

ICC Promotes Dispute Board Rules Worldwide

By Pierre M. Genton*

After more than three years of intensive work by the ICC Dispute Board (“DB”) Task Force,¹ consisting of more than 50 specialists from all over the world, the ICC approved the new rules on Dispute Boards on June 9, 2004 during its world congress in Marrakech, and these were published on September 1, 2004. For quite a while, some specialists in ICC arbitration had been thinking about the opportunity to complete the range of ICC services by new DB Rules and which would be the interest of such a procedure. The decision in favour of such rules was made by the ICC Arbitration Commission during its meeting in April 2002. The three following explanations justify the decision:

- (i) The ICC is open to new ideas and plays a permanent role in the business world by offering modern, efficient and innovative tools, for prevention as well as for resolution of disputes.² It is not by pure chance that the parties, wanting to avoid long and costly legal procedures which might destroy the efforts and investments of several years, show a great and regular interest for the almost amicable resolution of their disputes.
- (ii) The demand of the market is important regarding the success and the remarkable experiences in this field so far. Statistics show that the rate of success is particularly high (over 95 per cent). It must also be pointed out that the users, the international institutions for the financing of important projects, as well as the international standard contracts prescribe the DB procedure.
- (iii) The procedure, relatively new in civil law countries, tightly complements and thus protects arbitration, the “flagship” of the ICC. The DB procedure was introduced in the United States in the 1970s, but it was

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¹ It is not possible to list everyone here, all personalities having actively supported and contributed to the drafting of the ICC DB Rules. The author issues warm thanks to all of them for their efforts and support, and special thanks is addressed to Jean-François Boucly, Nael Bunni, Jean-Claude Goldsmith, Dominique Hascher, Emmanuel Jolivet, Christopher Koch, Gordon Jaynes, Igor Leto, Toshihiko Omoto, José Rosell, Carl Salans, Robert Smith and Peter Wolrich for their active and fruitful participation.

² See also the report on the “Introduction, by the ICC, of Dispute Boards for the Prevention and Resolution of Disputes” of March 14, 2002, prepared during the “Forum on ADR Techniques” under the chairmanship of Jean-Claude Goldsmith, to whom the author wants to express his gratitude for his precious assistance.

only at the beginning of the 1980s that it was used for the first time in the frame of an international construction contract and only since the middle of the 1990s has it been used more systematically in international contracts.

Rôle of the DB and objectives of the ICC

The DB is a permanent and independent body which assists parties in resolving any disputes which might arise during the execution of a contract. It may render either recommendations or decisions in connection with the execution of the contract.

The DB is generally set up at the outset of a contract and usually consists of three members intervening at regular intervals. In order to assist the parties efficiently and without delay, the DB is at the disposal of the parties for the duration of the contract. It follows tightly the execution of the contract, on the one hand by a systematic and regular study of the main writings of the parties, and on the other hand by periodical meetings and/or site visits.

The DB's assistance usually consists of two main steps:

- (i) Informal assistance on questions of principle: The parties jointly inform the DB which then renders a preliminary opinion.
- (ii) A more formal assistance in case of referral: After having received a short report by each party and after a contradictory hearing with the parties, the DB delivers a Recommendation or a Decision in the form of a written report.

The ICC is conscious that several institutions and associations have already adopted or even imposed the DB procedure in their medium/long term contracts.³ For this reason, the ICC has opted for an ambitious objective, namely to introduce rules which are valid for any kind of commercial transaction, adapted to the different mentalities of the parties, convivial and innovative. In other words, their objective is to offer comprehensive rules including the existent DB approaches and favouring the smooth execution of the contract. The ICC DB Rules are the only ones offering the parties a free choice between three alternative types of DB, each of them presenting advantages and disadvantages with regard to the identity of the parties and the nature of the considered contract.

The ICC Rules have been drafted with a certain number of details. The objectives are to allow users to choose an appropriate DB type knowing fully what they should expect to make them comfortable with the selected procedure and finally to facilitate the task of those designated to act as DB members. In the future, the ICC intends to organise information and training conferences in order to promote the DB approach. In fact, a large proportion of potential users today consider DB imperative for the sound execution of important and complex contracts.

Finally, it should be pointed out that *the DB procedure is not an alternative to arbitration* but a complement. Arbitration is the only ICC service ending with a binding award. In the case of a disagreement with a Recommendation or

³ e.g. financial institutions such as the World Bank, the Asian Development Band, FIDIC, the European Bank for Development.

Decision rendered by the DB, the parties have the possibility to resort to arbitration proceedings. The foreword of the DB Rules describes the context for the use of the DB procedure and presents its principal characteristics. The DB procedure is applicable for all medium and long term contracts in any domain.

