

Dispute Resolution Mechanism by Dispute Resolution Board According to FIDIC Contract Model and Experience for Vietnam



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ABSTRACT: The article “Dispute resolution mechanism by the Dispute Board according to the FIDIC contract form and experience for Vietnam” researches the theoretical issues related to the FIDIC Contract and the Dispute Settlement Board of the FIDIC. In addition, the article also focuses on researching and analyzing the practice of applying dispute settlement mechanisms by Dispute Settlement Boards in various nations throughout the world. The article's usefulness stems from the knowledge gained while researching this dispute resolution mechanism in countries throughout the world, as well as the present situation of Vietnamese law, which provides solutions and recommendations based on Vietnamese law.

KEYWORDS: FIDIC, Construction Contract, Dispute Resolution Board, DAB, DAAB.

1. Overview of FIDIC contract form and dispute resolution mechanism by the Dispute Resolution Board according to FIDIC contract form

1.1. Overview of FIDIC contract form

The International Federation of Consulting Engineers, commonly known as FIDIC, is the largest international representative body globally made up of national associations of consulting engineers, who come from many countries worldwide. Accordingly, this association has launched the FIDIC Contract Model Set, which is the most commonly used contract model in international construction contracts in the world. FIDIC contract templates are often used in both large and small construction projects and ensure suitability for parties of different nationalities, with different languages and from many countries with different legal systems. These contract templates aim to clarify the contractual relationship between the parties and the division of risks between the parties in an acceptable and controllable way (Lighthouse Nha Trang Law Office, 2021). However, it should also be noted that the FIDIC contract form is only a template for the parties to prepare a construction contract and adjust the contract form accordingly depending on each project and the needs of the parties (CNC Counsel, 2017).

Rooted in the mission “To improve the business environment and promote the interests of consulting engineering firms globally and locally, in accordance with our responsibility to provide quality services for the benefit of society and environment” (FIDIC, 2012), in 1957 FIDIC issued and published the first form of standards, called the “Red Book”. Accordingly, through a development process until 1999, FIDIC launched “The Rainbow Suite”. This is a set of standard contract forms in the construction field. Specifically, the Suite includes contract templates that are: (i) Red Book (Used for classic projects designed by the Investor); (ii) Yellow Book (Used for classic projects designed by the Contractor); (iii) Silver Book (Used for turnkey/EPC projects); (iv) Green Book (Used for low-cost or quick projects with easy access); (v) Pink Book (MDBs Edition); (vi) Metal Gold Book - Project Design, Construction and Operation Contract Conditions (Design, Construction and Operation Contract); (vii) Blue Book - Model Contract for Dredging and Reclamation Project; (viii) White Paper - Consulting Services Contract Form and conditions of Subcontracting Contract for construction designed by the Investor. The content of these contract forms not only differs in terms of the subject of the contract, but it is also related to the allocation of legal responsibilities and risks arising therefrom.

Since “The Rainbow Suite” 1999 contract model was announced and developed until now, it has been commonly and widely used by engineers, investors, lawyers... all over the world. That shows the value and effectiveness of the contract template for the success of the project. However, with the development of humanity comes the increasingly diverse and complex transformation of projects, as well as the needs of the parties. In 2017, FIDIC reviewed these contract models and released the 2nd version of the Contract Models “The Rainbow Suite”. At the same time, FIDIC also provides the 2017 set of agreements (the fifth edition of the FIDIC White Book and the second edition of Consulting Subcontracts and Joint Venture Contracts). The purpose of FIDIC reviewing these contracts is to meet the increasing requirements of contract users and to bring outstanding features of FIDIC contracts in general.

1.2. Overview of the dispute resolution mechanism by the Dispute Resolution Board according to FIDIC contract form

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In the world, the Dispute Board (DB) is one of the above dispute resolution mechanisms. DB (Disputes Board) is the common name used to refer to the Dispute Prevention, Mediation and Arbitration Board. Known by many different names such as: DRB (Dispute Resolution Board; Dispute Review Board) has the function of making non-binding recommendations on project disputes); DAB (Dispute Adjudication Board), whereby the DAB issues decisions that must be immediately implemented and the decision is binding/final and binding on the parties unless modified by an amicable conciliation or arbitration award; or DAAB (Dispute Avoidance/Adjudication Board) has the same function as DAB but adds the function of preventing disputes. Accordingly, DB is a mechanism commonly found in complex contracts with long implementation periods, with the purpose of preventing, conciliating and resolving disputes arising from the contract.

