

# **DISPUTE BOARDS IN PRACTICE AS PREVENTION OF DISPUTE AND COMPLEMENT TO ARBITRATION**

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## **I. OVERALL CONSIDERATIONS**

1. Even though a party may have a good case, legal proceedings are always considered the last step of a dispute resolution. Considering the duration of the contract, not only the arbitration costs, but the internal costs of each company are often disregarded. The key personnel on a project may be no more available because they have been assigned on other projects or have left their company. The need to mobilise again managers and engineers, the loss of image and the market requirements (blacklisting) may generate not only difficulties, but quite important costs. Moreover, shorter proceedings will improve the cash flow and administrative requirements for the parties. Parties, therefore, should be quite keen to look for the prevention and for amicable resolution of disputes.
2. There are different approaches of prevention of disputes such as mediation, neutral appraisal, as well as adjudication and Dispute Boards proceedings. They are systematically used in mid/long term construction projects with an impressive success rate. Dispute Review Boards were used for the first time in the construction industry in the seventies (Eisenhower tunnel project in USA) and later in the eighties in international projects (Honduras El Cajon Dam)<sup>2</sup>. Dispute Boards do not only focus on the construction industry. The ICC DB Rules were drafted with the intention to be used in other fields.
3. The first comprehensive ICC Dispute Board Rules were issued in September 2004 after some four years of efforts. The ICC Arbitration Commission showed great interest in promoting dispute avoidance mechanisms to be used before launching legal proceedings and especially arbitration. Both, Dispute Boards (DB) proceedings and Amicable Dispute Resolution or Alternative Dispute Board Resolution (ADR) mechanisms were considered to be a true and indispensable complement to arbitration proceedings.

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<sup>2</sup> Igor Leto, Minutes of Meeting held in Genova by the Dispute Resolution Board Foundation (DRBF)

4. It should be pointed out that the ICC DB Rules are the only ones in the world considering under one single term the various types of Dispute Boards, namely the following alternatives:
  - (a) The Dispute Review Board (DRB): It issues “*Recommendations*” (adopted by the World Bank, it is presently largely used in the United States of America),
  - (b) The Dispute Adjudication Board (DAB): It issues “*Decisions*” (adopted in the FIDIC Conditions of Contract<sup>3</sup>) and has to be clearly distinguished from the Adjudication approach and
  - (c) The Combined Dispute Board (CDB): It issues either “*Recommendations*” or “*Decisions*”, depending (i) on the request of the Parties and (ii) on the importance of the case and the resulting consequences.
5. For more than four decades, ICC Dispute Board Rules have greatly assisted the Parties in resolving their differences. Considering the experiences made during the last ten years and that any rules may be improved, the Dispute Boards Conclusions (overall term replacing the FIDIC wording “*Determinations*” used for the Engineer’s assessment) have not always been satisfactory and distortions have been observed in some cases. As a consequence, the ICC DB Rules needed to be amended and adjusted. The revised 2015 ICC DB Rules emphasise the need for informal assistance and amicable settlements.
6. The main concerns of the business community remain the adequate application of DB procedures, the enforcement of Decisions<sup>4</sup> and the selection of appropriate DB Members with a view to the nature of the project and the applicable law.

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<sup>3</sup> Fédération Internationale Des Ingénieurs- Conseils (FIDIC), last Editions 1999/2000.

<sup>4</sup> Case of PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation 2010 SGHC 202 (Singapore High Court and Supreme Court)

## II. THE MAIN REVISIONS OF THE 2015 ICC DB Rules

7. It is worth to recall that Dispute Boards are characterised by two step proceedings. They offer at first the parties an “*informal assistance*” as part of the prevention of disputes. If the first step does not result in a positive outcome, the second step tries to resolve disputes in a formal and speedy referral by issuing either a “*Recommendation*” or a “*Decision*” depending on the approach selected by the parties. This shows the intention of the ICC to avoid disputes and to assist the parties in selecting the adequate approach at contract signature (DRB, DAB or CDB). The notion of prevention of disputes has been emphasised in the revision of the 2015 ICC Dispute Board Rules, namely in the following clauses

