and various opinions exist.

### 1. Contractual Mechanism

Given that the DAB is a contractual mechanism for dispute resolution, enforcing its decision constitutes a contractual obligation of the party, and the contract must be performed in accordance with the principle of *Pacta sunt servanda* (Agreements must be kept). The FIDIC Agreement expressly states that a decision made by the DAB must be complied with immediately, even if a party disagrees with it and issues a Notice of Disagreement (NoD).<sup>59</sup> This is where the main concept of DAB, “*Pay now, argue later*”,<sup>60</sup> and “*Comply now, argue later*”,<sup>61</sup> is revealed. If a party issues a NoD, the decision of the DAB is non-final, although it is binding on the parties<sup>62</sup> regardless of

<sup>57</sup> Gould N., McCrea R., Dispute Boards, in: *Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World*, edited by R. Nazzini, London, 2022, 131.

<sup>58</sup> Ibid.

<sup>59</sup> Construction Contract (Red Book), 2<sup>nd</sup> Edition, International Federation of Consulting Engineers (FIDIC), 2017, Art. 21.4.3.

<sup>60</sup> Smith M. QC, McCarthy H., Ho J., Alternative Dispute Resolution in Construction and Infrastructure Disputes, in: *The Guide to Construction Arbitration*, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 136.

<sup>61</sup> Patterson L. QC, Higgs N., Dispute Boards, in: *The Guide to Construction Arbitration*, 4<sup>th</sup> Edition, edited by S. Brekoulakis and D.T. Brynmor QC, London, 2021, 120.

<sup>62</sup> Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: *Transna-*

whether the party plans to proceed with the dispute in arbitration or in court. However, a mechanism in which enforcement of the decision relies solely on the will of one party obviously cannot be considered an effective dispute resolution mechanism.

## 2. Compensation for Damages Resulting from Non-Enforcement of the Dispute Resolution Board's Decision

Although the party is obligated to enforce the decision made by the DAB, cases of non-enforcement of the decision are still common in practice. One mechanism under consideration to prevent this is applying compensation for damages caused by non-execution of the decision on the party that fails to comply.<sup>63</sup> Accordingly, the party in whose favor the decision was made by the DAB is entitled to refer to arbitration and request both a decision on the matter discussed by the DAB ("Primary Dispute"), as well as damages caused by the non-enforcement of the decision made by the DAB, known as "Secondary Dispute".<sup>64</sup> This became the subject of significant discussion in Singapore in the case of PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation, where the Singaporean courts had to consider the issue twice. These cases are known as the *Persero I* and *Persero II* cases.<sup>65</sup>

In the same disputes, it was discussed whether the party has the right to directly apply to arbitration together with the main dispute ("Primary Dispute"), with a request for damages ("Secondary Dispute"), or if the party should first apply to the DAB with a request for damages, and then to arbitration.<sup>66</sup> It is clear that the secondary dispute is a product that arises from the main dispute, and thus it is more appropriate to consider them together. Submitting to the DAB a claim for damages resulting from non-enforcement of the primary DAB decision will create an additional barrier for the party whose claim has been upheld and who seeks immediate enforcement.

The *Persero I* case clarified that the arbitrator had no authority to consider a claim for damages until that claim had been brought before the DAB.<sup>67</sup> However, in

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tional Construction Arbitration, Key Themes in the Resolution of Construction Disputes, edited by R. Nazzini, London, 2018, 163.

<sup>63</sup> Ibid., 225-226.

<sup>64</sup> Ibid., 225-226.

<sup>65</sup> Seppala Ch.R., A Welcome Decision from Singapore: The Second Persero Case, journal "Construction Law International", Vol. 10, No. 1, 2015, 18-23.

<sup>66</sup> Ibid.

