

Dispute Boards as Pre-Arbitration Tools: Recent Developments and Practical Considerations

Kluwer Arbitration Blog

February 28, 2015

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Please refer to this post as: Paul Taggart, 'Dispute Boards as Pre-Arbitration Tools: Recent Developments and Practical Considerations', Kluwer Arbitration Blog, February 28 2015, <http://arbitrationblog.kluwerarbitration.com/2015/02/28/dispute-boards-as-pre-arbitration-tools-recent-developments-and-practical-considerations/>

Introduction

Initially created as a tool for construction contracts, a dispute board may be defined as an intermediate dispute resolution mechanism established at the outset of the project and remaining in place until the end thereof whereby board members, with the expertise of the relevant construction sector, upon request provide prompt recommendations or decisions whenever a dispute arises. In the case of the latter, the decision has a binding effect on the parties unless and until it is reversed by the arbitral tribunal or court. When defined so, it is clear it serves mainly for dispute avoidance along with providing interim relief of the dispute until a final award is made to that respect.

In a recent conference where I made a speech on the dispute board mechanism in construction contracts, I encountered a strong statement by a very large construction company's in house lawyer to the effect that: *"We do not think dispute boards may be effective, therefore we do not use them"*. Very surprising when articulated, but it is a fact that such an approach exists. On the contrary, an evaluation of the recent developments in the usage of dispute boards as well as certain practical considerations may prove to be useful for a better understanding of the benefits of this prominent pre-arbitral dispute resolution tool.

Developments

1. Rules and Revisions

Available and widely known dispute board rules are firstly those incorporated in the FIDIC 1999 suite of contracts drafted for the international construction sector. These were followed by the ICC Dispute Board Rules initially introduced in 2004 and mainly, but not exclusively, used for the construction contract related disputes. Further examples of dispute board rules are to be found in the American Arbitration Association (AAA), the Dispute Resolution Board Guide Specifications for construction contracts where actually the concept was initially created, effective as of 2000; and finally those drafted by the UK Chartered Institute of Arbitrators (CI Arb) in August 2014.

The last of these represents a significant development as the CI Arb in producing its rules; demonstrated the growing usage and need for tailoring the rules according to demand. The most significant aspect of the recent rules is their underlying flexibility and applicability to all types of disputes in all types contracts and in all types of industries, potentially widening the use of dispute boards beyond the field of construction.

2. Legislation

Another noteworthy recent development in dispute boards is the official encouragement for their use especially in emerging markets where even other alternative dispute resolution methods are fairly new and recently established.

A good example of this is to be found in Peru. Following the initiative by the Catholic University's Center for Dispute Resolution, Lima and the Peruvian Society of Construction Law, dispute boards become mandatory prior to the ultimate dispute resolution, in Public Works Law and in Framework Law in Public-Private Partnerships. Likewise, in Honduras the Law of Public Works includes dispute boards as an obligatory step for public contracts above a certain threshold.

3. Case-law

Lastly, world-wide case-law is in process of establishing dispute board "case precedents", especially that related to the enforceability of dispute board decisions and dispute board agreements; thus permitting a better functioning of this pre-arbitral tool.

The famous *Persero* cases quite recently decided in the Singapore High Court are noteworthy with regard to the enforceability of binding dispute board decisions. In this regard the second HC decision rendered on 16 July 2014 ("*Persero II*", *CRW Joint Operation vs. PT Perusahaan Gas Negara (Persero) TBK*) approved an interim arbitral award for the interim enforcement of a DAB decision emphasizing that "*nothing in its interim award precludes the same tribunal from determining the primary dispute on its merits and with finality in future*" (*Persero II*, paragraph 115). Without going into the details of the discussion, it may simply be stated that such an approach is in line with the intention of dispute board mechanism: effectiveness in time.