ICC standard clauses

The ICC, which enjoys a high credibility all over the world, was compelled to provide an overall view covering all existing techniques and to develop tools adapted to the different mentalities of the five continents. For this reason, without giving preference to one or another of the DB alternative types, the ICC has adopted three DB standard clauses for selection by the parties:

The "Dispute Review Board" ("DRB")

The DRB approach was at the origin of the DB development in the 1970s in the United States. In this approach, the DB renders a *Recommendation*. The parties are free to accept or to reject it within 30 days of reception. If neither party has rejected the Recommendation within the set period, the Recommendation becomes effective and contractually binding.

The DRB approach is presently the most widely used. Experience shows that this flexible and consensual approach makes it possible to resolve the disputes while at the same time preserving good working relations between the parties during the execution of the contract.

The "Dispute Adjudication Board" ("DAB")

The DAB approach was introduced in Great Britain in the middle of the 1990s as "adjudication".⁴ In this approach, the DB renders a *Decision*. The parties are free to accept or reject it within 30 days of reception, but they are compelled to apply it immediately. If one of the parties disagrees with the Decision within the set period, this Decision may be referred to arbitration, but nevertheless keeps its temporary binding character.

The DAB approach was introduced in 1996 by the FIDIC⁵ and has recently been adopted by the World Bank/ADB. It is used in numerous international construction contracts. Experience shows that this more binding approach makes it possible, in certain particular cases, to take decisions more rapidly and to accelerate the provisional resolution of disputes. However, it tends to rigidify the position of the parties.

The "Combined Dispute Board" ("CDB")

The CDB approach is an innovation by the ICC. It tries to combine the advantages of the DRB and the DAB. In this approach, the CDB renders in

⁴ The Housing Grants, Construction Regeneration Act ("HGCRA"), 1996. This procedure requests the moving party to submit its claim to be examined by "adjudication" before it may be decided by a competent ordinary court. The procedure before the "adjudicator", a professional designated by the court, was generally to be carried out within 30 days.

⁵ FIDIC: Fédération Internationale des Ingénieurs Conseils (International Federation of Consulting Engineers). It regroups all national consulting engineering associations. Its headquarters are in Geneva. The FIDIC is the author of the international standard contracts frequently used in the construction field, especially in Anglo-Saxon countries. These contracts are better known under the names of red, yellow, green and silver books.

principle a *Recommendation*, unless one party or both parties prefer a *Decision*. In the event that the parties disagree on the selected option, the CDB is authorised to take an irrevocable decision according to the importance of the dispute and its consequences. The modalities remain the same as described for the DRB and the DAB, particularly those regarding the 30 day deadline for rejecting a Recommendation or a Decision and the binding and non-binding aspects.

Comments on the DB Rules

The present rules have been the subject of extensive and numerous discussions between 2001 and 2004, among the members of the ICC DB Task Force, the ICC National Committees and the ICC Arbitration Commission (5 sessions). The rules are therefore the result of numerous compromises between various points of view. Amendments to the ICC DB Rules may still occur in the future on the basis of experiences. The following explanations may help to understand the new ICC DB Rules:

Preliminary arrangements (arts 1–2)

It must be pointed out that, following the publishing of the DB Rules, the ICC has set up a “DB Centre”, in order to demonstrate the difference to arbitration. The parties now have the possibility to address themselves without restraint to the DB Centre for any question linked to the understanding of the Rules and to the intervention itself.⁶

Types of Dispute Boards (arts 4–6)

Deadline for rejecting a Recommendation or a Decision: The 30 day period prescribed to the parties to express their disagreement with a Recommendation or Decision is of utmost importance. If the given date is not respected, the Recommendation or Decision becomes contractually binding. The use of a shorter period of time, in order to accelerate the contract development, has been abandoned for two reasons: The first reason is that the parties need enough time to think before expressing any disagreement. The second reason is that the upper management of the parties, which may have a little involvement in the development of the contract, may be consulted if required.

Powers of the CDB: The power granted to the CDB to irrevocably decide on the nature of the Determination (Recommendation or Decision) has been subject to some hesitation. The attractiveness of the CDB approach is, on the one hand, to get an efficient solution in case of urgency and, on the other hand, to promote a reasonable attitude of the parties during negotiations and to avoid obvious misuse.

Setting up the DB (art.7)

ICC assistance for the nomination of the DB: Each party designates in principle one member of the DB and the two designated members select the third member who takes over the chairmanship. The DB thus formed has to be approved by the two parties. It may happen that one or both parties or the nominated members of

⁶ See arts.7 and 21. Ms Katherine González Arrocha, Senior Counsel; ICC DB Center; Tel: 33–1–49 53 30 53, Fax: 33–1–49 53 29 29, email: disputeboards@iccbo.org

the DB are not able to proceed with the designation or confirmation within the prescribed periods. By providing ICC assistance for the nomination of a DB member, the ICC offers those parties experiencing difficulties the opportunity of a useful and speedy alternative to start or continue the DB procedure.

