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Dispute Resolution Boards: Lessons from Latin America

Yasemin Çetinel (Dispute Resolution Board Foundation)/June 22, 2016 /Leave a comment

In May 2016, DRBF gathered in Santiago, Chile, for its annual international conference. The location is testimony to the rising demand and dispute boards practice in the region. Having served for some years in the management of our organization, it is observable that the purpose of the concept proves to be successfully established. Indeed, the newly issued dispute board rules (in Spanish) by Santiago Chamber of Commerce Arbitration and Mediation Centre, the Peruvian law enacted installing dispute boards on public contracts and finally the incorporation of dispute boards' into the projects being readied for the Rio Summer Olympics, as reported in Chris Miers' **post**, could not be better indicators.

Despite the wide range of very interesting topics covered during the conference, I will try to provide the highlights in our debates.

Dispute Boards Building Trust

The conference focused on the issue of building trust which is an essential tool for the generality of the business environments, as well as, eventually, for the resolution of disputes. Marcela Radovic, emphasized that with the competence, impartiality and the reliability element brought to the construction projects, the dispute boards are trust mechanisms: they convey trust from the board to the parties and accordingly flourish the trust between the parties.

A second speaker, Pablo Laorden referred to a very specific circumstance wherein he opined that dispute boards, by being credible entities, function to explain the "no" to the parties whilst simultaneously ensuring trust and reliability. There is no room for doubt that this is the core issue in any kind of dispute resolution and prevention system.

Dispute Boards' Role in Arbitration

It is a hot issue whether or not the dispute boards are going to eventually result in less arbitrations and therefore, stopping them, or the arbitration is unavoidable. The answer is certainly not a simple yes or no for both options. It is a fact that the main purpose of the boards is actually to prevent any disputes, which, in an ideal world, would simply result in no arbitration. On the other hand,

arbitration is avoidable. Therefore the answer is somewhere in between. As we are not in an ideal world, in practice the dispute boards may be considered as complementing arbitration.

Macarena Letelier remarked this in her speech, by later underlining, “there is no competition” between dispute boards and arbitration. The function of complementing should be by eliminating a good level of disputes at dispute board level and leaving the ultimately unsolvable ones to arbitration. After all, who would not like an arbitration with less boxes and in a faster mode?

Another point was on the difference in the competences of two concepts. Indeed, different sets of skills are necessary for dispute board and arbitration procedures. The first one requires a substantial technical knowledge on the nature of the dispute and practical solutions whilst the other requires theoretical – and most of the times procedural – depth. To that end, I would note that throughout the conference repeat emphasis was placed on the fact that the process dispute board should be simple, fast and effective. Likewise, some voiced criticism over certain institutional dispute board rules which are very detailed and which resemble arbitration rules. I myself would emphasize that the tendency is that dispute board mechanism should not be a pre-arbitration trial so as to perform and function optimally.

During discussions elaborating the dispute resolution process overall, we heard complaints on the length and cost of arbitration which may then be followed by setting aside procedures that may additionally take years in some countries. At that point, an interesting question was asked from the audience: why not combining dispute boards directly with courts, skipping the arbitration? This is an interesting proposal, yet quite radical. Very briefly, it will surely bring speed to dispute resolution, however the principle of “due process” will also be a concern. There should be a balance between the two. At this stage, strengthening the provisionally “binding” nature of the dispute board decisions seems to be a more preferable option than wholly skipping the arbitration.

Dispute Boards Compared to Mediators

Last highlight of the conference was indeed a discussion in the advance workshop. While debating on the discretion and authority of dispute boards with regard to the conduct of dispute board proceedings, the question arose: what if we empower the dispute board with authority to act as mediators? I should remind all here that if parties agree, dispute boards may meet parties ex-parte, especially in case of informal recommendations.

Nevertheless, we had a reply from one of our participants who emphasized that the “distance” and “reliability” of the dispute board vis-à-vis the parties may be hampered with such informal ex-parte meetings. The participant added that in countries that do not have an amicable settlement culture and that are newcomers to alternative dispute resolution method altogether (such as eastern Europe and Middle East), dispute boards may work because they are considered as experts and approached by the parties with respect (which is

essential to create the “trust” and “reliability”, as emphasized throughout the conference as a core element of the system). If you empower the dispute board to act as a mediator, you may risk to lose such an approach.

The conference in conclusion hosted the exchange of many ideas and very fruitful discussions. What was reiterated and confirmed however, is the fact that the dispute board concept is a unique component of the dispute resolution system with a substantial level of potential still to be developed.