<sup>67</sup> Judgment No. 206 of the High Court of Singapore (SGHC 202) on the case "PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation", 20 July 2010; Dedezade T., Enforcement of

*Persero II*,<sup>68</sup> the court provided an important answer to this question, rightly changing its approach and holding that a party has the right to submit both claims to arbitration at the same time.<sup>69</sup> Any other definition would contradict the idea of an alternative dispute resolution mechanism in general, which aims to quickly and efficiently resolve disputes. Therefore, since the main idea of the combined use of DAB and arbitration is for the parties to resolve disputes efficiently, all issues that require clarification should be addressed with this goal in mind. While imposing damages serves a preventive function and encourages parties to comply with the DAB's decision promptly, relying on this measure alone will not be sufficient to ensure enforcement, and its effectiveness will still not be satisfactory.

### 3. Enforcement of the Dispute Board's Decision via an Interim/Partial Arbitration Decision

In international practice, enforcing a DAB decision before the final settlement of the dispute through arbitration can also be achieved through a decision or a partial decision<sup>70</sup> taken as an interim measure.<sup>71</sup> However, there is no unified or established approach to this matter.<sup>72</sup> First, it should be assessed how compatible the enforcement of the decision made by the DAB, which mostly concerns the payment of money,

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DAB decisions under the FIDIC 1999 Forms of Contract, in: *Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes*, edited by R. Nazzini, London, 2018, 225-226.

<sup>68</sup> Judgment No. 148, 149, 5277, 5985 of the Court of Appeal of Singapore (SGCA 30) on the case “PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation”, 27 May 2015.

<sup>69</sup> Judgment No. 148, 149, 5277, 5985 of the Court of Appeal of Singapore (SGCA 30) on the case “PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation”, 27 May 2015; Seppala Ch.R., A Welcome Decision from Singapore: The Second Persero Case, journal “Construction Law International”, Vol. 10, No. 1, 2015, 18-23.

<sup>70</sup> For details on terminology: Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: *Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes*, edited by R. Nazzini, London, 2018, 238; მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 36-38 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghs-rulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 36-38].

<sup>71</sup> Dedezade T., Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract, in: *Transnational Construction Arbitration, Key Themes in the Resolution of Construction Disputes*, edited by R. Nazzini, London, 2018, 237-244; Seppala Ch.R., An Engineer's / Dispute Adjudication Board's Decision Is Enforceable by An Arbitral Award, 2009, <[https://fidic.org/sites/default/files/5%20seppala\\_PARIS\\_2251210\\_1.pdf](https://fidic.org/sites/default/files/5%20seppala_PARIS_2251210_1.pdf)> [22.03.2024].

<sup>72</sup> Ibid.

is with the nature of the interim measures, the purpose of which, in the majority of cases, is different and is aimed at ensuring the enforcement of the final award and/or ensuring the “right” of the disputing parties.<sup>73</sup>

However, if the parties do not comply with the decision of the DAB and proceed to arbitration, the arbitration tribunal must consider the merits of the dispute and simultaneously order the party to carry out the action mandated by the DAB following the case review, even if it reaches a different outcome. According to international standards, when implementing a provisional measure, arbitration should not involve itself in a substantive examination of the case.<sup>74</sup> Aside from the above-stated, the recognized approach is that an interim measure does not qualify as a final arbitral decision, and is not enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Decisions.<sup>75</sup> Instead, its enforceability is subject to national legislation.<sup>76</sup> Courts in different countries have provided different resolutions regarding the enforcement mechanism of a DAB decision. For example, in the case of *Persero II*, the Singaporean court considered it acceptable,<sup>77</sup> while the Romanian court looked at the same issue differently.<sup>78</sup> In the Georgian context, considering the established approaches to interim measures,<sup>79</sup> and the fact that court/arbitration practice regarding DAB is not well established in the country, it is unlikely that DAB decisions will be enforced in this form at the initial stage.

<sup>73</sup> მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 40-45 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 40-45].

<sup>74</sup> Born G., *International Commercial Arbitration*, Second Edition, Volume II, Kluwer Law International, 2014, 2478. Caron D., Caplan L., *The UNCITRAL Arbitration Rules*, Oxford University Press, 2013, 523.

<sup>75</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations, New York, 10 June 1958.

<sup>76</sup> მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 185 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 185].

<sup>77</sup> Gould N., McCrea R., *Dispute Boards*, in: *Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World*, edited by R. Nazzini, London, 2022, 153-154.

<sup>78</sup> Ibid.