Obligations of the DB members (arts 8–10)

Independence of the DB members: The independence of the DB members is certainly of importance. However, it would be exaggerated and is not recommended to adopt the same criteria of independence as may be seen for arbitrators in some particular courts of law. The objective is to guarantee that the DB members are independent and impartial. In the past it was not abnormal for a specialist to have been in contact with either party. That is why, for practical reasons, it is suggested that a DB member should reveal any contact with either party within the past three years.

Agreements with the DB members: The nature of the agreement and the financial conditions to be agreed upon with the DB members are delicate, as the DB members may reside in countries with different living conditions and indices. In order to avoid painful discussions, to enable each party to pay half of the costs for each DB member and, finally, to favour the motivation and cohesion of the DB, the Rules recommend that all agreements should be identical in their wording as well as in their financial conditions.

Obligations of the parties (arts 11–13)

Meeting/site visits: It is necessary to distinguish between “meetings” and “site visits”. The present rules apply to all medium and long term commercial transactions. The term “meeting” applies to contracts with no need for a visual inspection, while the term “site visit” relates to construction contracts where site visits are imperative. Experience shows that the meetings/site visits should take place every 3 to 4 months to ensure an optimum DB intervention. However, the parties have the right to ask for a shorter period depending on the nature of the events and/or disagreements.

Functioning of the DB (arts 14–15)

End of the contract: The Rules are silent concerning the frequency of the meetings at the end of the contract. Especially in the case of construction contracts, the execution of the works may be slowed down or even completed without the contract being terminated (for instance a maintenance period). In such cases, it is reasonable that both parties, together with the DB, re-examine the activity of the DB considering the unresolved disputes, foreseen interventions, necessary availability of the DB members and remaining works. Because of the very different nature of the contracts, the Rules generally cannot prescribe such adaptations. The adaptations must take into account not only the type of the contract and the field of activity, but also the particular circumstances of the contract. In certain construction contracts, the parties convene at the end of the execution of the works on site to keep the DB in operation. However, site visits are suspended and interventions are foreseen on an “ad hoc” basis. At the same time, the financial terms are modified.

Power of the DB: Some parties may have the wrong impression that the power of the DB as defined in the Rules is too extensive. From a practical point of view,

it is in the interest of the contract and that of the parties, that the DB works with the required efficiency and that it has the necessary power to do so. It is not advisable to limit the power of the DB, as this would be harmful to the DB procedure and the execution of the contract.

Procedures before the DB (arts 16–19)

Informal assistance by the DB: Article 16, relating to *the informal assistance of the parties by the DB, is probably the heart of the DB intervention in terms of efficiency*: In fact, if the parties are receptive to the arguments of the DB, most of the disagreements will be resolved as a result of such informal assistance. The DB's informal opinion must be requested jointly by the parties only in the case of an obvious lack of tangible results during serious negotiations between the parties. Such an opinion deals in general with questions of principle and the parties are free to jointly submit to the DB whatever documents they consider useful or necessary. There is, however, no obligation to do so. The option to jointly request the preliminary opinion of the DB on questions of principle makes it possible for the parties to take up their discussions/negotiations on a more defined and confident basis.

Informal assistance in case of disagreements: The DB has several possibilities to proceed. One solution consists in reserving one day or half a day for the intervention during the next pre-programmed meeting/site visit. The DB first hears both parties in a joint meeting. If necessary, the DB may request authorisation from the parties to discuss the case in caucus with each party. The objective of such separate meetings is to trace a first track for reflection, for the claimant (namely moderation of the claim if it turns out to be excessive or even unjustified) as well as for the defendant (backing of the argumentation if it turns out to be convincing, evaluation of the risks if the claim is rejected). If his evaluation of the disagreement is clear, the DB informs the parties in the course of or at the end of the meeting/site visit. Such a preliminary and short opinion is not binding on the DB, especially if the dispute is considered later as a formal referral. Such opinion may be given orally or in writing. If the complexity of the submitted case or the language is likely to lead the parties to different interpretations or certain misunderstandings, the written form may be preferable.

Formal referral of disputes: In order to obtain a Recommendation or a Decision, the procedure starts at the date of reception of the claim by the chairman of the DB. In order to save time, the Rules do not oblige the claimant to formally notify the other party of its intention to submit the dispute to the DB. In certain cases, for instance in the field of construction, it is recommended that the claimant informs the defendant before his submission, to allow him to get organised accordingly. The reason is that the so-called engineer, representative of the employer, might have an interest in playing down the claims and/or might prepare the response to the referral of the contractor without his client having clearly understood the scope and consequences of the claims submitted.

