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SESSION 3: THE DAB ADJUDICATION

DECIDING DISPUTES BY PROPERLY BALANCING CONTRACT AND GOVERNING LAW

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Introduction

Compared to judicial decisions and arbitral awards, would DAB decisions necessarily imply a natural preference for the application of the terms of the contract rather than the provisions of the governing law?

The DRBF Practices and Procedures Manual, 2007, for Dispute Boards, including DAB, offers rather meager guidance. The explanations under Canon 5 of the DRBF Code of Ethics provides:

"The paramount purpose of the DRB process is impartial consideration of all disputes referred to the DRB. This requires that members act without favor to either party to the dispute. DRB reports must set forth the facts, and the DRB's findings and recommendations must be based on those facts, the provisions of the contract documents and prevailing law."

The Manual points to a controversy within the United States that "once intimately involved in the process, the organized legal community may push to alter the process in ways that render DRBs less effective in fostering common sense resolution". However, in complex projects and where the attorney holds a degree in engineering and has a thorough understanding of construction law, the

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although warning that parties and DRBs should discuss the pros and cons of legal counsel participation, recognizes that DRBs that have included attorneys as Board members have generally experienced commendable results. In any event, the experienced construction professionals can readily interpret contract documents and probing questions from knowledgeable Board members is often far more effective than a lawyer's cross-examination.

Where multiple nationalities are involved in the project, often involving a state entity and entailing large amounts of money, the assistance of lawyers could prove beneficial for the preparation of written presentations to the DB to better assure clarity and completeness. However, hearings being less formal than in arbitration or litigation, the use of lawyers to present the case should be discouraged, except perhaps in relation to legal matters.

Achieving a fair and just result must remain the guiding principle in "properly balancing contract and governing law". The Manual rightly points out that like a judge or arbitrator, each Board member will have his or her personal views of fairness and equity.

Governing law: procedural issues

- The contract and the DB operating rules will often be silent on procedural difficulties encountered during the DB process in which case the governing law should be resorted to resolve issues such as to:
 - Jurisdiction:
 - Late or absence of appointment of the DB as required by the contract
 - Fidic appointment required but no available candidate in the mandated language: can the DB proceed?
 - Admissibility of documents.

- Equality of treatment and due process despite the fact that a hearing before a DB is far less formal, at least it should be so, than in arbitration and even more so in court. The DB must ensure that each party has had a full opportunity to be heard and present its case. Unexpected production of documents can create problems as the other side should be afforded the opportunity to consider and respond.
 - *Ex parte* situation: due regard must be given to the position of non-appearing party as for instance the Engineer's right to set new rates when a variation in design is issued.
 - Inequality of arms of the Parties vis-à-vis the DB process especially if the local contractor is without the assistance of counsel or cannot put its case forward with clarity. In any event, the Chair or any board member should not give the appearance of partiality vis-à-vis either party.
- A legally trained professional is likely to be better equipped to deal with procedural issues than a sophisticated engineer.

Tipping the balance in favor of the Contract

The Channel Tunnel experience in relation to the governing law:

"The Arbitrator(s) shall apply the following rules in descending order or priority:

(a) The rules (including rules of interpretation) set out in this Agreement either expressly or by way of implication;

(b) The common principles of English law and French law, and in the absence of such common principles, such general principles of international trade law as have been applied by national and international tribunals;

(c) *Such principles of international trade law as have been applied by national and international tribunals, including, but without limitation, the following:*

- (i) *The principle that judgments should not be unreasonable or decisions unequitable;*
- (ii) *The principle of mutual goodwill and good faith;*
- (iii) *The principle of "pacta sunt servanda";*
- (iv) *The principle that fraud merits no protection.*

The Arbitrator(s) shall decide all cases on the basis of respect for law and, in circumstances where none of the rules, laws, regulations or principles referred to in paragraphs (a) to (c) shall be applicable, the Arbitrator(s) shall apply such principles of justice, equity and good conscience as it shall determine to be appropriate."