<sup>79</sup> მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 41 [machaidze o., uzrunvelqopis ghonisdziebebis gamoqenebis da tsnoba-aghsrulebis p'irobebi saarbit'razho ts'armoebisas, tbilisi, 2020, 41].

## 4. The Dispute Resolution Board as a Mandatory Pre-Arbitration/Pre-Trial Procedure and Exceptional Cases

Recently, parties are ever more often turning to multi-step dispute resolution processes, which allow them to use different dispute resolution methods: negotiation, mediation, DAB, and/or arbitration.<sup>80</sup> It is typical for such agreements that the parties must attempt to resolve the dispute using all agreed-upon methods, and proceed to the next step only if those methods fail to resolve the dispute.<sup>81</sup> A similar approach is seen in Georgian legislation. For example, according to Article 7.4 of the Law of Georgia “On Mediation”, if there is an agreement for mediation, where the parties agree not to use court or arbitration until a certain time or situation happens, the court or arbitration shall not handle the dispute until the conditions in the mediation agreement are met, unless the claimant proves they would face serious harm without court or arbitration.

### 4.1. Mandatory Pre-Arbitration/Pre-Trial Procedure

FIDIC agreements also provide for multi-level dispute resolution mechanisms:

- i. Engineer Determination
- ii. DAB Case Review;
- iii. Amicable Settlement;
- iv. Arbitration<sup>82</sup>

The FIDIC contract regarding the DAB expressly states that parties can only turn to arbitration after a decision has been made by the DAB and they have failed to settle the dispute by agreement within the specified period.<sup>83</sup> This approach is also supported by international practice. In the case of *Peterborough City Council v Enterprise Managed Services Limited*, the English court did not allow the parties to bring the

<sup>80</sup> Gary B., *International Arbitration and Forum Selection Agreements*, sixth Edition, Wolter Kluwer, 2021, 105.

<sup>81</sup> For comparison: Blackaby N., Partasides C., Redfern A., Hunter M., *Redfern and Hunter on International Arbitration*, 6<sup>th</sup> Edition, Oxford University Press, 2015, 101-102. DOI: <https://doi.org/10.1093/law/9780198714248.001.0001>, para. 2.88-2.93

<sup>82</sup> *Construction Contract (Red Book)*, 2<sup>nd</sup> Edition, International Federation of Consulting Engineers (FIDIC), 2017, Art. 20; *FIDIC Red Book*, 1999, Art. 20. *FIDIC Plant and Design-Build Contract (Yellow Book)* 1<sup>st</sup> Edition 1999 and 2<sup>nd</sup> Edition 2017, Art. 20.

<sup>83</sup> *Construction Contract (Red Book)*, 2<sup>nd</sup> Edition, International Federation of Consulting Engineers (FIDIC), 2017, Art. 21.5.



case to court until the DAB had completed its review and offered its recommendations. It indicated that going through the DAB stage is a mandatory prerequisite for judicial review.<sup>84</sup> The same approach was developed by the Swiss Supreme Court in case 4A\_124/2014, where it indicated that the DAB is a mandatory prerequisite for arbitration. However, in the same decision, the court established an exception, in which case it is possible for a party to have the right to commence arbitration without the DAB hearing the case.<sup>85</sup>

This issue became the subject of discussion within the ongoing arbitration proceedings in Georgia. Considering international practice, the arbitration tribunal supported the recognition of the DAB as a mandatory prerequisite<sup>86</sup>, which is a step forward and should significantly contribute to the establishment of the DAB in Georgia.

## 1.2. Exceptional Cases

Considering that the DAB is not regulated at the legislative level, but is a contractual dispute resolution mechanism, the procedures for the selection and operation of the DAB are determined by the parties themselves. There is a risk that the selection and operation of the DAB may become deadlocked, thereby making the DAB ineffective. This contradicts the purpose of having a dispute resolution mechanism that is meant to be swift and efficient. Therefore, international practice and literature recognize, as an exception, the possibility for a party to directly resort to arbitration or court to resolve a dispute.