FIDIC Contracts do not specifically define what a Dispute Arbitration Board or Dispute Board is. However, it can be understood that the Dispute Resolution Board is a mechanism specified in the FIDIC Contract Model, consisting of experts who are neutral towards the disputing parties, established at the beginning of the project with the purpose of The purpose is to monitor the construction process, encourage dispute prevention and assist parties in resolving disputes during project implementation. To better understand the Dispute Resolution Board according to the FIDIC contract form, here are some outstanding features of the Dispute Resolution Board:

Firstly, regarding the form of DAB, Clause 21.1 of the Red Book provides us with two alternative models of DAAB: (i) standing DAB (standing DAAB) and ad hoc DAB. The FIDIC 1999 contract has different regulations on the form of DAB. There are two forms, including permanent DAB and incident DAB. For the FIDIC 2017 Contract, DAAB will be appointed from the beginning of Contract implementation in all three books (Red, Gold, Silver Books), i.e. in permanent form. However, this does not mean that there is no case DAAB, the above regulations are recommendations to use permanent DAAB when using FIDIC Contract Forms.

Second, the composition of DAAB depends on the agreement and terms in the contract between the parties. In case neither the contract nor the parties have any agreement, the number of members will be one or three members. In addition, the DAAB shall be deemed to be established on the date that the Parties and the sole member or three members (as the case may be) of the DAAB have all signed the DAAB Agreement (Red Book of FIDIC 2017 Contract Model Set). The law governing the DAAB agreement is the Law governing contracts.

Third, the dispute prevention and resolution function of the Dispute Resolution Board according to the FIDIC Contract Model Set. The preventive function of DAAB is most clearly shown in the permanent type of DAAB. With the advantage of being established from the beginning, closely monitoring the progress of the project, so as soon as any conflicts arise, the parties can request DAAB for immediate support or DAAB to resolve it themselves to limit the problem. Maximize conflicts leading to major disputes. In addition, because DAAB can be established before or after a dispute occurs, both permanent DAAB and ad hoc DAAB have the function of resolving disputes that arise when requested by the parties.

2. Current status of the dispute resolution mechanism by the Dispute Resolution Board according to the FIDIC contract form of countries around the world

2.1. Conditions for applying the dispute resolution mechanism by the Dispute Resolution Board

It can be seen that the conditions for applying the dispute resolution mechanism by the Dispute Resolution Board in each country are relatively similar and similar to the provisions of the FIDIC Contract Model. That is, the general condition is that one of the parties must send a request to bring the dispute to the DAB and depending on whether the parties choose the permanent DAAB model or the ad hoc DAAB model, the dispute will be resolved in the order at the DAB. FIDIC Contract Forms. The practice of contracting parties in developing contract terms in accordance with the provisions of FIDIC Contract Forms and legal regulations in different countries. It has been shown that if the parties decide to still apply the DAB mechanism to their project, the issue of conditions for application or in other words, activation of the dispute resolution mechanism by the regular dispute resolution board is concerned from the provisions of the contract (Ben Mellors, 2017). Because this regulation usually does not affect the legal provisions of other countries and also because this is the nature of the dispute resolution mechanism by the Dispute Resolution Board.

As for practice in countries that have applied FIDIC in construction projects, it shows that the majority of countries choose a permanent DAAB right from the beginning, to be able to regularly supervise and monitor the project. throughout and throughout the project's operation. That will help maximize DAB's unique advantage of preventing disputes and promptly resolving conflicts before it becomes a major dispute, thereby contributing to the success of the project. There are early and significant reported successes of dispute panels in large (US\$ billion) FIDIC projects, such as: Ertan Hydropower Project in China and Katse Dam Project in Africa. Both projects provide for a permanent DAAB of three people, appointed early in the project, who can make non-binding recommendations. During both projects, the board made multiple site visits. Specifically, 16 times for the Katse dam project and more than 20 times for the Ertan project. In the Ertan project, more than 40 disputes were referred to DAAB, with not a single dispute referred to arbitration or litigation. In the Katse Dam project, of the 12 disputes referred to the DAAB, only one went to

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arbitration and at arbitration the panel's recommendation was upheld (Cyril Chern, 2020). From the above practice, it can be seen that since the permanent DAAB has the function of preventing disputes, the DAAB can make non-binding decisions to resolve conflicts that occur when the parties bring those disputes up r esolved by DAAB and only then will DAAB perform the function of resolving disputes and make a final decision binding on the parties in the project.