- Precedence was given to the contract over the applicable rules of law: common principles of English and French law.
- A year after the contract was signed, a DAB was introduced in 1987 in the settlement of dispute process: each side appointed a member and an alternate member, all engineers, and a French law professor (Philippe Malivaud) acted as chair.
- Practically all the referrals implied a legal, if not a contractual issue: determining the respective rights and obligations of the parties with respect to specific questions such as the limits of the employer's authority to seek variations or to intervene in the selection of sub-contractors. The engineers felt at times frustrated having to deal mostly with questions of law. Although counsel grappled to identify what French and English law had in common, it did not create much difficulty for the DAB to deal with the 20 referrals submitted to it. Professor Malivaud found it somewhat unfortunate that the presence of counsel basically transformed the DAB process into a kind of arbitration despite the 90 day period to render the

decision; at least, counsel were compelled to present all the strong arguments from the outset.

As DABs are composed of non-jurists, at least in a majority of cases, the Channel Tunnel case illustrates that the contract will most likely, if not exclusively, be viewed as the primary source of the parties' rights and obligations. Construction lawyers tend to be pragmatic, at least much more than law professors, and will therefore consider the dispute in the light of the contractual terms rather than the provisions of the applicable law. In the words of Peter Chapman, at the DRBF Brussels Conference in November 2011, practical and acceptable solutions are often possible whilst remaining faithful to the contractual and legal obligations.

Issues of interpretation

Above all, DABs will be called upon to interpret the contract. One objective in drafting is to achieve as much clarity and simplicity as possible, working within the limits of given legal concepts. In the real world, however, this objective will often be severely tested when the words of the contract must be applied. Issues of contractual interpretation will therefore commonly be raised in disputes before DABs. How should the words used by the parties be understood? Interpretation is required to decide upon the legal effect intended by the parties.

The rules of interpretation are provided, in most systems, by the national law applicable to the contract. As it can be expected, the application of those rules may create difficulties when the DAB is composed of members of different nationalities. Furthermore, the rules of interpretation provided by the domestic law will have been explained and refined by commentators and case law. These may not be readily available or understood by a DAB, a situation which becomes even more acute when the DAB is composed of engineers. Legal intricacies surface when the application of a contract first requires the interpretation of its terms.

When it comes to interpretation, the traditional divide between the common law and the civil law will poke its head. Confronted with the interpretation of a provision of which the meaning is disputed by the parties, the DAB has to

determine what the parties intended. Guidance should first be looked for under the governing law. In the common law, the rules, including domestic jurisprudence, will provide for an objective approach that is to say the words will be ascribed the meaning that a reasonable reader would have. The DAB members could possibly have different views as to whom the reasonable reader should be. In fact, they are likely to consider themselves to be that person and will therefore appreciate the import of the litigious words according to their own professional background.

Under common law systems, little evidence will be admitted to assist in understanding what the words actually mean. Indeed the procedural law will likely forbid the production of documents or testimonies that would relate to the pre-contract and post-contract conduct of the parties as evidence of what should be read into the words of the contract. It is true that common law rules are gradually becoming more flexible in admitting that the pre-contract negotiation and the post-contract communication and conduct may be relevant. Indeed, a strict application of exclusionary rules may result in injustice when an analysis of the negotiations clearly shows that the words used in the contract could not have been intended by the parties if applied strictly.

On the other hand, civil law jurisdiction will attempt overall to identify the true or subjective intention of the parties. This approach entails looking at possibly extensive documentary evidence for determining what the parties' intention is. In this approach, documentary proof and testimony will be admitted, especially in regard to what transpired during the negotiation, to establish what the parties had in mind when they concluded their contract. In this interpretative process, the DAB can also appreciate the parties' conduct after the contract has been

concluded. Whatever evidence is available will be taken into account to establish the actual intention.

Obviously, if the DAB members come from different legal backgrounds, there will likely be much discussion to identify the right approach for determining the parties' intention. As a matter of fact, there is an obvious risk that no unanimity be reached as to the extent of the parties' respective obligations and rights under the contract.