The Swiss Supreme Court, in case 4A\_124/2014, addressed such an exceptional circumstance, where the claimant had tried to establish a DAB for 18 months. However, due to the other party's interference and lack of cooperation, the court concluded that the defendant had unreasonably delayed the DAB process. As a result, the court determined that the initiating party had the right to directly initiate arbitration.<sup>87</sup> A situation where the a party declines to sign a tripartite Dispute Adjudication Agreement (DAA) with a member of the DAB is seen as a similar exception.

<sup>84</sup> Judgment No. 3193 of England and Wales High Court (EWHC-TCC) on the case "Peterborough City Council v. Enterprise Managed Services Limited", 10 October 2014.

<sup>85</sup> Decision No. 4A\_124/2014 of the Federal Supreme Court of Switzerland, 7 July 2014.

<sup>86</sup> Decision No. 8865 of the Arbitration Tribunal of the Dispute Resolution Center, 12 August 2022.

<sup>87</sup> Decision No. 4A\_124/2014 of the Federal Supreme Court of Switzerland, 7 July 2014.



This approach has been adopted by ICC arbitral tribunals,<sup>88</sup> although there are differing views on it. In some cases, the tribunal has ruled that even if the opposing party does not sign a DAA, the initiating party must proceed independently with the proceedings and abide by the DAB decision.<sup>89</sup> This approach is rather formalistic, and does not align with the objective of alternative dispute resolution, which aims to resolve disputes efficiently. If a party refuses to follow a DAA and attend a DAB hearing, it is unlikely that the party will stick to the decision made by the DAB. Consequently, the initiating party already expects that it will need to initiate arbitration after investing time and resources in the DAB hearing.

## VI. Conclusion

Dispute resolution through a Dispute Board is becoming increasingly popular world-wide, especially with the support of FIDIC and international financial institutions. Therefore, it is appropriate for the Georgian legal system to follow this trend and change the approach that was noted in the decision of the Tbilisi Court of Appeals on November 19, 2021, which stated that Georgian legislation does not recognize DAB as a dispute resolution mechanism.<sup>90</sup>

The decision made by a DAB is often voluntarily complied with by the parties as a contractual obligation, so as to avoid the imposition of additional damages and time consuming and expensive arbitration or court proceedings. However, the issue of enforcing the decision made by the DAB still remains a significant challenge. Considering the established role of security measures in the Georgian legal system<sup>91</sup>, it is not expected that this form of enforcement will be supported in Georgian reality, especially when no consensus has been reached on this issue even at the international level.

Following the international approach, it is fitting to support DAB as a mandatory pre-arbitration/pre-trial procedure in Georgia, subject to the appropriate agreement

<sup>88</sup> ICC Cases No. 16155 of July 2010 and No. 18505 of November 2013, cited: Gould N., McCrea R., Dispute Boards, in: *Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World*, edited by R. Nazzini, London, 144.

<sup>89</sup> ICC Cases No. 15956 of June/July 2010 and No. 16570 of March 2012, cited: Gould N., McCrea R., Dispute Boards, in: *Construction Arbitration and Alternative Dispute Resolution, Theory and Practice around the World*, edited by R. Nazzini, London, 144.

<sup>90</sup> Decision No. 2b/9384-19 of the Tbilisi Court of Appeal, 19 November 2021.

<sup>91</sup> მაჩაიძე ო., უზრუნველყოფის ღონისძიებების გამოყენების და ცნობა-აღსრულების პირობები საარბიტრაჟო წარმოებისას, თბილისი, 2020, 41 [machaidze o., uzrunvelqopis ghonisdziebebis saarbitrazho წარმოებისას, თბილისი, 2020, 41].

of the parties. Signs of this can already be seen in the decision of the Supreme Court of Georgia dated February 10, 2020,<sup>92</sup> and the analysis of the decisions made by the local arbitration tribunal.<sup>93</sup>

However, it should also be recognized that the parties have the right, in exceptional cases, to directly apply to arbitration/court. This ensures that alternative dispute resolution mechanisms serve their actual purpose and do not become additional formal obstacles in the dispute resolution process.

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<sup>92</sup> Judgment No. AS-1665-2019 of the Supreme Court of Georgia, 10 February 2020.

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