In addition, there is an issue about whether, when a dispute occurs, the parties are required to refer the dispute to the DAB before referring the dispute to arbitration. In the Doosan Babcock Limited. Comercializadora de Equipos y Materiales Mabe dispute, the FIDIC 1999 Contract Models were applied. Specifically, the contractor sought an injunction in relation to arbitration to prevent the Owner from recourse to the securities. Contract No DAB was appointed and Judge Edwards-Stewart concluded, without analysis, that clause 20.8 applied: According to clause 20.8 which provides for the expiration of the DAB appointment, if no DAB is appointed designation, the dispute may be referred directly to arbitration. The matter was also resolved in the Swiss Supreme Court, following a partial ruling by the arbitral tribunal that it had jurisdiction to hear a dispute even though a DAB had not been appointed. Accordingly, the Swiss Supreme Court held that referring a dispute to the DAB is a prerequisite for arbitration (Donald Charrett, 2015).

In addition, Counsel for EMS, Miss Anneliese Day QC, relied on the opening words of clause 20.2 and pointed out that if the wording in clause 20.8 was taken literally, it would make the sub-clauses from 20.2 to 20.5 becomes redundant (Taner Dedezade, 2014). It can be seen that, in the FIDIC 1999 version, due to clause 20.8, there are differences in opinions between dispute resolution agencies, leading to conflicting decisions, affecting legitimate interests of the parties in the case. With this regulation, some dispute resolution agencies have removed the conditions for applying the dispute resolution mechanism from the resolution process and gone straight to arbitration. However, in some reported cases of ICC arbitration, it has also often been concluded that it is mandatory to refer the dispute to a DB before arbitration (Donald Charrett, 2015). Judicial practice shows that the British and Swiss judgments both support the existence of DAB as a dispute resolution center in FIDIC contracts. In the UK, judges have gone so far as to consider the DAB process as a mandatory condition before arbitration. The Court felt it could overcome all the difficulties that arose on the facts of that case by using its far-reaching powers to ensure that the DAB was "properly placed" (Taner Dedezade, 2014). Thus, for this provision it must be understood that both parties have tried to appoint a DAB but after the deadline has expired and there is still no DAB to resolve the dispute, then the dispute can be submitted to arbitration, not without carrying out the DAB activation procedure but immediately referring the dispute to arbitration. Therefore, when developing the FIDIC 2017 version, Article 20.8 was edited, removing the easily misleading provision about being allowed to not carry out the procedure to establish a DAB but refer the dispute to arbitration. Change Article 20.8 to a regulation on no DAAB: "If there is no DAAB when a dispute arises, the parties do not have to follow the DAAB procedure". Accordingly, only in cases where a dispute arises without a DAAB is there no need to comply with its procedures and no need to activate the dispute resolution mechanism by the DAB. Thus, it can be understood that the parties must first transfer the dispute to the DAB before being able to refer the dispute to arbitration. And the procedure for transferring disputes to DAB is a condition for applying the dispute resolution mechanism by the dispute resolution board, at which point the DAB will be established and resolve disputes for the parties according to the order and procedures of the DAB.

