

THE CIArb DISPUTE BOARD RULES

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1 INTRODUCTION

The Chartered Institute of Arbitrators (CIArb) held a public consultation on dispute boards in 2013/2014, seeking to identify the key issues of a dispute board process which is not geared to any particular economic sector. Responses were welcome from individuals, organisations, and the business community. The second stage of the consultation consisted of the distribution of the draft rules and tripartite agreement, inviting comments on the draft documents. The consultation produced valuable feedback from a range of respondents including several senior dispute board members with vast experience on dispute boards.

In August 2014 the CIArb published a single set of international dispute board rules (the CIArb Rules), together with a model tripartite agreement. The CIArb Rules can be used on a wide range of commercial projects by the incorporation of a short precedent dispute board clause into the parties' contract.

2 DISPUTE BOARDS IN CONTEXT

Conflict is an inevitable part of life. It cannot be eliminated, but the way we deal with conflict can be transformed. In the last twenty years there has been an increasing demand for less adversarial dispute resolution methods such as mediation 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, non-technical demands such as environmental regulations and governmental requirements, and the use of detailed standard and non-standard contracts all contribute to generate disagreements.¹

This audience is of course *fully* aware that the use of dispute boards in the construction industry has over many years significantly contributed to the avoidance and early resolution of disputes, saving time, project costs, and legal fees. However, the scope for DBs is substantial and they could be

¹ See the article in *The Resolver (CIArb)* by Entwistle, M (2013), *Dispute boards lay strong foundations. Infrastructure Projects*, August, page12.

established in a range of industries worldwide. Dispute boards have been used in the following industries:

- The financial services industry (and project finance)
- Concession contracts²
- Operational and maintenance contracts
- IT projects
- Manufacturing: clothing
- Contracts where IP is an important issue
- Process plant: brewing
- PPP projects: roads, hospitals, rail projects
- Aerospace procurement
- Insurance contracts
- The maritime industry (particularly shipbuilding)
- Telecommunications
- Film and TV production

Costs

The cost of a DB is an understandable concern. 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 CI Arb follows the DRBF's policy of recommending standing DBs over *ad hoc* DBs. 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. 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 DB's determinations are admissible as

² In a typical concession contract, the concession-granting authority is a government, the concession is awarded for a limited but potentially renewable period, during which the concessionaire (private partner) enjoys the exclusive right to use the (public) asset. The concessionaire is responsible for all investments in the asset and developing new facilities, under supervision of the state or regulator. The concessionaire is remunerated in accordance with agreed tariffs collected directly from users.

evidence in case of arbitration or court proceedings (Article 3 (6) and Article 4 (6) of the CI Arb Rules).

The resolution of disputes in ‘real time’ provides the DB with the benefit of hearing from those involved in the works while matters are fresh in their memory. Another benefit of a standing DB is the resolution of disputes in manageable packages. The on-going dispute resolution by a DB usually minimises the aggregation of claims.

The cost of litigation and arbitration can be extremely high, and the applicable courts and arbitral tribunals are often unable to facilitate the rapid resolution of an international commercial dispute that can be crucial in a long-term contract where maintaining a commercial relationship is very important.

The early resolution of disagreements by a readily available DB is much more cost-effective and less acrimonious than arbitration or litigation. The expense of periodic meetings and site visits can be regarded as prevention costs.

3 THE CI Arb DISPUTE BOARD RULES

DRB or DAB?

The CI Arb Rules make the two “classic” alternatives available: Dispute Review Boards (DRBs) and Dispute Adjudication Boards (DABs). Article 2 provides sample clauses: Parties decide whether to have a DRB or DAB and include the appropriate clause in their contract.

The CI Arb Rules adopt a straightforward approach. The Rules equally apply to both types of dispute board procedures (Article 5). The only difference arising from the parties’ choice of a DRB or a DAB is that DRBs issue non-binding Recommendations as described in Article 3, whereas DABs issue binding Decisions as described in Article 4.

Appointing Dispute Board Members

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 CI Arb Rules opted for the method which appears to be the most frequently used in cases of three-member DBs: the “Bottom Up” approach, see Article 6 (3): 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 chair.

In view of the importance of establishing a dispute board at the start of a contract, the CI Arb Rules include a default appointment mechanism if the parties cannot agree on some or all of the DB members.³ If the parties fail to appoint the DB by the date stated in the contract or, where the contract is silent, within 28 days of the effective date of the contract, then the CI Arb shall, after due consultation with the Parties, appoint the DB member(s), or the whole DB if needed, see Article 6 (6).

4 DB MEMBER'S OBLIGATIONS

What does it take to be a DB member? Most importantly, you must be independent of the parties. The DB member's independence and impartiality are imperative for the parties' confidence in the whole board, and the only way to avoid any perception of bias, even if real bias does not exist.

Eight key aspects of the obligations of a DB member can be distilled from the rules of FIDIC, ICC, DRBF, AAA, ICE - and CI Arb:

- 1. Neutrality.** This really means that the DB member should be impartial and without any conflicts of interest.
- 2. Impartiality.** 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*.⁴ 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

³ 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.

