

ADR Head to Head: dispute boards and arbitration

30 July 2020

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Introduction

- The basics
- Legal basis
- Procedure
- Enforcement and enforceability
- Lessons from COVID-19

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The basics



What are they?

- Dispute boards (DBs) and arbitration are both private dispute resolution mechanisms agreed by the parties.
- Default position is disputes can be referred to local courts. This can be amended as follows:
 - Firstly, parties may agree to use arbitration instead of the courts to finally determine the merits of disputes under the contract.
 - Secondly, parties may agree to include a preliminary dispute procedure, such as a DB, which must be completed before a dispute can be referred to arbitration or court.
- Once agreed upon, these mechanisms will be mandatory.

Common features

- Dispute boards and arbitral tribunals consist of:
 - A person or panel of three or more people (sometimes up to seven, as with many Investor-State arbitrations, and DBs on large projects such as the Hong Kong Airport extension at Chek Lap Kok, and the current DB for the works to upgrade the CERN Hadron Collider);
 - Who is/are independent and impartial, and suitably qualified and experienced for the types of issues arising from or which might arise from the project in question;
 - Selected and appointed by the parties (and/or a nominating entity where the parties cannot agree or one party does not cooperate);
 - To issue recommendations (not arbitration) and/or decisions in relation to disputes arising from a contract.

Not a like-for-like comparison.

In a nutshell: arbitration

- Arbitration is effectively private litigation. It is a relatively rigid procedure designed to finally decide any dispute that is referred.
- Key benefits:
 - Confidentiality
 - Flexibility
 - Cost
 - Limitation
 - Enforceability

In a nutshell: arbitration - cont.

- Key negatives:
 - Unlike Dispute Boards, it is not responsive
 - Aggregation of claims
 - Cost

In a nutshell: dispute boards

- DBs fulfil a different role to arbitration. They are a preliminary procedure designed to quickly resolve issues and claims, and avoid them turning into disputes that escalate to formal proceedings.
- Ideally set up at the start of a project and remain in place for its duration.
- Key benefits:
 - Private.
 - Parties choose DB members.
 - Highly customisable.
 - Dispute avoidance.
 - Resolution of disputes in “real time”, from a DB already informed about the project.
 - Avoids aggregation of claims.
 - Significantly reduced procedural steps, timeframes, and costs.

In a nutshell: dispute boards - cont.

- Key negatives:
 - Upfront costs.
 - Not a recognised legal concept, enforceability issues.
 - It can be difficult to enforce the procedure if one party does not cooperate.
 - Does not stop limitation running.

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Legal basis



Legal basis: arbitration

- Doctrine of separability
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”)

Legal basis: arbitration

England and Wales

- ***Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638***
- Three-stage test to determine the law of an arbitration agreement:
 1. is there an express choice of law governing the arbitration agreement?
 2. if not, can a choice be implied?
 3. in the absence of a choice, with which law does the arbitration agreement have the 'closest and most real connection'?

Legal basis: arbitration

Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb

[2020] EWCA Civ 574

- The Court of Appeal ruled that where there is no express choice of arbitration law, general rule is that the parties' implied choice is the law of the seat of the arbitration, unless there are “*particular features of the case demonstrating powerful reasons to the contrary*”.

Legal basis: arbitration

Summary: the position under English law

- The current position under English law is that the seat of the arbitration will be the applicable law of the arbitration agreement, unless the parties have expressly chosen otherwise, or there compelling reasons otherwise.
- Supreme Court judgment awaited in *Enka v Chubb*.

Legal basis: arbitration

The *Sulamérica* test applied internationally: Singapore

***FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12**

- High Court welcomed the three-stage test applied in *Sulamérica*, however, it disagreed that the starting point for the second-stage of the test should be an presumption that the main contract law would apply to the arbitration agreement.

***BCY v BCZ* [2016] SGHC 249**

- This presumption was reversed in 2016 in *BCY v BCZ*.

Legal basis: dispute boards

- DBs are created by contract.
- DB powers and the basis of any decision are grounded in the contractual force given to them under the applicable law.
- DBs are not separate to the construction contract they have been incorporated into.
- The applicable law of the DB procedure will therefore be the governing law of the contract.
 - FIDIC, Sub-clause 21.2 of the 2017 Yellow Book: “The law governing the DAAB Agreement shall be the governing law of the Contract...”
 - CIArb Dispute Board rules, Article 1: “*Applicable Law means the law applicable to the Contract.*”
- Enforcement under applicable law or law of arbitration agreement?

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Procedure



Selecting a procedure: arbitration

Institutional or ad hoc arbitration?

- Standard forms and the incorporation of institutional rules by reference. For example, FIDIC incorporates the ICC Rules in its arbitration clauses.
- Other international institutions that have published rules include SIAC, DIAC, HKIAC and LCIA.
- Ad hoc arbitrations

Selecting a procedure: dispute boards

- There are several established types of DBs, the most common being dispute review boards (DRBs) and dispute adjudication boards (DABs).
- DRB: Non-binding recommendations.
- DAB: Binding decisions.
- Combined Dispute Board (CDB): Parties can request non-binding recommendation or a binding decision.
- Dispute Avoidance Adjudication Board (DAAB): Regular site visits, informal advice, and binding recommendations.

