The Future of the CIArb and Dispute Boards

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1 Introduction on Dispute Boards

1.1 What is a dispute board?

Dispute boards comprise one or three (sometimes five) impartial members who assist the parties of substantial projects in resolving disagreements arising in the course of the contract. Dispute boards are now an internationally recognised concept and are frequently included by default, for example by the use of FIDIC or by imposition of the development banks by virtue of their procurement procedure.

1.2 Demand for amicable dispute resolution

In the last twenty years there has been an increasing demand for less adversarial dispute resolution methods such as mediation, conciliation and dispute boards.

It is not surprising that disputes arise in the construction and engineering industry. The size and complexity of projects, the number of participants, environmental regulations, lower profit margins, the use of detailed standard and non-standard contracts, and a confrontational approach of parties with different objectives all contribute to generate disagreements. The use of dispute boards in the construction industry has over many years significantly contributed to the avoidance and early resolution of disputes.

The scope for DBs is substantial and they could be established in a range of industries worldwide, for example in the financial services industry, the maritime industry, operational and maintenance contracts and long-term concession projects.

1.3 Types of dispute boards

Dispute review boards ("**DRBs**") and dispute adjudication boards ("**DABs**") are collectively referred to as dispute boards or DBs.

DRBs

Dispute Review Boards originate in the construction industry in the USA, and are still found predominantly in the USA. **DRBs** make non-binding recommendations about disputes arising during a project. The board takes in all the facts of a dispute and makes recommendations on the basis of those facts and its own expertise. A DRB could also be considered a flexible and informal advisory panel, who might be asked for general advice on any particular matter before issuing a recommendation.

DABs

As adjudication developed in the 1990s, the World Bank and FIDIC opted for a binding dispute resolution process, so the **Dispute Adjudication Board** was born. DABs issue decisions which must be implemented immediately and are binding on the parties unless revised by an amicable settlement or arbitration.

2 Pro et Contra

2.1 Pro

Claim avoidance is clearly one of the positive attributes of dispute boards. The key characteristic that sets DBs apart from other non-court dispute procedures is that its establishment at the start of a project enables the board members to monitor the project's progress and be available as soon as the seeds of a dispute are sown. The early intervention of the DB before parties become entrenched in their positions may avoid the dispute altogether or lead to an **early resolution** while the **project continues.**

It reduces legal fees: Parties are less likely to adopt extreme positions in order to keep credibility with the DB members, also in view of the possibility that the dispute board's determinations are admissible as evidence in case of arbitration or court proceedings.

The resolution of disputes in 'real time' provides the DB with the benefit of seeing the project work as it progresses and hearing from those involved in the works while matters are fresh in their memory. Another benefit of a DB is the **resolution of disputes in manageable packages**. It is unlikely (albeit not impossible) that a referral to a dispute board contains the entirety of the issues arising between the parties during a project. The on-going dispute resolution by a DB usually minimises the aggregation of claims.

Safes goodwill: The early resolution of disagreements or disputes by a readily available DB is much more cost-effective and less acrimonious than arbitration or litigation and helps to maintain the parties' relationships.

2.2 Contra

Costs: DB members are remunerated throughout the project, usually by way of a monthly retainer, which is supplemented with a daily fee covering the time spent for activities such as travel, attending hearings, meetings and site visits, and producing written recommendations or decisions.

The cost of a DB is an understandable concern. The monthly retainer is paid to secure the availability and independence of the DB members, but may give the impression to parties that they are paying considerable amounts, while the DB members may have comparatively little work for part or even the entire project.

It requires time and effort early on to establish a dispute board. Finding and jointly appointing the right board for the project requires that the parties work together and want a dispute board.

An **example** of why DBs are ***claimed*** not to work is a typical development bank scenario: The World Bank awards a loan of US$ 100 million to a country to rebuild its infrastructure. The contract requires that a DB be appointed by the parties at the start of the project and before construction begins. The employer fails to comply. The lenders do not enforce the terms of their contract because the employer told them that a dispute board would be costly. The contractor does not insist on a DB until a dispute gets out of control. If the contractor then goes to the appointing body because the employer refuses to participate in establishing a dispute board, this delays the process considerably.