- Art. 16 “*Avoidance of Disagreements*”: The parties are encouraged at an early stage to bring any potential disagreement before the DB during meetings or site visits as early as possible and not to leave the potential disagreements undisclosed until a later stage;
- Art. 17 “*Informal Assistance with Disagreements*”: The revised ICC DB Rules define more accurately that such an assistance may take place either upon the request of one party with the agreement of the other party or at the initiative of the DAB with the agreement of both parties. The Conclusions (DAB’s opinion) are given orally or in writing issued after a joint and/or separate meeting(s). Such opinion is not binding for the parties and does not bind the DB if the disagreement becomes a dispute and is filed as a formal referral.
- Art.18 “*Formal Referral*”: If a disagreement becomes a dispute, any party is entitled, at any time, to formally refer the case to the DB. No more informal conversations and separate meetings shall take place. A short request of the claimant (statement of case), followed by a concise response by the defendant shall be filed. A hearing, limited in time, will allow each party to present its case, to respond to the other party and to answer the questions of the DAB. Here again, the parties should refrain to consider DB proceedings like arbitration proceedings. The presentations should be made by the representative of each party in charge of the operation (project director, project manager), who may also be assisted by external experts if required. The DB proceedings must be kept concise, simple, without “tactical intentions” and without procedural difficulties. It is important to avoid the four steps usually adopted in

arbitration proceedings. Another recommendation in DB proceedings is to limit the number of expert's reports, affidavids and oral testimonies.

8. It has been observed during the last ten years for some cases, that most of the DBs do follow the above principles developed hereabove and the ICC DB Rules have been prepared in this sense. In the recent years, practically all disagreements having occurred in the construction of very important projects, such as in China and in Iceland (Xiaolangdi Multipurpose Dam Project and Karahnjukar Hydroelectrical Project), have been resolved amicably by using extensively the informal assistance approach. The overall rate of success in resolving disagreements by DBs is generally estimated at over 95%. However, recently some parties complicated the DB proceedings due to a lack of awareness of the role and purpose of DB proceedings (which is at first to try to amicably resolve a disagreement), and/or by trying to modify DB proceedings into a first arbitration. Their intention may reflect an absence of will to arrive at a compromise and/or to use DB proceedings as a “trial test” with the objective to obtain a Conclusion on the merits and on the quantum of important claims before starting heavy arbitration proceedings.
9. The reasons for such an attitude are that the representatives of the parties often ignore the spirit of DB proceedings, intentionally or not. They are unable to freely accept compromises, and/or are afraid to be accused of important mistakes in managing the contract, of not having done their possible to protect the interest of their party regarding the resulting consequences. Moreover, in the case of an amicable settlement (informal assistance), the risk exists that a representative might be accused of dilapidation of public monies or even, in some cases, suspected of corruption. Depending on the case and on prevailing circumstances, all these factors have to be considered because such risks might be understandable. However, such an approach is not the adequate manner to prevent disputes. The selected DB approach might not have been sufficiently explicit or may not be the best way to prevent and resolve disagreements during the project in good faith. Under such circumstances, another approach might have to be selected.
10. Practical experiences also show that, in some countries, parties might be tempted not to respect their obligations and to “forget” the payments granted in the DB Decision. The defaulting party is in breach of contract and the injured party may refer the failure directly to arbitration in accordance with Art. 5.4 of the revised ICC DB Rules, without further formalities. Several ICC arbitration cases had already to deal with such failures. The

“Persero case” is one of them. In this case, the arbitration panel wrongly decided on the amount to be paid by the defaulting party instead of restricting its decision to the breach of contract and to order to comply with the DAB decision. In an appeal to the Supreme Court of Singapore, the decision of the arbitration panel was rightly turned down. The arbitration tribunal was not entitled to specify any final amount, the amount decided by the DAB being still an interim decision, but not a final award as in arbitration.

11. Another unpleasant case was when a party decided in the DB proceedings to refuse any “informal assistance” and to restrict the scope of work of the DB to formal referrals. By taking such a decision, the responding party just considered the DB as an entity deciding provisionally on the cases submitted to him. Such an interpretation of the DB proceedings disregards the spirit of DB’s and introduces a different kind of approach, namely the one shot or permanent adjudication proceedings adopted under English jurisdiction, aiming at limiting the number of cases submitted to the Court (Housing Grant by the English Courts), which is not at all the concept of DB proceedings.
12. Procedural difficulties in DB proceedings should be avoided by all means possible. In spite of the amounts at stake, the DB proceedings should remain as concise and efficient as possible. This is the reason why the ICC DB Rules clearly define in Art.19 to 21, the way the submissions should be filed by the parties and how a hearing should be developed having in mind the tight deadlines specified in the contract. Another important aspect is the drafting of additional DB detailed procedural rules (in addition to the ones set out in the ICC DB Rules). They are to be submitted to the approval of the parties at the beginning of the DB proceedings. These additional DB procedural rules should assist the parties to understand the procedure and to prepare submissions of concise but limited documentation. The parties should be open to discuss them and approve these rules without delay.
13. Another procedural difficulty encountered in practice is that a government body facing the payment of important unexpected sums might think appropriate to inform the population of the results of the DB proceedings by using media vectors. This strategy not only discards confidentiality, but puts pressure on the claiming party, thus exacerbating the climate of negotiation aiming at a settlement of the case. In principle, considering the important efforts made by the parties and the DAB as well as the corresponding invested sums, any Conclusion issued by a DB should remain admissible in any judicial or arbitral proceedings (Art.27).

