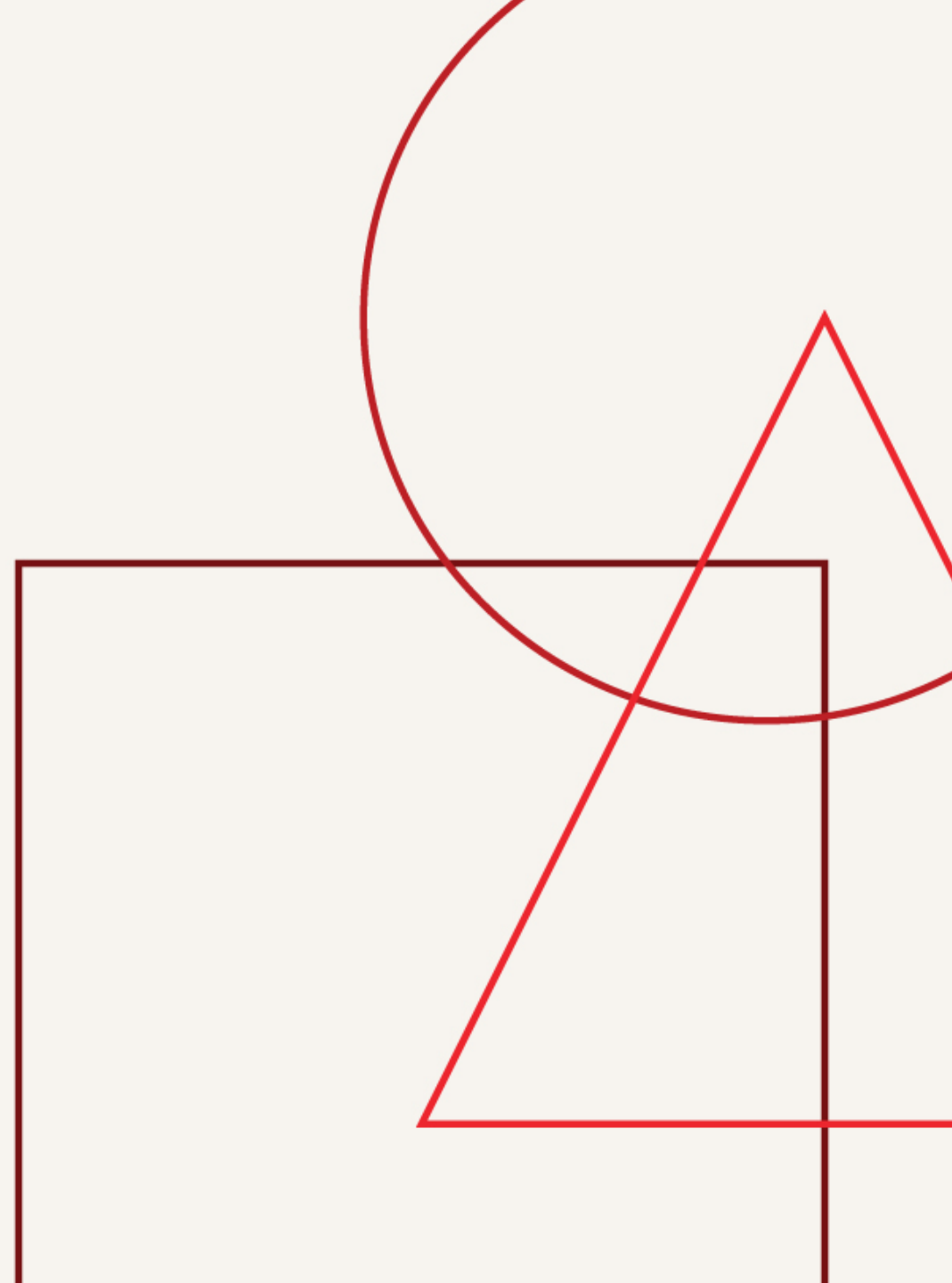




# Construction Adjudication

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# REFERRAL OF THE DISPUTE TO DAAB

- **FIDIC Red Book SC 21.4:** if a dispute arises between the parties, either Party may refer the dispute to the DAAB for its decision.
- The DAAB must issue its decision within 84 days of a dispute being referred to it.
- That decision shall be immediately binding upon the parties, who shall promptly give effect to it.
- **FIDIC SC. 21.4.3,** The Parties and Engineer must comply with the DAAB's decision "whether or not a Party gives a NOD with respect to such decision under this Sub-clause".

