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How risky are 'ex parte' DABs?

David Brown

- **THE FOCUS**
 - DAB appointment under the 1999 FIDIC forms
- **THE ISSUE**
 - Failure of one of the parties to sign the DAB Agreement. If the DAB decides to proceed with the Referral, but on an 'ex parte' / unilateral basis, what effect, if any, does this have upon the validity of the DAB proceeding and resulting decision?

- What the FIDIC forms specify – eg, single member DAB, Yellow Book
 - Sub-Clause 20.2: appointment of DAB by agreement of parties within 28 days of notice of intent to refer dispute
 - Sub-Clause 20.2, 5th paragraph : *"The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them"*.

- What the FIDIC forms specify
 - Start of 6th paragraph : "*The terms of the remuneration of either the sole member or each of the three members shall be mutually agreed upon by the Parties when agreeing the terms of the appointment*"
 - Sub-Clause 20.3 – if the Parties fail to agree on appointment of sole member "*then the appointing entity or official named in the Appendix to Tender shall, upon the request of either or both of the Parties, and after due consultation with both Parties, appoint the member of the DAB. This appointment shall be final and conclusive*"

- What do FIDIC forms not specify?
 - Clause 20 does not address possibility that a Party fails to sign DAB Agreement following appointment under sub-clause 20.3
- How should DAB/Parties proceed if DAB Agreement not signed by all concerned?
 - Should DAB proceed with Referral?
 - Can a Party refer the dispute directly to arbitration under Sub-Clause 20.8, since “*there is no DAB in place, whether by reason of the DAB’s appointment or otherwise*” ?

- What is the Parties' agreement :
 - Relevant provisions
 - Sub-Clause 20.2, paras 5 and 6
 - Form of DAB Agreement, clause 2
- "The Dispute Adjudication Agreement shall take effect when the Employer, the Contractor and each of the Members (or Member) have respectively each signed a dispute adjudication agreement"*
- Effect of Sub-Clause 20.3
 - What is meant when it is said that appointment of DAB by independent entity is *"final and conclusive"*?

- **PRELIMINARY CONCLUSION**
 - Serious doubts as to DAB's jurisdiction, and as to the enforceability of an DAB decision via arbitration
- However, such doubts are not necessarily recognized
 - Example of ICC arbitration in which 'ex parte' procedure found by arbitral tribunal to be valid
 - 1999 Red Book – DAB should have been appointed within 42 days of Commencement Date
 - Failure to appoint/agree DAB within 42 days
 - One party refused to participate in appointment process when disputes arose

- DAB decided it had jurisdiction to hear disputes and rendered two decisions
- Losing party served timely Notice of Dissatisfaction but failed to pay
- Successful party referred other party's failure to pay to ICC arbitration
- ICC Arbitral Tribunal decided DAB had jurisdiction

- SHOULD THE FIDIC FORMS BE AMENDED?
 - Two ideas
 - Express provision that DAB nevertheless deemed to be "in place"
 - Provide specifically for direct referral of dispute to arbitration – in other words, accept that a Party may hijack the DAB stage...
 - Any other suggestions?

THANK YOU!

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