Key elements of the procedure: arbitration

- Referring a dispute to arbitration
- Agreeing a procedure for the presentation of evidence
- Timeframes to award

Key elements of the procedure: dispute boards

- Broader, dispute avoidance function:
 1. “Standing” over “Ad hoc”: The DB should be appointed early and remain in place for the contract duration.
 2. Regular meetings and site visits: increased role of virtual meetings.
 3. Informal advice provision: care is needed.
 4. Either party may refer a “dispute” to the DB following which it will have a specified period of time to issue its recommendation or decision (whichever applies), usually 84 days.
 5. Limited period to notify dissatisfaction.
 6. Condition precedent to arbitration.
- Obtaining a decision or recommendation:
 - 84 day period from referral of dispute to issue of decision or recommendation.
 - The DB has discretion, usually not fettered by any particular procedure.

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Enforceability and enforcement



Enforceability of arbitration agreements

- As mentioned previously, an arbitration agreement is separate to the underlying contract in which it is contained (see *Enka*).
- If a main contract was found to be invalid, that would not necessarily affect the validity of the arbitration agreement.
- The principle of separability is recognised in most key arbitral jurisdictions and is necessary to ensure that arbitration remains a workable and effective method of international dispute resolution.

Enforcement: arbitration

Enforceability of arbitration awards

- The New York Convention provides an international framework for the enforceability of awards.
- There are 164 parties to the Convention.
- Countries that have signed and ratified the Convention agree to recognise and enforce awards made in other contracting states.
- Where a state has ratified the Convention, awards must be enforced by the national courts subject to certain limited defences.

Enforceability: dispute boards

- Mandatory pre-condition to formal proceedings. This will be upheld by the courts in most jurisdictions, both Common Law such as the UK and Singapore, and Civil Law such as Switzerland and the UAE.
- Can DBs be bypassed? In short, no:
 - *Peterborough City Council v Enterprise Managed Services Limited* [2014] EWHC 3193 (TCC).
 - Decision 4A_124/2014 (Swiss Supreme Court).
- Arbitral tribunals have shown sympathy to relief from “tactical manoeuvres”.
- New FIDIC Sub-clause 21.8:

If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAAB in place (or no DAAB is being constituted), whether by reason of the expiry of the DAAB’s appointment or otherwise:

(b)... the Dispute may be referred by either Party directly to arbitration.

Enforcement: dispute boards

- Where DBs are empowered to issue binding decisions, whether those decisions can be enforced is questionable.
- Typical issues with the enforcement of not-final DB decisions (i.e. where a NOD has been issued in respect of the decision) are as follows:
 - Whether the contracting wording permits it (e.g. 1999 FIDIC Contracts).
 - Whether an arbitral award enforcing a not-final DB decision will comply with the definition of an enforceable arbitral award in a jurisdiction's arbitration legislation, given that such an award (a) will not review the underlying merit of the dispute and (b) will be followed by a final substantive arbitral award on the underlying merits; and
 - Whether such an award will be prevented by the principle of *res judicata* (that a matter already decided cannot be decided again), because the final substantive arbitral award will need to decide the same matters that are subject to the enforced DAB decision.
- Enforceable: Singapore, South Africa, Namibia.
- Not enforceable: Romania, Bulgaria, United Arab Emirates.
- Example: *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 ("*Persero v CRW*").

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Lessons from COVID-19



Lessons from COVID-19

- Unprecedented disruption, but there was already a trend starting towards holding some DB meetings virtually. COVID-19 has made this necessary.
- Limited procedural guidance in relation to DBs. Some DB institutions are publishing guidance, or in the process of publishing guidance, on virtual hearings and meetings.
- Parties will need to look to what powers they have given to the DBs to conduct virtual or telephone hearings and meetings, and whether amendments should be agreed to cater to this.
- Similarly, COVID-19 has made conducting in person arbitration hearings extremely difficult, particularly in cases where international parties are involved.
- Some arbitral institutions such as the ICC have published guidance on how their rules can be interpreted to accommodate virtual hearings, whilst others such as HKIAC and the KCAB (Seoul Protocol), have issued guidance on how such hearings should be conducted.

Lessons from COVID-19

- Familiarity with digital meeting platforms.
- Technology: For instance, drone videos allow access to projects that site visits often cannot match.
- Hearings: virtual hearing providers.
- Benefits of virtual meetings include: easier to find available dates, it will encourage executives of the companies to join, cost.
- The downsides of virtual meetings: more difficult for the parties and DB or Tribunal to build relationships and discuss issues in-depth.
- Going forward?

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**Thank you.
Questions?**

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