FIDIC Dispute Adjudication Boards

5 Things you need to know

1. Resolution of disputes through Dispute Adjudication Boards is a fast track process

The FIDIC suite of Contracts (1999 Edition) provide within clause 20 that if an Engineer’s determination is disputed, that dispute may be referred to a Dispute Adjudication Board (DAB) who will adjudicate upon it and issue a reasoned Decision within 84 days (or such other period as the parties to the Contract agree).

For disputes that arise on major international projects, this can be a quick process, particularly in circumstances where complex engineering, delay or quantum issues need to be resolved. As such, parties need to be well prepared before commencing DAB proceedings in order to avoid viewing the process as “rough justice”.

2. DAB Decisions are binding unless challenged in Arbitration (or the Courts)

A DAB decision becomes final and binding unless either party issues, within 28 days, a Notice of Dissatisfaction. If a Notice of Dissatisfaction is served the Decision is binding, but not final.

In practice what this means is that the benefiting Party could seek an interim award from the ultimate tribunal to give effect to the binding DAB decision (re Persero, Singapore, 2014). This position has also recently been supported in English law. In the Technology & Construction Court in England, (Peterborough City Council -v- Enterprise Managed Service (2014)) the Judge observed that there would be nothing to prevent a Court ordering specific performance of the contractual obligation.

Accordingly FIDIC contracts provide that the decisions of the DAB will have legal effect and will bind the parties to the contract – if an award is made it should be complied with. Arbitration Tribunals (or Courts), in many parts of the world will give effect to the contractual terms and will not allow parties to step aside from their original agreements.

It is therefore important that a party to a FIDIC Contract prepares fully and understands its case to be submitted to a DAB.
3. What happens after a Notice of Dissatisfaction is issued?

FIDIC provides for a cooling off period to allow the parties to seek to achieve settlement after a Notice of Dissatisfaction has been served, but if settlement is not reached then the dispute will be decided in Arbitration (or, perhaps, litigation in a domestic Court).

Parties should consider whether or not the standard terms in FIDIC provide enough time for major international companies to make the most of the opportunities provided by FIDIC to achieve settlement. It is also worth considering the distraction that the DAB process and subsequent arbitration process is likely to have on a project team during an ongoing project.

4. How is the DAB Formed?

The FIDIC Red Book requires that the DAB shall be appointed by ‘the date stated in the Appendix to the Tender’ – a standing DAB; whereas by comparison the Yellow Book requires that the DAB will be ‘jointly appointed’ by the date 28 days after a Party gives notice of its intention to refer a dispute to the DAB’ – an ad hoc DAB.

Due consideration should be given to what best suits the project and the parties on a particular project before finalising the contract terms and agreeing the dispute resolution provisions.

5. Is referring a dispute to a DAB a mandatory step?

Whether or not a party must refer a dispute to a DAB before arbitrating on that dispute may vary depending upon the applicable law. However, recent cases in Swiss and English law have clarified the position in those jurisdictions (and it seems likely will be supported in, as a minimum, most other common law jurisdictions).

In a recent case, 4A_124/2014 the Swiss Supreme Court was asked to decide whether referring a dispute to a DAB was mandatory prior to any entitlement to refer a dispute to Arbitration.

The Court decided that it was and it reached its decision despite the fact that the construction of the DAB had not been agreed.

(It is noteworthy, however, that on the relevant facts because the Party arguing in Court that a decision of the DAB was a requirement before the matter could be referred to Arbitration had caused significant delay, the Swiss civil code good faith obligation meant resulted in the Swiss Court’s deciding that the Arbitral Tribunal did have the necessary jurisdiction).

In a case heard recently in the Technology & Construction Court in England, Peterborough City Council -v- Enterprise Managed Service (2014), it was further confirmed that a referral to a DAB is mandatory before a referral of the dispute to litigation (the arbitration provision had been amended to litigation in this case).

In this case the Purchaser/Employer argued that given the matters in dispute, final determination in Court would be required and that the DAB would simply add cost and unnecessary delay. The Court rejected this argument deciding that effect should be given to the mechanism agreed in the Contract.

Parties to a FIDIC Contract must therefore be alert to the fact that Tribunals will enforce its terms.

Conclusions

Real care is therefore needed; the unsuccessful Party to a DAB could face payment of sums which may or may not prove to be recoverable following a full and final determination.

It is essential that a Party prepares fully for the DAB process and does not see it simply as a toothless step through process on the way to arbitration.

On complex engineering projects the issues in dispute likely require detailed analysis and preparation, often involving external independent advice. This can, and most likely, will be both disruptive to the ongoing project works, time consuming and costly.

When agreeing the dispute resolution mechanism prior to entering into the contract, give due consideration to the 84 day period in which a DAB will issue a reasoned Decision.

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