⁴ *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

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. Article 8 (2) of the CI Arb Rules takes this into account by referring to “*the eyes of the Parties*”.

3. **Independence.** In contrast to the above, the obligation of independence is objective. If there is a financial tie between one of the parties and the DB member, then the DB member is clearly not independent of the project.
4. **Disclosure.** What facts need to be disclosed? The growth of international business and larger international law firms have increased the cases of possible conflicts of interest and the number of disclosures made by (potential) dispute board members and arbitrators.

Disclosure of any relationship, no matter how minor, may give one party the opportunity to deny the other party her choice of DB member, even when there is no conflict of interest. The IBA Working Group developed the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines) and believes that greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that do or do not warrant disclosure or disqualification of an arbitrator.⁵ Part II of the IBA Guidelines contains comprehensive lists of many situations and circumstances which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence.⁶

The obligations of DB members and arbitrators with regard to neutrality, impartiality and disclosure are so similar that the IBA Guidelines were taken into consideration by the drafting team of the CI Arb Dispute Board Rules (see Article 8).

5. **Qualifications.** The DB member should have the qualifications relevant to the circumstances. Qualifications demonstrate that the DB member

⁵ IBA Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004 by the Council of the International Bar Association, page 4.

⁶ Part I of the IBA Guidelines sets out the General Standards regarding impartiality, independence and disclosure. Part II of the IBA Guidelines provides a guide on the practical application of the General Standards in the form of four types of lists: the Non-Waivable Red List, the Waivable Red List, the Orange List and the Green List.

has the right kind of training, and they give the parties confidence in the board. Good interpersonal skills are essential for any board member and should include management, language and communication skills.

6. **Experience.** Experience of the industry, experience in the type of project work, experience in dispute resolution, and in making decisions... it's all required of a DB member!
7. **Availability.** The DB member must also be sufficiently available for the duration of the project.
8. **Confidentiality.** DB rules or tripartite agreements usually require DB members 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, see Article 7 (2) CIArb Rules. However, the analyzed DB rules and tripartite agreements do not expressly establish an obligation of confidentiality as between the parties.

Articles 7 and 8 of the CIArb Rules set out the DB members' obligations and required skills and expertise.

5 INFORMAL ADVISORY OPINION

Article 12 of the CIArb 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, Article 12 (2).

6 REFERRING A DISPUTE TO A DB

The preconditions for referral to a DB vary. Under the FIDIC rules the existence of a dispute is a precondition for referral to the DAB if either party seeks a binding decision. Under the FIDIC contract there are many possible claims that could be made, but if a claim has been made but not rejected, there is no dispute. Furthermore, under FIDIC rules the mechanics of the project's contract have to be exhausted before a matter is referred

to the DAB. Whereas the parties may at any time agree jointly to refer a matter to the DAB for an opinion, even if the issue has not matured into a dispute.⁷

Under the AAA Rules either party may refer a dispute to the DB if it believes negotiations are unlikely to succeed and if any contractual pre-review requirements have been met.⁸ Preconditions for referral to a DB under the DRBF rules are (1) prior good-faith negotiations between the owner and the contractor to settle the dispute; (2) compliance with prior dispute resolution process as per contract; and (3) passage of a reasonable period of time without progress toward a negotiated settlement.⁹

Under Article 13 (1) of the CIArb Rules, the parties must comply with any contractual pre-review requirements or prior dispute resolution process as stated in the contract, if applicable.

The CIArb Rules allow for any matter or disagreement arising under the contract to be referred to the DB by either party, Article 13 (2). The definition of Dispute in the CIArb Rules does not represent a further hurdle because it reads: *“Dispute means a disagreement (of any kind whatsoever) between the Parties arising out of, under or in connection with the Contract.”*

7 CIArb TRIPARTITE AGREEMENT

The CIArb Rules have been issued together with the model CIArb Tripartite Agreement for a Dispute Board (TPA). Each appointed DB member should sign a TPA.

About 50% of the respondents to the CIArb Consultation believe 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 Rules should promote a system of billing for time spent (plus expenses).

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

⁷ FIDIC 1999, General Conditions of Contract for Construction, clauses 20.2 and 20.4.

⁸ AAA Dispute Resolution Board Guide Specifications, clause 1.04.B.

⁹ Articles 6.A, 6.B.2 and 6.B.3, Appendix 2, Guide Specifications.

paying considerable amounts, while the DB members may have comparatively little work for part or even the entire project.

The CIArb Tripartite Agreement gives users of dispute boards a choice between two alternatives of remuneration. 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.

8 ENFORCEMENT

Status of a DB's decision

DB members do not act as arbitrators and DB's decisions do not qualify as arbitral awards. So what is the nature and status of a DB's decision? A DB's decision is contractually binding because the parties agreed by contract to be bound by it. If a DB made a decision in respect of a dispute, then (subject to any new facts) the DB is also bound by its past decision. Failure to comply with the DB's decision is a breach of contract by the defaulting party. The contractual remedy is a referral to arbitration or court. See Articles 2, 3 and 4 of the CIArb Rules.