2.3 Conclusion

It has to be acknowledged that a standing dispute board which remains in place for the duration of a contract is an additional expense for the parties. It is therefore likely that dispute boards will mainly be suitable for mid- to high-value projects because of the cost involved.

The Dispute Resolution Board Foundation (the "**DRBF**")[1] estimates that DRB cost ranges from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with

[1] Formerly known as Dispute Review Board Foundation.

disputes.[2] When compared to the likely costs of arbitration, which are anywhere between 2% and 4% of the cost of the project, the expense of a dispute board can be regarded as sensible prevention cost, or as an insurance premium against the uncapped costs of litigation.

Since 2001 the DRBF records show a continuing and expanding use of DRBs and DABs, and an impressive success rate of about 97%: → 97% of construction disputes using DRBs were settled without proceeding to arbitration or litigation.[3]

The benefit of avoiding disputes or resolving them quickly as a result of the DB's presence may far outweigh its costs. The cost of litigation and arbitration can be extremely high and, at the end of the process, the prevailing party may realise that it spent far more to win the dispute than the issue in dispute was ever worth. The applicable courts and arbitral tribunals are often unable to facilitate the rapid resolution of an international commercial dispute that can be crucial, particularly in a long-term contract where maintaining a commercial relationship is very important.

3 DB Members

3.1 Appointment procedure

The process of establishing a DB is challenging. Identifying, agreeing upon and appointing individuals with the appropriate skills and experience can be difficult and time-consuming. In an ideal world, the parties would agree upon all three DB members. This rarely happens in practice.

The method which appears to be the most frequently used **is that each party nominates a member for approval by the other parties.** The two appointed members will then nominate the third member, who requires the approval of the parties and will usually serve as chairperson. Article 6 of the CIArb DB Rules requires this method of appointment.

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[2] See DRBF Practices and Procedures Manual, January 2007, Section 1, Chapter 4, page 2, clause 1.4.2.

[3] For detailed information on projects catalogued by the DRBF, see www.drb.org. With regard to recent developments and data on the use of DBs, the DRBF issued the following statement in the DRBF Practices and Procedures Manual, January 2007, Section 1, Chapter 3, pages 2 - 3: "*The use of DRBs is growing so fast and so widely that reliable data has become impossible to collect. In addition, data on DBs outside North America has always been limited because most contracts require Board members to 'treat the details of the contracts as confidential', causing concern over reporting even minimal data. Therefore the DRBF will no longer update the database in the detail currently presented on the website. However, information of a more limited nature will be collected and reported as noted below.*"

In view of the importance of establishing a DB at the start of a contract, it is advisable that the rules include a default appointment mechanism if the parties cannot agree on some or all of the members.[4]

Article 6 of the CIArb Rules states that the dispute board must be established by the date stated in the contract or, where the contract is silent, within 28 days of the effective date of the contract. If the parties fail to establish a DB in accordance with Article 6, then the CIArb shall, after due consultation with the parties, appoint the DB Member(s) within 28 days of the written request of one or both parties. The CIArb's appointment is final and conclusive, and subject to payment of an appropriate fee.

3.2 Qualifications and Obligations

The key qualifications any DB Member should have are:

- **Impartiality and independence**
- **Good people skills**
- **Qualifications and experience relevant to the circumstances**

Impartiality and Independence

The question of whether a DB candidate is **impartial** can be reduced to a question of a perception of bias. The leading case in English law is the House of Lords decision in Porter v Magill.[5] The key question was not whether two councillors were in fact biased, but whether the decision, at the time the decision-maker gives it, is such that a fair-minded and independent observer, having considered the facts, might conclude that there was a real possibility that the decision-maker was biased.