2.2. Current status of the legal value of the Dispute Settlement Board rulings of countries

According to Article 21.4.3 Red Book of FIDIC 2017 Contract Model Set includes the following provisions related to the ability to enforce the DAB's decision. Accordingly, the DAB's decision will be binding on both parties and will take effect promptly, unless the decision is modified by an amicable settlement under Article 21.5 of the FIDIC 2017 Red Book of Contract Models or an arbitral award under Article 21.6 of the 2017 FIDIC Red Book of Contract Models. In particular, if the DAB makes its decision on the matter in dispute by both parties and neither party gives notice of dissatisfaction within 28 days. After receiving DAB's decision, that decision will become final and binding on both parties. However, if within 28 days a notice of satisfaction is given, the decision is still binding, but it is temporarily binding. That is, it remains binding unless and only until it is modified in an amicable settlement or an arbitral award. If a party fails to comply with a binding decision of the DAB, pursuant to Article 21.6 Red Book of the FIDIC 2017 Contract Model Set, it is stipulated that the other party may then bring that non-compliance directly to arbitration.

However, the situation involves a party's failure to comply with a provisional binding decision of the DAB, as demonstrated by the long-running litigation between PT Perusahaan Gas Negara (Persero) TBK (hereinafter referred to as PGN) and CRW Joint Operation (hereinafter referred to as CRW) in the Singapore High Court and Singapore Court of Appeal from 2010 to 2015 (Donald Charrett, 2015). Accordingly, PGN signed a contract with CRW to design, procure, install, test and operate a gas pipeline project in Indonesia. The contract adopted the general conditions of FIDIC's 1999 Red Book. A dispute arose between the parties regarding thirteen different proposed changes put forward by CRW to PGN. The dispute was referred to DAB in accordance with Article 20.4 of the contract. Accordingly, DAB decided in favor of CRW with the amount paid to CRW being 17.3 million USD. However, PGN subsequently issued an NOD alleging that the amount awarded by DAB was too large and refused to pay CRW the amount as determined by DAB. Immediately thereafter, CRW took PGN's non-compliance directly to arbitration, specifically the Singapore-

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based ICC. CRW mentioned to the arbitrator that it did not require the arbitrator to review DAB's decision, whether PGN was obliged to comply with DAB's decision and pay the amount of 17.3 million USD to CRW. This shows that CRW is trying to seek a binding decision and enforcement of the DAB's decision against PGN. Thus, it can be seen that in reality, the DAB's decision is still not completely binding between the parties, whether the parties will implement it or not depends entirely on the goodwill between the parties. If one of the parties does not comply, DAB does not have any enforcement mechanism with the parties, the remaining parties can only seek to bind the other party by another dispute resolution mechanism: request the arbitrator to force the other side to comply with the DAB's decision. Returning to the above case, the Arbitration Court's result was a final judgment in favor of CRW, allowing CRW to be paid the amount of 17.3 million USD immediately and the court order to take effect for with CRW's application was made (Enforcement Order).

Not stopping there, in 2010, PGN filed a separate application with the High Court of Singapore for an Enforcement Order and final judgment to be set aside. Accordingly, the High Court observed that the Arbitral Tribunal does not allow accepting the value of the final award of the DAB without a retrial.

Not accepting the above result, shortly thereafter in 2011, in the Joint Campaign CRW sued PNG before the Singapore Court of Appeal, however the Court of Appeal upheld the decision of the High Court. The Court of Appeal held that the scope of the arbitral tribunal's jurisdiction is determined by Article 20.6 of the Contract and the terms of reference of the arbitrator. The Court of Appeal dismissed CRW's application on the basis that the majority of the arbitral tribunal had exceeded their jurisdiction and breached the rules of natural justice by failing to review the merits of the award. DAB's decisions and create opportunities for PGN to defend their views.

In 2011, CRW commenced a second arbitration, following guidance from the Court of Appeal. CRW placed both the review of the DAB decision and the issue of PNG's mandatory payment obligation with CRW. The court unanimously decided that the DAB's decision was binding, even though PGN had issued the NOD. The majority of the arbitrators determined that CRW was entitled to enforce the DAB's decision by making an immediate payment order from PGN, pending the final resolution of the parties' dispute raised in the proceedings. This.

As for PGN, PGN refused to pay CRW the amount requested above by CRW. CRW sought and obtained an Enforcement Order from the High Court of Singapore. The Court examined the provisions of the DAB and the arbitration clauses in the Contract in detail (clauses 20.4 to 20.7 of the RB), most of which were not regulated according to the standard in the Red Book. In the end, the Court rejected PNG's application. Afterwards, PNG applied to the Court of Appeal, but in May 2015, the majority of the Singapore Court of Appeal rejected PGN's appeal. The Court of Appeal held that, the issuance of the NOD does not and cannot replace the binding nature of the DAB decision or the concurrent obligation of the parties to promptly enter into force and implement that decision. Failure to issue an NOD within 28 days means that the DAB's decision becomes final as well as binding and the arbitral tribunal has no authority to consider the merits of the decision.