Fortunately, DABs will in most instances not feel prisoner of the domestic rules of the applicable governing law. The adjudicators enjoy much more flexibility in interpreting contracts than national courts do. This is particularly true once evidence has been tabled spontaneously by the parties before the DAB often without regard to the rules provided by the governing law. Even then, however, members from a common law jurisdiction could be tempted to discard evidence which relate to pre-contract negotiation or the post-contract conduct of the parties. In any event, experienced DAB will remain mindful that awkwardly drafted provisions often reflect a last minute compromise while other provisions may have been left vague deliberately, as a party may have wanted to leave its options open or the parties may have preferred to close the deal without attempting to reach an agreement on every single point.

The suite of Fidic forms offers little guidance to DABs for interpreting contracts. For instance, Sub-Clause 1.5 limits itself to specify the priority of documents by which the contractual obligations are to be interpreted. Unless otherwise stated in a particular Sub-Clause, the hierarchy established by Sub-Clause 1.5 will be complied with. In addition, Sub-Clause 1.5 provides that if an ambiguity or discrepancy is found in a document, the engineer shall issue any necessary clarification or instruction. Presumably, when the engineer or the Employer's Representative, issues such a clarification, little attention is paid to the

interpretation rules provided under the governing law. The wording of Sub-Clause 1.5, as suggested by the Guidance for the Preparation of Particular Conditions, can be replaced by a provision requiring resort to the governing law to settle the ambiguity or discrepancy. Such a substitution may however be fraught with danger, especially if the rules under the governing law are not clear and if the DAB is composed of engineers coming from different nationalities.

There are, of course, many more examples of divergence between common law rules and civil law rules but issues of interpretation are particularly revealing. However, DAB members can find some comfort, in their empirical approach, by looking at *soft law* and internationally accepted principles of law, such as the Unidroit Principles.

Internationally accepted principles of law

Arbitrators often refer to the IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council on 29 May 2010 to assist in dealing with the admissibility of evidence. The introduction to the IBA Rules states that they "*reflect procedures in use in many different legal systems and they may be particularly useful when the parties come from different legal cultures*". The IBA Rules are indeed the result of compromise among the drafters who represented different legal traditions. The aim of the IBA Rules was to introduce a good degree of flexibility to adapt the taking of evidence to the circumstances of a particular case. In matters of admissibility, for instance, the DAB could turn to the relevant provisions of these Rules for guidance.

The IBA Rules could indeed provide some inspiration to the DAB when deciding the admissibility of evidence to support the manner in which it will use its powers to interpret unclear contractual provisions. A reference to international principles of procedural law, such as elaborated under the IBA Rules, could authorize it to accept, to the extent relevant, extrinsic evidence to ascertain the parties' intentions even working under the domestic law of a common law jurisdiction. This could provide some "legal" justification for the DAB to use an

otherwise empirical approach, a practice often followed. DABs will rarely, in my opinion, accept to remain, consciously or not, captive of strict interpretation rules under a given national law.

In a current arbitration calling for the review of a DAB decision as to quantum, one of the parties complained that the intensity of the DAB proceedings was such that they bore more similarity to arbitration than a normal Fidic adjudication process designed to result in a quick decision. Over the past few decades, concerns have been raised about the judicialization of the arbitral process. More recently, similar worries have been voiced about proceedings before DBs becoming akin to arbitration. The DRBF itself has cautioned against the presence of lawyers to prepare and argue referrals because their appearance before DBs can hinder their efficiency in practice. In other words, DBs are and should remain an on site jurisdiction. As decisions must be taken within a short period of time, there is very little room to debate which solutions ought to be adopted under the applicable domestic law. Nonetheless, DAB members must be attentive that their decisions, which remain reviewable in arbitration or before a court, do not offend the applicable governing law.

In aid to the DAB, the following proposal can be made: adjudicators could complement their legal reasoning, even if minimal, by making reference to generally accepted principles of law. Often criticized as being too uncertain, thus unsuitable, *Lex Mercatoria* norms are still referred to with hesitation. However, such norms have now been codified in the Unidroit Principles. As DABs will be more inclined in practice to identify and have regard for the legitimate expectations of the parties rather than apply strictly a rule of law that will produce an undesirable result. In their quest for comforting their perception of fairness, DABs could look at the Unidroit Principles.