Determinations of the DB (arts 20–25)

Time limit for rendering a determination: In the case of a referral, the ICC DB Rules prescribe a time limit of 90 days from the date of receipt of the referral by the DB to render a determination. Such a time limit may in some cases turn out

to be extremely short. The parties have to be aware that, according to the nature and complexity of the submitted dispute, an extension of the 90 day time limit is in their own interest. If there is no agreement on an eventual extension, the risk for the parties doubles: The DB may render an incomplete determination in order to abide to the 90 day time limit (compliance with the DB Agreement, but the determination may be insufficient in the eyes of the claimant), or the DB decides to prepare a more complete determination thus rendering his determination at a later date (non-compliance with the DB agreement and the possibility for one or both parties to start litigation or arbitration without having to wait for the determination of the DB).

Another time limit alternative to render a determination: The ICC DB Task Force has examined another solution which is favoured by the DB specialists. It consists in fixing a standard time limit for the submission of the determination, for instance 60 days, commencing at the end of the hearing. However, it may happen, for instance in complex cases where hearings may be prolonged, that either party is not satisfied with the overall duration of the DB procedure. In order to make it possible, if necessary, to resort to legal proceedings, an upper time limit might be fixed for the total duration of the DB procedure, for instance, six months from the date of referral.

Examination of the decisions by the ICC DB Centre: Taking into account the experiences with arbitration procedures, certain users may be interested, or even reassured, in being able to have a Decision "checked out" before it is addressed to the parties. The ICC DB Rules offer an option for such a revision by the ICC DB Centre. The option is either mentioned in the contract or jointly decided upon by the parties in the course of the contract. This is only valid for a Decision, since a Recommendation has no immediate effect if rejected by one of the parties within the prescribed 30 day time limit (art.4). The ICC Rules are innovative in this respect and are the only ones to offer this service.

Remuneration of the DB and the ICC (arts 26–32)

Remuneration of the DB and the ICC: It may seem unusual or even inappropriate that the Rules deal with questions linked to remuneration. The ICC DB Task Force has introduced such a solution for two reasons: first to assist the parties to assess the costs of the DB procedure and to facilitate their work when it comes to fix the conditions of the DB intervention, whether for the signature of the main contract between the parties or for the agreement with the DB members. Secondly, to render the Rules complete, accessible and understandable to all persons concerned by the DB procedure at the outset of the contract and throughout the execution of the contract.

Fees of the DB members: The remuneration principle for DB members (monthly retainer fee and daily fees), such as stipulated in the ICC Rules, is the same as has been used up to now in most DBs (except for the so called "ad hoc" DBs,⁷ their interventions being limited at the specific request of the parties). Experience shows that this remuneration principle is well balanced and satisfies both the users and the DB members. In order to guarantee a smooth development of the procedure, the Rules recommend adopting similar conditions for each DB

⁷ "Ad hoc" DB is an approach used also by FIDIC, whereby the parties call the DB from time to time only in case of disputes.

member, even though living conditions may differ in the countries where the DB members reside. It is strongly advised not to modify the remuneration principle nor to introduce different conditions for each DB member. If requested, the ICC DB Centre is at the disposal of the parties for any information on the rates used in general.

Costs of the DB procedure: With regard to the remuneration conditions of the DB, it should be pointed out that the costs of the DB procedure remain marginal when compared to the additional costs caused by delays, delayed payments, additional financing and/or legal proceedings, etc. (*i.e.* less than 0.5 per cent of the contract price).

Responsibilities of the DB (arts 33–34)

Exclusion of responsibilities: One of the most important articles of the ICC DB Rules, for both the parties and DB members is art.34. This relates to the exclusion of responsibilities for the DB members, the ICC DB Centre and the ICC National Committees. The same issue is referred to in art.7 of the Model Dispute Board Member Agreement. It is highly recommended to DB users and DB members to neither modify nor eliminate this article.

Conclusions

The ICC DB Rules were published on September 1, 2004. The international business community is invited to make use of these innovative rules. Considering the actual development of the DB around the world, it is hoped that the ICC DB Rules will be adopted by many potential users, institutions and professional organisations. Users, as well as DB members, will find these rules to be tailored for any mid or long term contract and a performing working tool. One of the challenges for the use of a DB lies certainly in the information of the potential users and in the training of the DB members, regardless of their original education whether as engineers, lawyers or economists. A breakthrough in the national markets would be highly desirable. A further challenge is the training of DB members from countries in which the DB procedure is used, especially the developing countries.

The finalisation of these important rules has only been possible thanks to the precious contribution of the ICC DB Task Force, the ICC National Committees, the ICC Arbitration Commission, its President and the President of the ICC Court of Arbitration. The author wants to express his warmest thanks to all these personalities for their efforts, for the pertinence of the comments received, for the high level of discussions, as well as for their confidence.