



The Dispute Resolution Board Foundation
Fostering common-sense dispute resolution worldwide

DRBF International Conference

Cost Control in the use of DB's "The Fair Hearing"

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Cost Control in the use of DB's – The Fair Hearing

Overview

- 1. Background.**
- 2. Basic Principles.**
- 3. Procedural Issues.**
- 4. How to get there.**
- 5. Scenarios.**
- 6. Key Observations.**

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2. Considerations

□ Basic Principles for a “Fair” Hearing

- The DRB tribunal members hearing the dispute must be independent and impartial with respect to both the parties and the subject matter of the dispute
- Each party has the right to have its point of view heard and the parties must be treated equally by the DRB.
- Each party must be given a reasonable opportunity to:
 - (a) prepare its case;
 - (b) present its contentions to the DRB;
 - (c) respond to the other party's case.

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3. Key Ingredients

□ **Procedural Efficiency**

- **The DRB should design the hearing procedures to suit the nature of the dispute. In this regard consider whether the resolution of the dispute requires:**
 - **fact finding by the DRB;**
 - **legal and/or technical interpretation of the contract;**
 - **the evaluation of expert opinions;**
 - **the determination of quantum (time, money).**

- **The DRB should direct a pre-hearing schedule and a procedure for the exchange of submissions, information and reports between the parties. The pre-hearing steps should be as simple and short as possible, without disadvantage to either party.**
 - **The dissatisfied Party submits a written Statement of Case to the other Party and DAB Members (normally Chairman for distribution)**
 - **The other Party response**
 - **Possible DAB request for additional information**

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3. Key Ingredients

□ **Procedural Efficiency**

- **The DRB should address the procedures to be adopted in the hearing (presumption) with regard to the following matters:**
 - **oral and/or written submissions by the parties;**
 - **limiting the duration of oral presentations and the length of written submissions;**
 - **legal or other representation;**
 - **language and translation issues;**
 - **recording and/or transcription of the proceedings;**
 - **attendance of party and non-party witnesses;**
 - **questioning of witnesses during the hearing;**
 - **location of and facilities required for the hearing.**

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3. Key Ingredients

□ Procedural Efficiency

The DRB should not allow the following matters to arise during a hearing:

- **adversarial cross-examination of witnesses;**
- **direct questioning between the parties;**
- **surprises;**
- **Lack of adherence to agreed procedures;**
- **any indication from the DRB of possible pre-judgement or bias;**
- **hearing proceeding in the absence of one party;**
- **tactics designed to delay or disrupt a hearing.**

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4. How to get there

Statement of Case

- DB jurisdiction
- Statement of what DAB is asked to decide
- Clear/concise description of nature and circumstances of dispute
- List of issues and referring Party's position
- Supporting documentation

Response to the Statement of Case

- Statement of what DAB is asked to decide
- Clear/concise statement of responding Party's position
- Supporting documentation

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4. How to get there

□ The Hearing

- DAB Presides
- Refusal or failure of a party to participate is at its own risk
- Fair process
 - Reasonable opportunity for both Parties to be heard
 - Presentations (documents and timing)
 - Responses (homework and further submissions)

□ The Hearing participants

- Individuals with first-hand knowledge (no consultants or lawyers)
- Use of Experts
- No cross-examination
- Not under oath
- Not recorded (except for details of site Visit Report)

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4. How to get there

□ The Hearing Sequence

- DAB Chairman opens hearing
- Referring Party presents its case without interruption
- Responding Party presents its case without interruption
- Responses (repeat) 2 and 3
- Questions from DAB
- Parties responses
- Final rebuttals
- DAB issues Decision within specified time limit from receipt of Statement of Case (or other such bench mark)

IMPORTANT: Only one individual may speak at a time through the Chairman

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4. How to get there

□ **Obligations of the Dispute Board**

- **Independence, neutrality (continuing obligation)(the declaration)
A Party may challenge independence**
- **Confidentiality**

□ **Communications**

- **No ex parte communications**
- **“One for all and all for One”
DAB Chair to Parties, cc: DAB Members
One Party to all three DAB Members and other Party
Both Parties to all three DAB Members**

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5. Scenarios

□ Scenario 1

- **Assume that contrary to the DRB procedures set down in the Contract, one party to a dispute insists on being legally represented at the DRB hearing and also requires the hearing to be recorded and transcribed.**
- **How should you deal with such demands?**

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5. Scenarios

□ Scenario 2

- **During the pre-hearing preparations, Party A complains that Party B is withholding key documents which are likely to be prejudicial to its position. Party A insists that the DRB should direct Party B to produce these documents for inspection prior to the hearing, even though Party B claims the documents are commercial-in-confidence and privileged from production.**
- **What approach should the DRB adopt?**

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5. Scenarios

□ Scenario 3

- **During a hearing, a party's factual witness becomes abusive and verbally threatens a representative of the other party sitting across the conference table. He also refuses to answer certain questions put to him by the DRB.**
- **How should the DRB respond in this situation?**

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5. Scenarios

□ Scenario 4

- **During the hearing of a complex claim involving competing expert opinions, the defending party requested an adjournment of the hearing on the basis that it had very recently uncovered new information. The defendant asserted it was important that the DRB should allow it time to consider and obtain a report on the new information, as it would significantly improve the defendant's position.**
- **Should the Board grant the adjournment?**

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5. Scenarios

□ Scenario 5

- **After several Decisions, it comes to the attention of one of the Parties that the site representative of the other Party is related one of the DB members. Some of the Decisions have gone against the other party. The Chairman had knowledge of this for some but did not disclose it to anyone.**
- **How should the Parties respond to this?**
- **What about the DB?**

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5. Scenarios

□ Scenario 6

- **The Parties are allocated equal time by the DB to make presentations on an international project . After one of the Parties has given his presentation to the DB using translators (primarily for the benefit of the other Party), the receiving Party proceeds to explain that he will not be using translators in his presentation .**
- **You are a member of the DB. How would you react?**

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6. Key Observations

“The Fair Hearing”

The fair and efficient hearing can be achieved if the following is observed

- ☐ Observe the Basic Principles.**
- ☐ Ensure procedures imbue fair treatment.**
- ☐ Control the Hearing so that equal opportunity arises.**
- ☐ Respect the neutrality of the DB.**