Thus, from the above dispute between CRW and PNG, according to the Court of Appeal in 2011, the arbitration council needs to review and resolve the DAB's decision before considering PNG's payment obligation. However, the Court of Appeal in 2015 held that the DAB's decision did not need to be reviewed by the Arbitral Council, only considering PNG's payment obligation. From the dissenting judgment of the Court of Appeal in 2015 and the judgment of the Court of Appeal in 2011, it shows that the provisions of the DAB's decision, without an enforcement mechanism, have made the legal value of the final judgment is theoretically binding on the parties. However, in reality, the Courts are still quite emotional and make decisions that are not in agreement with each other regarding the legal value of the DAB's decision. When FIDIC experts draft contract templates, they always aim to enhance the value of the DAB decision. Faced with the above reality, the FIDIC 2017 Contract Model Set has made changes to help clarify the legal value of DAB decisions. Specifically, the DAB's decision must be complied with immediately, even if an NOD is filed and a party wishes to dispute its merits. Payment at the discretion of the DAAB must be made promptly – immediately upon receipt of the invoice by the payer, without any certification or notification requirements. At the same time, payment may be requested at the discretion of the DAB, whether or not a NOD exists. Failure to promptly pay an amount in a DAB award may be referred to the tribunal as a single matter, whether or not an NOD has been issued. The issuance of the NOD does not affect the legal validity of the DAB's decision but is still binding between the parties. Even when the parties go to Court or arbitration, the DAB's decision is still binding on the parties, only until there is a decision by the Court or arbitrator. In the FIDIC 2017 version, the issue of enforcement of DAB decisions has been resolved, by which parties will be able to have their decisions quickly enforced by the court before reaching final dispute resolution by arbitration, even if an NOD has been issued, this helps encourage the parties to try to resolve the dispute informally, perhaps with the assistance of the DAAB. Therefore, we can see the advantages of the FIDIC 2017 version compared to the old version in terms of the legal value of DAB judgments. These new regulations have partly helped resolve the situation where parties delay implementation. DAB decisions. Therefore, FIDIC encourages parties when developing contracts to choose the FIDIC 2017 Contract Form, instead of the old contract form, to ensure the legitimate rights of the parties in the project.

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3. Improve Vietnamese law on dispute resolution mechanism by dispute resolution board from experience of FIDIC Contract Model

3.1. Current status of Vietnamese law on dispute resolution mechanism by Dispute Prevention/Adjudication Board (DAAB)

In the context that Vietnam is on the path of international economic integration, promoting the development of industrialization and modernization of the country. The number of construction projects with the participation of the state, foreign investors, as well as projects in the private sector in recent years is considered an area with potential for development at present, now and future. Although Vietnam has known FIDIC contract forms since 1989, in 1995 the Vietnam Construction Consulting Association (VECAS) was established and VECAS became a member of FIDIC in 1997. That shows that the country We have known and accessed FIDIC contract forms from a very early age, but until now, these contract forms are only often used for projects with foreign investment (FDI), funded by foreign investors. The World Bank (WB) or projects with state investment capital, but projects in the private sector between Vietnamese investors, or small projects are not really popular. The reason for this situation is because the alternative dispute resolution mechanism is still quite unfamiliar to Vietnamese investors. Just like in Vietnam today, there are not really many experts in the field of construction with in-depth knowledge, experience, expertise, and capacity to take on the responsibility of making the most of the advantages of each contract form. appropriate to the specific characteristics of the project and resolve disputes according to this mechanism. That makes the costs of hiring foreign experts as DAAB members become expensive and limits investors from using the permanent DAAB mechanism. Eliminate the underutilization of the effectiveness and potential of the dispute resolution mechanism by the Dispute Resolution Board. In addition, another reason leading to the limited application of FIDIC is that there are no sanctions to help enforce the decisions of the dispute resolution board in Vietnam.