14. Finally, parties may often consider in the DB proceedings that their project director and his colleagues might not sufficiently able to defend efficiently their interests. As a corollary, in order to protect its interests, such a party may be tempted to call for the assistance of lawyers, thus disregarding the basic principle that DB proceedings differ from arbitration. In DB proceedings, persons having lived with the project and managed the project should be the key persons in the dialogue with the DB panel and should as far as possible avoid to enter into long contractual/legal debates. The presence of lawyers might be necessary, but only as experts called by the main presenter. For example, there has been an important case where parties assigned over ten counsels in the presence of some 50 persons during an extensive hearing lasting one or two week. This experience was in complete contradiction with the usual approach of DB proceedings, because it transformed the DB approach into a first step arbitration.

### **III. THE KEY ROLE OF THE PARTIES**

15. The role of the parties in selecting the adequate dispute clause is of utmost importance. The following points should be carefully analysed and decided by the parties at contract signature or at an early stage of the project:

- a) Selection of the approach to dispute prevention. Are both parties willing, at the outset of the contract, to try to amicably resolve differences/disagreements which will inevitably occur? Will they look for adequate compromises in the course of the project? If this is the case, the DB is an optimal approach and, together with the 2015 revised ICC DB Rules, it should be implemented for important projects. If this not the intention of either party, other optional measures exist before referring a dispute to arbitration or to litigation, such as the “one shot” adjudication (previously wrongly called by the FIDIC “ad hoc DAB”) or permanent adjudication by a panel of adjudicators (POA).
- b) Selection of the DB approach. Which DB approach is adequate and should be selected, DRB, DAB or CDB? All these approaches have been adopted by users. The ICC, in its neutral position, does not recommend one alternative or another. Depending on the efficiency of the DB proceedings, on the commitments resulting from each approach, on the prevailing customs and on the mentality of each party, the parties are invited to

consider the advantages/disadvantages of each alternative and to jointly decide on the most appropriate approach.

- c) Selection of the DB Members. Which are the criteria to be used by the parties in selecting the appropriate expert? Attention is drawn to the importance of the appointment of each member of the DB, which is a key factor for a successful DB. In this difficult task, the parties may even require the assistance of the ICC DB Centre (Art.7.7). The basic requirements are independence, neutrality, absence of conflict of interest and availability, but important criteria are also the experiences of the DAB member in prevention/resolution mechanisms, the practical knowledge of the site issues gained from past experiences. The selected member should be conversant in (i) the technical/financial aspects of the project and (ii) in the interpretation of contract clauses as well as (iii) in the applicable law. Engineers with experience in dispute resolution have to be preferred, but the appointment of one lawyer specialised in construction law might also be an asset. The ideal panel appears to be the one constituted of engineers with experience in technical/financial aspects and an adequate background in contractual/ legal aspects; a balanced panel made of two engineers and one lawyer might also be an attractive solution.

#### **IV. MAIN RISKS IN DB PROCEEDINGS**

16. Even though remarkable progress has been achieved in the past in amicable settlements as well as in avoiding unnecessary legal proceedings by using and complying with DB Conclusions, important difficulties have turned up in a limited number of cases. All these issues need to be discussed with the parties at the outset of the DB assignment. Moreover, parties might be reluctant to use DBs due for instance to a negative experience in their past, a lack of practical experience in DB proceedings or by the fear to be compelled to immediate payments following a DB Decision. This emphasises the importance, like in arbitration, of a balanced DB Panel with adequate competences.
17. There is a risk of “degeneracy of the DB”. This risk exists when substantial amounts are claimed by adopting a too formal and a too complex approach in DB proceedings, which consequently leads to costly procedures. This degeneracy has been observed in several cases. It may result from various factors, such as disregarding the informal assistance in

the DB two-step approach and jumping immediately to the second step i.e. the formal referral. The formal referral the DB procedure might be assimilated to arbitration proceedings with long pleadings and the hearing of external experts supporting the position of the Party which appointed them. DB proceedings are not the same as arbitration.