Alongside the cases on enforceability of the decisions, enforceability of the dispute board provisions in a contract has also recently been elaborated. Here the Swiss Supreme Court in its decision dated 7 July 2014 (Case no. 4A 124/2014) decided that FIDIC Clause 20 established the dispute board as a mandatory step before arbitration so that even the absence of a time limit to appoint the dispute board did not change its mandatory nature.

Similarly, the Technology and Construction Court of the English High Court decided on 10 October 2014 (*Peterborough City Council vs Enterprise Managed Services Ltd* [2014 EWHC 3193 (TCC)]) that "*in the absence of any agreement to the contrary, the [DAA] is to be in the form set out in the Appendix to Conditions[...]*" (paragraph 28) and that even the signing of the dispute adjudication agreement should not be an imposed obligation given that "*if a party without good reason refused to sign the agreement, I cannot see why it could not be compelled to do so by an order for specific performance at the suit of one or more of the other parties*" (paragraph 31).

Both decisions undoubtedly favour the applicability of the dispute board provisions against parties' attempts to overcome such step.

Practical Considerations

Having listed certain recent developments, I would also like to offer certain suggestions as to dispute board practice that require to be adopted so as to obtain the best possible outcome from it.

One issue that is often encountered as shown in the recent case law cited above, is the key issue of timely appointment of the dispute board. Whether a time limit is set forth or not, it is most advisable to appoint the board at the very initial stage of the contract to avoid any future discussions over the validity of the dispute board clause and the enforcement thereof. To save time, dispute board member candidates are to be contacted at the initial stage if not prior to conclusion of the contract, to

ensure their availability as well as to eliminate any conflict of interest problems. Parties may well consider contract closure or effectiveness as dependent on the boards appointment.

Again at the stage of appointment, another element to be taken into consideration is the careful selection of dispute board members sufficiently experienced in the type of work comprising the contract and the jurisdiction in which the attached project is undertaken. Simple put it may be that, these two considerations, when not undertaken properly, may result in unintended expenses and ineffective decisions as the board is not familiar with the project type, contract interpretation, or without as regards the chairperson knowledge of law including that of the jurisdiction any decision has been rendered in.

Finally, a food for thought. One of the most problematic areas especially in construction disputes is the calling of the performance bond by the project owner, which can be unconditional and irrespective of existence of any default on the part of the contractor. There is an imbalance between an unconditional demand guarantee (thus, heavily favouring the owner) and a demand guarantee that may be called only upon a favourable arbitral award (thus, heavily favouring the contractor). A requirement of a dispute board decision stating the contractor is in breach (or not) in order to call the guarantee may provide the necessary balance and accordingly discourage any lengthy disputes which are not good for either party.

Conclusion

"We do not think dispute boards may be effective, therefore we do not use them" was a call to arms. It highlighted to me lack of knowledge of the width of application and current usage of dispute boards and their attendant benefits. Dispute boards installed at the outset of a project following it closely are now entrenched in international forms of construction contracts and increasingly state legislation as the primary step for avoiding and resolving disputes at an early stage and preventing them from festering and graduating into something more protracted and resource consuming in nature. The plethora of forms of dispute boards and rules now available is testimony to the dispute board systems growing reputation and attraction as an early intervention "real time" approach. The dispute avoidance role performed by the board is a fast developing craft in itself.

A body of DB jurisprudence giving support to force of boards and the interim enforcement of DB decisions is also accumulating which is dispelling any early fragility concerns. That development gives gravitates to a system which has enjoyed its successes in the USA even without that. The author has experienced cases where disputes referred to a dispute board and which have then proceeded to arbitration have returned the same outcome, yet the cost and time to resolve has multiplied many fold.

Of course for such a system to be successful, certain fundamentals should be observed. It is desirable that boards are appointed early in the project and adopted as part of the project team, and board members be qualified impartial professionals with the ability to acquire the trust and confidence of the parties such that when they apply their combined technical and contractual knowledge to the facts presented, well-reasoned recommendations or decisions are result ...and all in real-time.