According to the provisions of Article 45 of Decree 37/2015/ND-CP detailing construction contracts, in this decree lawmakers consider the dispute resolution method by the Dispute Resolution Board as a method mediation between the parties. However, in Decree 22/2017/ND-CP on commercial mediation, this decree does not stipulate a dispute resolution board and also does not regulate the method of resolving disputes using a resolution board. dispute. This has made the parties in the project confused about negotiating and editing contracts so that when applying FIDIC's Contract templates, they must be in accordance with Vietnamese law. In addition, currently Vietnamese law still does not have a mechanism to help enforce the decisions of the dispute resolution board in practice. Regarding arbitration or court mechanisms, when the parties do not enforce the award, the party receiving enforcement has the right to request the enforcement agency to enforce enforcement. However, if Vietnamese law is chosen as the source of contract regulation, then the decisions of the dispute resolution board in current FIDIC contract forms in Vietnam will only rely on the goodwill between the parties enforce it, or one of the parties submits the dispute to arbitration or court, but there are no sanctions if the parties do not do so. Thus, it can be seen that it is very difficult for a decision of a dispute resolution board in Vietnam to have legal value for the parties. This leads to parties applying FIDIC contract forms in Vietnam being quite hesitant and afraid. Because a certain party can take advantage of current Vietnamese law that does not have clear and complete regulations to invalidate the decisions of the dispute resolution board, causing damage to the other party and its success.

Besides, the difference between the provisions of Vietnamese Law and FIDIC contract models is that Vietnamese law has an additional mechanism to be resolved by the Court, in addition to the mechanism of conciliation or settlement at court. Arbitration is similar to FIDIC contract forms. It shows that Vietnamese law still attaches great importance to the dispute resolution mechanism through the Court, which has invisibly created a work burden for this agency, as well as created psychological pressure for investors. have not boldly applied the above alternative dispute resolution mechanism. According to ICC statistics, in 2019 in Vietnam, up to 40% of the cases that the ICC resolved were construction contract disputes, the average resolution time was 26 months for each case, there were Complicated matters will take even longer (Minh Thu, 2020). In addition, from 2019 up to now, there have been 220 Court judgments and decisions publicly announced related to construction disputes, out of a total of more than 6,908 judgments and decisions announced in the field of construction, business and trade sector (Supreme People's Court, 2023). It can be seen that the dispute resolution mechanism by Arbitration and Court is still the mechanism favored by the parties compared to the alternative dispute resolution mechanism when the parties in Construction projects give rise to disputes. Thus, the dispute resolution mechanism by the dispute resolution board according to the provisions of Decree 37/2015/ND-CP for parties in projects in Vietnam in general, as well as the mechanism for using DAAB according to regulations The provisions in FIDIC's contract forms in particular in Vietnam are still not really popular and widely used.

3.2. Some suggestions and recommendations to improve Vietnamese law

Up to now, the FIDIC Contract Set revised in 2017 has been in effect for 5 years, however, Vietnamese law still has no regulations, or in other words, construction law still has no regulations. Official recognition of the terms of the FIDIC Contract Model. This has created certain effects when one of the two parties wants to apply the FIDIC Contract Model and Dispute Resolution Board while the other party wants to apply and comply with Vietnamese law. Therefore, to help the process of resolving disputes arising in Vietnamese construction contracts take place quickly and effectively, as well as helping the parties not to be shy or worried when deciding to use Use the Dispute Resolution Board to protect your rights and interests in transactions. The following are some

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outstanding suggestions and recommendations to improve legal regulations on Dispute Resolution Boards in the construction sector in Vietnam on the basis of absorbing and inheriting the positive points of the contract model. This, as well as based on practice:

Firstly, it is necessary to clearly stipulate the nature of the Dispute Resolution Board in construction law