In practice this means that the decision-maker must be seen to be impartial at the time when the decision is made. Impartiality and the perception of bias are subjective in nature. Whether an individual is or is not biased is something that only that individual can truly know. An outside observer (such as the parties or a judge) attempts to measure if the person is or is not biased, not by the actions of the person but by reference to the fictitious neutral observer.

Therefore a DB must maintain impartiality and must also be seen to be acting impartially.

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[4] FIDIC, ICC and ICE Rules all specify default procedures if the parties fail to appoint the DB by a certain date. The AAA Rules set out a default procedure for single-member boards in limited circumstances only. In contrast, the DRBF Rules do *not* include rules for the default appointment of DB members.

[5] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

In contrast to the aspect of impartiality, the obligation of **independence** is objective. If there is a financial or personal tie between one of the parties and the DB member, then the DB member is clearly not independent of the project.

Good interpersonal skills are essential for any board member and should include management, language and communication skills.

Having **expertise** in the particular type of work or services to be performed under the contract is certainly very helpful. However, the parties might agree that general background knowledge in the field of the project is sufficient because a DB candidate is known for his/her excellent people skills, which the parties may value above the other qualifications.

The DB Member's key obligations include:

- **Disclosure of conflicts**
- **Availability**
- **Confidentiality**

Disclosure of conflicts: DB members must remain without any conflicts of interest and disclose any facts or circumstances which in the eyes of the parties may give rise to justifiable doubts as to the member's impartiality or independence.

Availability: The DB members should be sufficiently available for the duration of the project.

Confidentiality: DB members are usually required to treat the details of the contracts as confidential and to keep the information obtained during the process confidential, and use such information only for the purposes of the DB's activities.

3.3 Remuneration as per TPA

In October 2013 the CIArb held a wide consultation on dispute board rules (**"the Consultation"**) to give potential users the opportunity of having an input in what should be in the Rules.

About 50 % of the respondents to the Consultation think that the use of monthly retainers has been a major deterrent to the adoption and use of dispute boards, especially in developing countries. The principal objection of borrowers from multilateral development banks (**"MDBs"**) is the cost of

boards. The respondents who voted against a monthly retainer stated that the DB should be paid for actual work carried out, regardless of the size of the project, and that the CIArb should promote a system of billing for time spent (plus expenses).

The CIArb Tripartite Agreement gives users of dispute boards a choice between two alternatives. If Alternative 1 is chosen, the DB member shall be paid a monthly retainer plus a daily fee and expenses. If Alternative 2 is chosen, payment made to the DB member shall be for services rendered plus expenses, without a monthly retainer fee. The hourly rates and the retainer and daily fees are to be agreed between the parties and the DB members.

4 Overview of the draft CIArb Rules

4.1 Two types of DB: DRBs and DABs

The Rules are drafted as a stand-alone dispute board process and equally apply to both types of dispute board procedures. The only difference arising from the parties' choice of a DRB or a DAB is that DRBs issue non-binding recommendations, whereas DABs issue binding decisions.

The CIArb Rules provide sample clauses. Parties decide whether to have a DRB or DAB and include the appropriate DB clause in their contract.

4.2 Informal advisory opinion

Article 12 of the Rules states that the true mission of a dispute board is not judicial; rather it is to prevent formal disputes. The parties may at any time jointly refer a matter to the DB for it to give an informal advisory opinion as a means of dispute avoidance.

The DB may on its own initiative raise an issue with the parties in order to establish a dialogue between them and to clarify matters in the presence of the DB. However, the parties have the right to stop the DB's initiative if they regard it as unnecessary, provided that they notify the DB promptly, jointly and in writing.

4.3 Referral of disputes to DB

Any matter or disagreement arising under the contract may be referred to the dispute board by either party. Following a hearing, the DB shall issue its Determination promptly after having completed its discussions with the parties and DB members.