According to the introduction to the 1994 Edition of the Unidroit Principles (two further editions were published in 2000 and 2010), which still holds true today, the Unidroit Principles reflect concepts to be found in many, if not all, legal systems. They are written in straight forward language, systematically refraining from referring to national laws, and embody what are perceived to be the best solution, even if still not yet generally adopted. The Unidroit Principles are not a

binding instrument and, as such, do not compete with the governing law, but, quite to the contrary, can complement it. The Unidroit Principles apply to the formation, validity, interpretation, performance and termination of commercial contracts.

In a recent article on the use of the Unidroit Principles by arbitrators in international construction projects, featured in the March 2015 Issue of the IBA Construction Law International, Juan Eduardo Figueroa Valdès, an attorney in Santiago, considers that the Unidroit Principles can fill any gaps in determining the parties' intention under the applicable construction law, as a modern manifestation of *Lex Mercatoria*. The Unidroit Principles can be taken into account as part of the applicable trade usages. For instance, the Unidroit Principles could help a DAB member to convince his English colleagues to consider the notion of good faith and fair dealing, the main principles of contract interpretation and the notion of cooperation between the parties, in making decisions under the governing law. Several other provisions of the Unidroit Principles could cover other situations.

Admittedly, construction contracts are generally complex and entered for a long rather than a short duration. Even if they provide detailed provisions, such as those suggested by the Fidic forms of contract, issues will nonetheless arise in particular with respect to the interpretation of certain provisions. The Unidroit Principles, which reflect generally recognized principles of law, can be of assistance whenever a DAB is inclined to privilege the legitimate expectations

of the parties over the strict application of the governing law that would counter such an approach.

Article 4.1 of the Unidroit Principles in relation to interpretation provides the following rules for determining the intention of the parties:

"1) A contract shall be interpreted according to the common intention of the parties.

2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

This Article is further complemented by other articles found under the chapter dealing with interpretation, including the taking into account of relevant circumstances such as the meaning commonly given to terms and expressions in the trade concerned or usages. This is likely how the DAB will interpret the contract provisions in any event but its decisions can be comforted by resorting to internationally recognized rules of interpretation.

Guidance can also be obtained from Article 4.8 of the Unidroit Principles when the DAB has to supply an omitted term in the contract. This Article provides that in determining what is an appropriate term, regard shall be had, among other factors, to (a) the intention of the parties, (b) the nature and purpose of the contract, (c) good faith and fair dealing, and (d) reasonableness.

Likewise, Article 1.9 of the Unidroit Principles dealing with "usages and practices" can support a finding that the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. Furthermore, as the DAB members are professional in the field of construction, they can easily appreciate when a usage is widely known and regularly observed in the international construction industry.

Many other principles can assist the DAB in filling gaps and clarifying uncertainties. As the Unidroit Principles are written in plain language and easily accessible, DABs should be encouraged to keep them in mind to support the conclusions they reach whenever the strict application of the governing law could upset the parties' bargain. While the national law applicable to the contract should not be ignored, the Unidroit Principles are useful by helping to introduce a certain dose of flexibility which is often essential in complex construction contracts involving several nationalities.

Conclusion

Whether or not engineers sitting on a DAB can more easily grapple generally accepted universal principles of law, as codified, for instance, by the Unidroit Principles, than the provisions of a national law, the fact remains that when it comes to international construction contracts, a balanced DAB composed of engineers or other technicians and one or more legally trained members, specialized in construction contracts, will likely benefit the DB process.

A purely legal question can be put to the DAB. In such a situation, the legally trained member will certainly have a more readily access to relevant material for the DAB to decide. A recent case that I am aware of involved the determination of the following issue: whether fear could constitute a case of *force majeure* under a typical Fidic construction contract especially as the events causing the fear took place in a different country. In that instance, when the European Headquarter learnt that some employees of its subsidiary working in an African country had been kidnapped, personnel of the same subsidiary involved in a different project in a neighboring state was immediately ordered to suspend all activities for fear that it could face a similar fate.

Lawyers could even outnumber engineers on a panel when the issues expected to be submitted to the DAB are likely to be of a legal nature rather than a

technical one. I would suggest that lawyers versed in construction matters have an approach in practice similar to that of engineers. The practical approach adopted by most DABs can thus be safeguarded.