Currently, Vietnamese law does not specifically stipulate a dispute resolution mechanism by the Construction Dispute Resolution Board, whether it is conciliatory in nature or in the nature of a FIDIC contract form. Therefore, the author recommends that Vietnamese law needs to have clear regulations on the above issue in the following direction: (i) Vietnamese law needs to build a DAB with a conciliatory nature; or (ii) Vietnamese law needs to build a DAB with the nature of the FIDIC Contract Model Set. In the author's opinion, DAB should be regulated in the direction of the FIDIC Contract Model. Because according to the provisions of Article 45 of Decree 37/2015/ND-CP detailing construction contracts, in this decree lawmakers consider the dispute resolution method by the Dispute Resolution Board as a method of conciliation between the parties. However, in Decree 22/2017/ND-CP on commercial mediation, this decree does not stipulate a dispute resolution board and also does not regulate the method of resolving disputes using a resolution board. This has made the parties in the project confused about negotiating and editing contracts so that when applying FIDIC's Contract templates, they must be in accordance with Vietnamese law. Besides, the nature of the dispute resolution mechanism by the Dispute Resolution Board is not a conciliation method. Because the legal value of the DAB decision is binding on the parties, forcing the parties in the dispute to implement that decision, the conciliation method is not. At the same time, the resolution of the dispute comes from the DAB's decision, not from a voluntary agreement between the parties in the project. Therefore, it is necessary to amend and replace the provisions in Article 45 of Decree 37/2015/ND-CP in the direction that the dispute resolution mechanism by the Dispute Resolution Board should not be considered a method of conciliation between the parties. Only then will the Dispute Resolution Board under Vietnamese law move in the right direction, thereby contributing to the development of Vietnam's construction industry, as well as protecting the rights and fairness of the parties when participating in the contract. Construction, especially contracts with foreign elements. In addition, in addition to clarifying the nature of DAB, it is also necessary to develop a Circular providing detailed guidance and specifying Clause 2, Article 45 of Decree 37/2015/ND-CP for the dispute resolution mechanism by DAAB.

Second, it is necessary to clearly stipulate the mandatory nature in case the parties agree to apply the DAB dispute resolution method in construction law.

In the opinion of the authors, Vietnamese law should stipulate a mandatory dispute resolution mechanism by DAB before going to arbitration in case the parties have an agreement on the application of this mechanism in the contract. Practice shows that, although the parties have agreed to apply the dispute resolution mechanism by the Dispute Resolution Board, when a dispute arises, one of the parties delays the establishment of the Resolution Board within the prescribed time limit, to submit the dispute to arbitration. Furthermore, if a litigant objects to this decision and believes that the DAB step is mandatory before arbitration, the law does not specifically provide for that. That leads to the arbitrator and the parties in the project becoming confused about whether if the arbitrator accepts the settlement and makes a decision, will the award be invalid or not. Because although the parties have agreed to use this mechanism to help the parties resolve disputes effectively, in reality this provision can cause a number of complicated legal issues in the event of a dispute, in the parties do not comply with the agreement. Pursuant to the provisions of the 2010 Commercial Arbitration Law, there are no clear, specific regulations on the legal value of this agreement. Leading to the Court making different decisions on the consequences of breach of the dispute settlement agreement by the Dispute Resolution Board. Accordingly, violating the above contract terms can make the arbitration award invalid and affect the rights of the parties in the project.

For example, in the EPC Contract signed between the investor and the contractor, the parties agree to apply the dispute resolution mechanism by the Dispute Resolution Board in Article 20.2 "Disputes must be resolved." adjudicated by the Dispute Resolution Board under Clause 20.4". However, when a dispute later arose, the parties did not resolve it by DAB but took it to arbitration. At this time, the arbitration center handling the above dispute encountered many difficulties when it could not determine whether the Arbitrator had the authority to resolve the above case if the parties had not brought the dispute to the DAB or not. Then one party in the contract sued the case to the Court and the Court held that the Arbitrator had jurisdiction to resolve the matter even though the parties had violated the above agreement.

Another approach, specifically in the case of *Vietmindo v. Hoang Long* (People's Court Hanoi City, 2014). Specifically, the two sides have agreed to negotiate in advance and only if the two sides fail to negotiate will the dispute be submitted to arbitration. But the parties never took steps to discuss and negotiate, so Vietmindo company complained to Arbitration. The People's Court of Hanoi issued a decision to accept the request to cancel the arbitration award based on violation of the MDR clause (multi-level dispute resolution clause). The court emphasized the binding value of the contents of the MDR clause.