4.4 Recommendations and Decisions

If the parties have chosen the implementation of a DRB, they are not bound by its recommendations. If one party rejects the recommendation, either party may submit the dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties may voluntarily comply with the recommendation. (Articles 3 and 15)

If the parties have chosen the implementation of a DAB, they are bound by its decisions. If one party rejects the DAB's decision, either party may submit the dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties must comply with the decision. (Articles 4 and 15)

Instead of the complicated NOD procedure under the FIDIC rules: If the DB has issued a Recommendation or Decision, as the case may be, each Party shall submit its written acceptance or rejection of the DB's Determination to the other party and the DB within 21 days of receipt of the Determination.

Recommendations and Decisions are admissible in any subsequent arbitral or judicial proceedings.

4.5 No notice of dissatisfaction ("NOD")

Question 23 of the Consultation read: "*Should a NOD procedure be excluded from the CIArb DB Rules?*" This was answered with "*Yes*" by 70% of the respondents. The reasons given ranged from "*The entire NOD concept is alien to an original DRB*" to "*a NOD procedure is not necessary*".

The enforcement of DAB decisions is not necessarily a simple matter under FIDIC contracts.[6] Under clause 20.4 of the FIDIC Red Book, a DAB decision is **temporarily binding** on both parties if a valid notice of dissatisfaction (**"NOD"**) has been given by either party; and it is **final and binding** in the absence of a valid NOD. The timely service of a NOD is a condition precedent to arbitration under clause 20.6.[7]

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[6] See Gould, N (2012) *Enforcing a Dispute Boards' Decision: Issues and Considerations*, The International Construction Law Review, p 442 – 478. See also Gillion, Fred (2011), Enforcement of DAB decisions, The International Construction Law Review, October issue. A summary of this article can be found in the Annual Review 2011/2012 on www.fenwickelliott.com

[7] Clause 20.4, paragraph 6 states that "*neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.*"

The interpretations of FIDIC clauses 20.4, 20.6, and 20.7, and in particular the implications of a NOD, lead to jurisdictional pitfalls and enforcement difficulties, which may prevent a winning party from obtaining in arbitration the amounts awarded by the DAB.[8]

The CIArb has excluded a NOD procedure from the Rules. A more simplistic and straightforward approach could avoid many of the problems faced in the past with regard to DAB's decisions.

5 Conclusion

5.1 Demand for CIArb DB Rules

The need for prompt, cost-effective and impartial dispute resolution can be found in many contractual relationships in several industries. In order to meet this need, the Chartered Institute of Arbitrators offers the international business community the CIArb Dispute Board Rules, which cater to any medium or long-term project, whether construction, IT, commercial or otherwise. This kind of 'preventive law' could save time, project costs, and legal fees.

5.2 Promulgation of DB Rules

What could be done to make the CIArb DB Rules widely known? Might a press release, an article and some commentary be sufficient to bring the Rules to public knowledge?

What else might be done to promulgate the Rules?

5.3 Future of the CIArb in the context of DBs

The CIArb provides a complete set of comprehensive but straightforward DB rules suitable for any project. The CIArb could start:

- training people to use the Rules
- certify DB members, and
- establish itself as appointing body.

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[8] The decisions from the High Court and the Court of Appeal of Singapore in PT Perusahaan Gas Negara (Persero) TBK ("**PGN**") v CRW Joint Operation ("**CRW**") ("**the Singapore case**") sent a confusing message to parties dealing with the FIDIC form of contract. A thorough analysis of the High Court Decision shows that the Singapore Court seems to have been misguided in its interpretation of Sub-Clauses 20.6 and 20.7. There is nothing in the FIDIC Conditions that would prevent a winning party from referring to arbitration simply the issue of the other party's failure to comply with a DAB decision, as a second dispute, without having to refer also the underlying dispute.

No one else does this. FIDIC is limited to construction and FIDIC contracts. FIDIC does certify DB members, but only for FIDIC contracts. DRBF trains DB members, but does not certify. ICC has dispute board rules and appoints DB members, but does not train and so does not certify.

There is an opportunity for the CIArb to establish itself as a dispute board training, certifying and appointing body.

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