

UPDATE ON :AFRICAN DEVELOPMENT BANK AND DISPUTE RESOLUTION

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MDBs

- All Multilateral Development Banks (MDBs) including the African Development Bank (AfDB) have harmonized their policies (in spirit and text) particularly the Procurement Rules and Procedures.
- Dealing and understanding MDBs became simpler and similar. In addition their interventions became more efficient.

AfDB and DRBF

Importance

- ▣ Through policy based interventions and sector activities AfDB helps in setting policy directions in its member Countries (All of Africa)
- ▣ AfDB is an important vector of policy changes through dialogue with its member states
- ▣ All MDBs yield common stands and policies

AfDB and DRBF

Importance:

- ▣ MDBs encourage member countries to Emulate successful projects and ideas
- ▣ AfDB provides Training and Capacity Building
- ▣ Frequent use of International Competitive Bidding in large contracts
- ▣ Active participation in implementing large infrastructure projects

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Thus:

AfDB and other MDBs are important vectors of change due to the high level of Leverage in Influencing Policies Development and Resource Mobilization in Borrowing Countries. International firms participate in ICB contracts; which ideally should contain DBs. AfDB covers 53 Borrowing Countries (plus Southern Sudan)

AfDB and DRBF

Dispute Resolution Clause in AfDB Procurement Rules 1999

The conditions of contract shall include provisions dealing with the applicable law and the forum for the settlement of disputes. International commercial arbitration may have practical advantages over other methods for the settlement of disputes. Borrowers are, therefore, encouraged to provide for this type of arbitration in contracts for the procurement of goods and works.....

In the case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall also include mechanisms such as dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement.

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Dispute Resolution Clause in AfDB Procurement Rules (2012)

The conditions of contract shall include ... the forum for the settlement of disputes. International commercial arbitration has practical advantages over other methods for the settlement of disputes. Therefore, the Bank recommends that Borrowers use this type of arbitration in contracts for the procurement of goods and works. In case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall also include mechanisms such as dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement.

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Dispute Resolution Clause in Harmonized MPDs

Clause on Appointment of the Dispute Board

“Disputes shall be referred to a DB for decision in accordance with sub-clause [Obtaining Dispute Board’s decision]. The Parties shall appoint a DB by the date stated in the Contract Data”.

Explicit Use of DBs

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Current Practice

- AfDB encourages the resort to amicable solutions to avoid Disputes Resolution mechanisms
- Litigation in Africa is strenuous and lengthy thus could negatively affect project implementation
- Contractors are very careful when implementing projects financed by AfDB thus avoid disputes and exert preemptive measures.

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Future Development

- ✓ The new harmonized Master Procurement Document explicitly encourages the use of DBs
- ✓ The revised Procurement Rules (2012) have more positive wording towards the use of DBs but not yet mandatory
- ✓ Recently it is noted that thinking about the use of DB has increased

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Views of AfDB Procurement Managers

- ✓ Believe that DBs can serve an important purpose,
- ✓ Think there is need to make a case for the benefits that will accrue to the Borrower countries by using DBs,
- ✓ Reckon the number of experts with the necessary qualifications to be Dispute experts is really very small

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AfDB Future Plans

- ▣ Have a thematic workshop (or a roundtable) to discuss DBs.
- ▣ Bring DBs experts from the industry and Borrowers that are about to award large infrastructure contracts.
- ▣ Hope that AfDB will be able to make a case for a greater use of the DBs through the workshop.

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Active participation is required in the following Fora for promoting DBs

- ▣ FIDIC
- ▣ CICA
- ▣ OECD/DAC
- ▣ MENA/OECD
- ▣ Annual Meeting of Heads of Procurement

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General Recommendations:

- ❑ DRBF should endeavor to collect information on the use of DBs by MDBs and governments
- ❑ Capitalize on DBs success stories
- ❑ Network and liaise with MDBs to share information and training on DBs
- ❑ Spread & activate regional chapters & country representatives to promote the use of DBs
- ❑ Increase Use of Local Expertise (Nationals) in Africa to control costs

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Recommendations regarding MDBs:

- DRBF to dialogue with MDBs (possibly at the margin of the HoP Annual Meetings with FIDIC and CICA)
- Making information and data available to MDBs staff (paper form and web-based)
- Conduct training-sensitization meetings (e.g. AfDB one-day seminar-March 2008). MDBs are ready to adopt DBs

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Recommendations at the Country Level:

- ❑ DRBF Region 2 and their members should lay down strategies to access the African market
- ❑ Introduce Countries to DBs through Sensitization, Training and Capacity Building
- ❑ DRBF could provide ideas and expertise to national governments to include DBs in their Procurement and Contracting Codes

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Way Forward: Implementing Harmonized MPDs

1. Sensitize Implementers and build capacity
2. DRBF can provide a network of adjudicators from Africa and elsewhere
3. Provide information on time requirements, cost, etc of DBs for Local and International contracts
4. DRBF should play a proactive role to facilitate the use of DB using the new MPD
5. Liaise with FIDIC and CICA to enhance use of DBs

LIBYA AND THE USE OF DR

After the Libyan up rise, thousands of contracts worth billions were suspended due to *force Majeure*.

Situation:

1. National procurement code does not permit DBs unless permitted by a cabinet exception
2. Government contracts do not include a mechanism for dispute resolution
3. *Force Majeure*; if included *is* badly stated in the contract conditions which rendered the handling of the situation very difficult

LIBYA AND THE USE OF DR

Last Slide:

- ▣ Few contracts were settled (mainly in oil industry) as they use FIDIC books
- ▣ Majority of contracts are still suspended
- ▣ Tasyeer Training Center (among others) are promoting the use of *ad hoc* DBs to address and resolve the disputes of the suspended contracts.
- ▣ Tasyeer in collaboration with FIDIC has organized the 2nd Libya FIDIC Day on 24 April 2013; DBs will discussed