Through the above case, it can be seen that the Court viewed the MDR agreement in general and the dispute resolution method by DAB in particular as a pre-litigation procedure and mandatory for the parties. In the group's opinion, this approach is appropriate, because the parties have agreed with each other on the principle of free and voluntary agreement. At this time, the parties have the obligation to comply in good faith and honestly with the commitments in the contract according to the provisions

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of Article 3 of the 2015 Civil Code. In addition, in Clause 3, Article 6 of Decree 37/2015/ ND-CP clearly stipulates that a valid construction contract is the highest legal basis for resolving disputes for the parties. Therefore, the parties should respect and seriously comply with the agreement that the parties committed to each other in the contract. The fact that the parties do not carry out the stage of bringing the dispute to DAB but taking it directly to arbitration is a violation of the contract. And the Arbitrator or Court must also respect the agreement of the parties that has been legally established (Tran Viet Dung, 2021).

Because of the above reasons, construction law should stipulate the direction of bringing a dispute resolution mechanism by the Dispute Resolution Board according to the FIDIC Contract Forms to be mandatory before going to arbitration. That helps the parties to maximize the advantages, as well as follow the true nature of this mechanism. In addition, learning from the FIDIC 2017 Contract Model Set, it is necessary to clearly stipulate that the DAB's judgments will be immediately binding and remain until the arbitrator's decision is issued. This regulation will help encourage parties to try to comply with the DAB's decision instead of having to incur additional arbitration costs.

Third, it is necessary to enhance the role of VECAS (Vietnam Construction Consulting Association - joined FIDIC since 1997) in resolving construction contract disputes.

The majority of projects in the construction sector in Vietnam today that use the FIDIC Contract Form are projects of great value or with the participation of the state or foreign investors. As for projects in the private sector, small projects, not many projects apply the FIDIC Contract Form or if they do, they usually only apply case DAAB (DAB only has the function of resolving disputes, without preventative function). This is because the cost to hire experts with full capacity, experience and deep understanding of FIDIC Contract Forms is quite large. Because currently in Vietnam there are not really many qualified experts participating in the Dispute Resolution Board, so most large projects that want to apply this mechanism have to hire experts from abroad. At the same time, when applying a permanent DAAB will be established from the beginning of the contract to the end of the project. That makes the cost of using this mechanism “huge” compared to small projects and projects in the private sector. This is also a huge barrier in building a dispute resolution mechanism through DAAB.

Therefore, to solve the above problem, as well as encourage investors to use this strict dispute resolution mechanism, it is first necessary to enhance the role of VECAS in resolving contract disputes. Therefore, the law first needs to recognize the changes in the FIDIC 2017 Contract Model Set on DAAB to promote the cultivation of professional skills and expertise of construction engineers and experts in Vietnam, at the same time. It is necessary to strengthen VECAS's role in providing expert advice, to avoid the situation where DAAB provisions become formal and ineffective. Specifically, it is necessary to organize seminars, workshops, and create conditions and environments for experts and engineers to have the opportunity to exchange, give comments, and give their opinions on the use of the Contract Form. FIDIC contract in general and using the dispute resolution mechanism by the dispute resolution board in particular. In addition, it is necessary to organize training sessions to improve professional qualifications and understanding of this dispute resolution mechanism for experts and engineers in the field of construction. In addition, it is advisable to create conditions for the parties to a construction contract to select foreign experts or a council of engineers, if the parties are qualified to choose and consider it necessary (Bui Tran Thuy Vy, 2021).

CONCLUDE

Currently, in the world, along with the FIDIC Contract Form being popularly used in construction projects, project parties also focus on applying the Dispute Resolution Board mechanism. This mechanism has played a very optimal role in preventing disputes as well as resolving disputes. Besides, in Vietnam today, the FIDIC contract form has not been unified in application, and there are many differences with the FIDIC contract form. Therefore, in order to improve the efficiency of construction projects and the benefits of all parties, Vietnamese law needs to have specific regulations, regulating the true nature of DAAB. The article aims to provide general knowledge about the resolution mechanism through the Dispute Resolution Board in the FIDIC Contract Form and some related practices in the country and around the world. From there, propose appropriate solutions and recommendations to improve Vietnamese law.

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