

DRBF R3 Breakfast Briefings

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An International Arbitrator's View on Dispute Boards

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Overview

- What Do Arbitrators See?
- The Arbitrator's Role
- The Differences in Process

What Do Arbitrators See?

Tip of the iceberg of issue resolution



What Do Arbitrators See?

→ A lot of jurisdictional/admissibility contentions

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Clause 3.7.5 Dissatisfaction with Engineer's determination

If either Party is dissatisfied with a determination of the Engineer:

(a) the dissatisfied Party may give a NOD to the other Party, with a copy to the Engineer;

...

(d) thereafter, either Party may proceed under Sub-Clause 21.4 [Obtaining DAAB's Decision].

Clause 21.4.4 Dissatisfaction with DAAB's decision

Except as stated in the last paragraph of Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], in Sub-Clause 21.7 [Failure to Comply with DAAB's Decision] and in Sub-Clause 21.8 [No DAAB In Place], neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

What Do Arbitrators See?

- The difference between jurisdiction and admissibility
 - Preconditions for arbitration viewed as conditions precedent means the Tribunal does not have jurisdiction (*International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130); or
 - Characterised as a matter of admissibility (*Republic of Sierra Leone v SL Mining* [2021] EWHC 286 (Comm))

- The DAB decision(s)

The Arbitrator's Role

→ *De novo* decision

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Clause 26.1 Arbitration

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Engineer, and any decision of the DAAB (other than a final and binding decision) relevant to the Dispute.

The Arbitrator's Role

- Decide on a lot more material than was available to the DAB
- Take the DAB decision into account amongst all other material
- Conduct a “due process” proceeding

The Differences in Process

- An attenuated procedure
- “Pleadings”, statements, document disclosure, hearing, Award
- More formality

The Differences in Process

- Enforcement and “seat” review
 - Limited role for court at the seat

- Circumstances where the court may refuse to enforce a foreign award (see Article V of the New York Convention and s 8 of the *International Arbitration Act 1974*)
 - The parties were under some incapacity, or the arbitration agreement was invalid
 - Lack of proper notice of the appointment of arbitrator or the proceedings
 - Award contains decisions on matters beyond scope of the submission
 - Parties were unable to present case
 - Composition of the arbitral authority or the arbitral procedure was not in accordance with parties’ agreement or law at the seat
 - Subject matter is not capable of settlement by arbitration
 - Enforcement would be contrary to public policy

- Dispute board decisions are part of the genre of expert determinations and do not assume the “judicial” character of arbitration

QUESTIONS / COMMENTS

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