

<p style="text-align: center;">PROCEDURE AND TIMEFRAME FOR THE RESOLUTION OF DISPUTES BY DISPUTE BOARDS</p>

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1. Scope

This paper deals with disputes formally referred to Dispute Boards with a view to obtaining a decision or a recommendation.

This paper refers to the two bodies of rules best known and most often used in Europe, namely:

- the FIDIC Conditions of Contract, more especially the Conditions of Contract for Construction of 1999 (commonly called the “Red Book”),
- the ICC Dispute Board Rules of 2004.

2. The procedure

2.1. Under the FIDIC Red Book

Procedural matters are addressed by article 20.4 and also by an annex titled “procedural rules”.

a) Referral of the dispute

The claiming party must submit to the DAB a written statement setting out the dispute. Copies must be handed over to the other party and the Engineer.

b) Examination of the dispute

- There are no uniform rules defining a standard procedure. The DAB decides on a case by case basis.
- The DAB’s powers regarding the procedure are almost discretionary. The only mandatory obligation of the DAB is to act “fairly and impartially” and to give each party “a reasonable opportunity of putting his case and responding to the other’s case”.
- The DAB is not obliged to hold a hearing in the presence of the parties. If he decides to do so, he conducts the hearing in the way that he deems proper.
- The parties have to cooperate, notably by making available to the DAB “promptly” the additional information and all “appropriate facilities” requested by the DAB.

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c) Decision

- The DAB, unless it comprises a single member, must hold a private meeting in order to prepare its decision.
- The DAB must endeavor to reach a unanimous decision. If impossible, the decision is made by a majority of members. The minority member may be requested by his colleagues to deliver a written report.
- The decision has to be “reasoned”.

2.2. Under the ICC Dispute Board Rules

Procedural matters are addressed by articles 17, 18, 19, 21, 22, 23 and 24.

As a reminder, ICC dispute boards can be either DABs, DRBs or CDBs (contrary to FIDIC dispute boards which can only be DABs).

a) Referral of the dispute

The claiming party must submit to the DB and the other party a written statement describing the dispute.

b) Examination of the dispute

- The ICC procedure is more structured than the FIDIC procedure. However, the DB has the power to deviate from most of the written rules.
- The normal calendar of the procedure is as follows:
 - the responding party submits a written response;
 - the DB convenes a hearing with both parties present; during the hearing both parties present their position, the DB asks questions and the parties answer;
 - after the hearing, the DB may request the parties to provide a written summary of their declarations.

c) Determination (= recommendation or decision)

- Unless it comprises a single member, the DB must endeavor to reach a unanimous determination. If impossible, the determination is made by a majority of members. If no majority can be reached, the president decides alone. A dissenting member must state the reasons why he disagrees in a separate written report.
- The determinations of the DB must be reasoned.
- The Rules encourage the DB to give details, for instance by summarizing the positions of both parties, referring to the relevant contract clauses, setting out the chronology of events, etc. – the goal being to cause both parties to understand and accept the determination.

d) Review by the ICC International Court of Arbitration (optional)

If the parties have so agreed beforehand, the DB must submit its draft decision to the review of the ICC International Court of Arbitration. The Court may lay down modifications “only as to the form of the Decision”.

2.3. Example of a practical problem

Many experienced DB members take the view that the parties’ solicitors or attorneys should not be allowed to intervene directly in the hearings. Basically those specialists fear that the intervention of external lawyers will change the process into a “pre-arbitration” – longer, more complex, more costly. Nevertheless the parties often demand that their case be presented by their solicitors or attorneys, which creates difficulties.

3. The timeframes

3.1. Under the FIDIC Red Book

This matter is addressed by Article 20.4.

a) Timeframe to give a decision

- The decision must be issued within 84 days of the reception of the referral.
- This period can be extended if proposed by the DAB and approved by both parties.

b) Failure to comply with the timeframe

If the DAB does not issue its decision within 84 days (plus extension if any), either party may give to the other party a notice of dissatisfaction within 28 days, and then commence arbitration.

3.2. Under the ICC Dispute Board Rules

The matter of timeframe is addressed by article 20.

a) Timeframe to render a determination

- The DB must issue its determination “promptly” and at the latest 90 days from date of receiving the referral.
- This period can be extended by a decision of both parties after consulting with the DB.
- Within this global period of 90 days (i) the responding party must reply to the request within 30 days, and (ii) a hearing must be held 15 days after the responding party’s reply is received (unless otherwise agreed by the parties or instructed by the DB).

b) Timeframe for the International Court of Arbitration to review the draft decision (optional)

If the draft decision must be reviewed by the International Court of Justice, the 90 days period is extended by 30 days. In practice however, the Court has the discretion to extend this additional period.

c) Failure to comply with the timeframe

If the DB does not render its determination within the time prescribed, either party can refer the dispute to a state court or an arbitral tribunal as the case may be.

3.3. Example of a practical problem

The timeframes set by both the FIDIC General Conditions and the ICC Rules are very short. In order to meet the deadlines, a DB must be ready to act as soon as it receives a referral. Some DBs do not make themselves available quickly enough. They start examining the dispute after a couple of months. Inevitably they end up having to ask the parties for one or several time extensions. Such delays harm seriously the effectiveness of the system because the success of DBs rests first and foremost on the speediness of the determination.