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Appointing the Dispute Board – Why It Differs from Arbitration Appointments

Lindy Patterson (Dispute Resolution Board Foundation) · Monday, April 20th, 2015

As contracts containing Dispute Adjudication Boards (“DAB’s”) as a mandatory prerequisite to arbitration are on the increase (and being recognised as such by many legal systems) what issues are there around enforcing the establishment of such a Board? There is always, especially when a contentious situation has arisen, a party more reluctant to engage in resolving matters. In contracts which provide for dispute boards this is evident where one of the party which refuses to agree the appointment of a board and will not sign a dispute adjudication agreement. Can a dispute board be properly constituted by only one party? Is it any different to appointment of an arbitration tribunal and if so why?

The party initiating the appointment of the board will usually be the contractor. Some employers will do all they can to avoid appointment of a board. If you take the typical clause 20 Dispute Board provision in FIDIC red book –what does it provide for in the event of such non co-operation?

Clause 20.2 provides that parties shall jointly appoint a DAB. Clause 20.3 provides that where parties fail to agree upon a sole DAB member or, in the case of a three member board, one party fails to nominate a member, the appointing entity steps in to appoint. Clause 20.3 states “*this appointment shall be final and conclusive*”. It also provides that parties shall each be responsible for one half of the cost. So far, so good. Only one of the party’s participation is required to get to this stage. In the case of a one man board it will have meant the participating party has not obtained its choice of DB member- it will have had to rely on the appointing body’s selection. But it has obtained an appointment. So what then?

Clause 20 then refers to a tripartite agreement being entered into among the two parties and the DAB. It states the agreement between the parties and the board shall incorporate by reference the General Conditions of the Dispute Adjudication Agreement. These General Conditions are set out as an appendix to the FIDIC contract. If both parties do not sign the agreement, the wording of clause 20.3 is such that these General Conditions will not apply. This is unfortunate as they contain extremely useful procedural rules as well as dealing with the level and timing of the DAB Members’ fees and expenses. So what happens then? Is the DAB not able to be established?

The absence of such an agreement does not in my view prevent a DAB coming into effect. The provisions leading to appointment of a DAB sit separately from the obligation for parties to enter in to an agreement with the DAB. What it does do, however, is leave the remuneration of the DAB

members to that which is fair and reasonable rather than daily rates as agreed. And leaves the procedure much more open to debate. Some DAB members will not be keen to operate in such circumstances.

How does this process compare with arbitration? As with dispute boards, in most cases arbitration is as a result of an arbitration agreement between the parties. However in most legal systems the arbitration process will be underpinned by legislation or case law. This will recognise party autonomy in agreeing an alternative to the courts. It is also likely to provide a support mechanism where the courts can step in and appoint a tribunal where the contractual arbitration mechanism just does not work (including where this is because of an unwilling participant). In addition in some jurisdictions, default procedural rules are, such as those contained in the English and Scottish Arbitration Acts will apply in the absence of agreement of the parties on other applicable rules. So if there is no other agreement as to procedure they are already there.

These are the significant differences between appointing an arbitration tribunal and a Dispute Board. One has the underlying support of legislation and the courts. The other does not. Dispute Boards depend entirely on the contract terms establishing them and the courts' enforcement of these as a matter of contractual obligation. Accordingly any underpinning of the process can only come through the terms of the contract. The more that the appointment of the DAB and its terms can be enshrined with the contract itself rather than a separate "agreement to agree" relying on both parties' co-operation, the better.

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