# REFERRAL OF THE DISPUTE TO DAAB

- **FIDIC SC. 21.4.3 (i)** If the DAAB awards payment of a sum of money, that amount shall be immediately due and payable after the payer receives an invoice, without any requirement for certification or notice.
- **FIDIC SC. 21.4.3 (ii)**, If there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amounts in the event their decision is reversed, the DAAB may require an appropriate security to be issued for payment of the sum awarded.
- **FIDIC SC 21.7** provides that if either party fails to comply with a DAAB decision, whether final or not-final, the other party may refer the failure itself directly to arbitration under Sub-clause 21.6.

# WHEN IS DAAB DECISION BINDING

- Either party can prevent a DAB decision from becoming final by issuing an NOD within 28 days.
- However, the 2017 Contracts wording adds that if no arbitration is commenced within 182 days after the NOD is issued, then that NOD shall be deemed to have lapsed and be no longer valid.
- This will allow DAB decisions to become final where arbitration is not pursued.
- FIDIC SC 21.8 Where no DAAB is in place or is not being constituted or its mandate has expired, either party can directly refer the dispute to Arbitration under SC 21.6.

# ENFORCEMENT OF DAAB DECISIONS

- FIDIC provides that if a party fails to comply with a decision of the DAAB, whether binding or final and binding, then the other party may refer the failure itself to Arbitration since it amounts to a breach of contract. SC 21.6 FIDIC 2017.
- The Arbitral Tribunal shall have the power to enforce the DAAB decision by way of a summary or other expedited procedure through an interim award.
- In Botswana, the High Court enforced the DAB decision as a liquidated demand in the case of **Liftoff Investments (Pty) Limited v Debswana Diamond Company (Pty) Limited**, HC Case No. MAHGB-000193-23.

# ENFORCEMENT OF DAAB DECISIONS

- On appeal, in the case of Debswana Diamond Company (Pty) Limited -v-s Liffort Investments (Pty) Limited, CA No.292 of 23, the Apex Court held that;

*“...DAB awards may be referred to the High Court for enforcement .. Courts should, as a general rule, be slow to enforce such awards, and that judicial interference should be resorted to in exceptional circumstances, such as where the contractual imperatives relating to the resolution of disputes are found wanting.”*

- To ensure uniformity in the enforcement of DAAB decisions, the world needs a convention similar to the Singapore Convention on Mediation, which provides a uniform framework for the recognition and enforcement of mediated settlement agreements.

# CASE LAW

Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC).

- The Court held that the DAB was a mandatory precondition to arbitration, and that Sub-clause 20.8 would only apply in the exceptional situation where the mission of a standing DAB has expired before a dispute arises between the parties, or other limited circumstances such as the inability to constitute a DAB due to the intransigence of one of the parties.

# CASE LAW

## Fort Portal Municipal Council v Plinth Technical Works Limited, HCMA No. 231/2019

- The Court stayed the Arbitration proceedings that had commenced before the Conclusion of the Adjudication proceedings.
- The Court held that without a decision of an Adjudicator, the Arbitrator had no jurisdiction to resolve the dispute.
- Adjudication is a condition precedent to Arbitration.

# ARBITRATION

- FIDIC SC 21.6 Any dispute in which the DAAB's decision is not final shall be finally settled by International Arbitration.
- ICC Rules Apply.
- Dispute to be resolved by 1 or 3 Arbitrators.
- Arbitration to be conducted in the language defined under the contract.
- Arbitrators shall have full power to open up, review, and revise any certificate, determination, instruction, or DAAB decision.
- The Arbitral Award shall be final and binding.

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