18. In order to avoid these difficulties, the Parties should turn back to the initial principles where the case is presented by the project managers. The filing of the referral should be as concise as possible, limited to the statement of case (SOC) and to the response to the SOC (RSOC). Replies, rejoinder, rebuttals will take place at the hearing (by using PP slides copied to the DB and to the other Party at the hearing, prior to the presentation). Parties should refrain as much as possible from the four-step procedure used in arbitration. In presenting his case, the project manager may well need to be assisted for support. If contractual/legal issues are of utmost importance, lawyers/external counsels should explain these contractual/legal aspects, but the DB procedure should not derive into arbitration pleadings. The risk exists and all measures should be taken to avoid it. By refraining from lengthy hearings, the parties will benefit from a shorter preparation of position papers and from less participants at the hearing (whether lawyers or experts). The whole DB process will be speedier and limit the costs.
19. There is a risk of inconsistency between Conclusions of the DB in separate Referrals (Recommendations or Decisions). In large projects, most of the differences may be resolved by informal assistance (thus leading to an amicable settlement). But practice shows that numerous referrals may be presented, some of which may be qualified as “approaching topics”, because they are based on similar grounds and principles. In practice, it is not unusual that the DB may face no referral, a few referrals or several dozens of referrals in large projects lasting several years. The risk of having contradictory DB Conclusions exists. The reason is quite simple: each Conclusion and especially Decision is based on the arguments presented by the parties, on the ground of technical/financial or contractual/legal aspects. If a similar or approaching case occurs with a revised and/or amplified argumentation of the parties, the DB will try to remain consistent with its previous Decision, but the DB is compelled to duly consider all new arguments submitted by the parties. The argumentation/substantiation having been modified, the DB Decision may well change.
20. This shows the additional difficulty faced by the DB if compared to arbitration. The risk of inconsistency exists irrespective of the quality of the submissions. It must be explained to

the Parties in advance as far as possible. Each Conclusion must be considered to be completely separate from any other Conclusion, based on the arguments of the parties. Even if an award has been rendered by an arbitration tribunal on a previous case, there is no obligation for the DB to simply abide by such an award, as a new award rendered in another case by a new tribunal may differ. The risk of inconsistencies between different DB Conclusions/Decisions exists and demonstrates the difficulty of the DB proceedings if compared with arbitration.

21. There is a risk of dissenting opinions amongst the DB Panel, both on the merits and on the quantification. The DB should try by all means to arrive at a compromise in order to issue a joint Conclusion/Decision and thus to reinforce the weight of its unanimous Conclusion with the aim to avoid subsequent legal proceedings. However, if a DB Conclusion on the merits is not shared by all DB Members, the impact of a different opinion expressed by one or two DB Members might apply to the Conclusions on other referrals. This often happens for quantification issues where assumptions may differ from case to case. There is, therefore, a high risk of a dissenting opinion by one or two of the DB members, thus implying different results and possible subsequent legal proceedings.
22. The risk of a dissenting opinion must not be excluded, even if all DB Members wish to arrive at a unanimous Conclusion. Different types of dissenting views may be expressed depending on the importance and on the impact of that Conclusion. In the case of a minor disagreement with no impact on future referrals, both alternatives may be described without drafting a DB Minor Opinion. In the case of a more serious disagreement which might influence other Conclusions, but with a limited impact, the text of the dissenting views may be integrated in the Conclusion drafted by the DB Majority. In the case of a serious disagreement between the DB Members, the dissenting Member may prefer to issue a separate DB Minority Opinion<sup>5</sup> which might have an important impact on future decisions referred by the parties.

## V. CONCLUSIONS

23. The drafting of a DB Conclusion is a difficult exercise, as several referrals may have to be dealt with over the project duration. Especially in the case of a Conclusion, which might

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<sup>5</sup> « 30 Years of Experience in the Prevention and Resolution of >Disputes and Still a Lot of Challenges for the Coming Years” by Pierre M. Genton (booklet published 2013 for the 30 year anniversary of PMG, p.18/19)

be repetitive on merits and on quantification approaches, such Conclusion may greatly assist the Parties in their activities. Each Conclusion must be considered on its own, independent one from the other. The important advantage for the parties is to get, in a relatively short time, a Conclusion which might assist them in the performance of the contract and in deciding on their position and rights in the development of the project. With respect to a Decision, the DB will provide the parties, within a short time, with a decision rendered by an independent competent third party, which not only will assist both parties in subsequent proceedings, but will help the winning Party to improve its cash flow management.

24. In 2004 already, the ICC DB Rules were considered the most modern and comprehensive set of rules existing for Dispute Boards around the world, both under civil and common law. When preparing the 2015 revision of the DB ICC Rules, experts of both the ICC and the FIDIC took the precaution to closely cooperate. The ICC DB Task Force regrets that these revised 2015 ICC Dispute Board Rules have not yet been adopted by the FIDIC and hope that this will be the case when preparing the new editions of the FIDIC Conditions of Contract.

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