

DRBF 13th Annual International Conference (Session 7)

INITIATIVES FOR BETTER RESOLUTION IN DISPUTE BOARD REFERRALS

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1. Users' expectations

- Efficiency of the DB procedure in terms of time, costs and quality enabling the parties to settle their disagreements. Context, cultural usages may influence the objective.
- Type of disagreement/disputes (such as contract interpretation, delays, acceleration, quantum)
- Timing and costs depends also on
 - (i) Selected Dispute Board approach
 - (ii) DB Members' qualification being appointed
 - (iii) Additional Procedural Rules

2. Result oriented Dispute Board

Type of Actions to be initiated

- a) Pre-contractual activities (tender, negotiation)
- b) Selection of the DB approach,
- c) Appointment of the Board
- d) Procedures
- e) Effectiveness of the DB
- f) Implementation/enforcement of determinations

3. Result oriented DB

Tools at disposal of the Parties

- Before referring a disagreement in a dispute
 - (a) Internal dialogue – regular, continuous information
 - (b) Promote dialogue to resolve disagreements
 - (c) Use of Site visit meetings
- Referral to the DB: 2 major procedural steps
 - (1) Informal assistance: joint referral on principles only
(no quantum)
 - (2) Formal referral, binding/non-binding determinations

4. Selection of the DB Approach

- **DRB**: non-binding determination, notification constraint, approach mostly selected in USA, usually preferred by Employers;
- **DAB**: contractually binding determination, immediate implementation of the determination, approach usually preferred by Contractors;
- **CDB**: a combination of DRB and DAB, power of the CDB to decide the type of determination if parties disagree, acceptable compromise during negotiation.

5. Criteria for selecting the DB approach

- Approach usually defined in the Tender. Should be discussed at contract negotiation (re. objectives, needs of the project, risks to be incurred, usages, mentalities, etc.)
- Standing DBs versus not standing DBs:
- Differences between ICC and FIDIC Rules:
 - ICC: DAB, DRB and CDB, selection to be made by the Parties, pros-cons.
 - FIDIC: limited to DAB
- DB ICC Rules and FIDIC GCC under revision

6. Selection of the Board

- Designation by each party of one member; designation of the chair by the two designated DB members after having consulted the parties, acceptance by both parties at the outset of the contract
- Signing of the DABA at the outset of the contract; never postpone as jurisdiction of tribunal exist only after having a DAB determination
- Main criteria:
 - competences in the legal, technical contractual and legal fields
 - Conversant with other dispute mechanism
 - human qualities

7. Criteria for selecting the Board

- Competences in project management, technical, financial, procedural and law aspects
- Conversant with other dispute mechanisms such as arbitration, mediation, adjudication, expertise
- Human qualities, open-minded to different mentalities, to negotiation, capacity in listening
- Assessment of project risks and consequences

7. Procedural Rules

- General procedural rules included in ICC DB Rules and FIDIC Standard Conditions of Contract
- Need for additional detailed procedural rules in accordance with the specific project

8. Revision of the DB Rules

Issues under consideration

- Enforcement of Decision: unhappy experience in Singapore case – report of the IBRP- Working Group (Art. 4/5/6)
- Improvement of the DABA - existence of the DABA, default mechanism, language, (Art.10)
- Adjustment of DB remuneration (retainer, fees)
- Improvement of informal assistance (ICC art.16)
- Deadlines for rendering determination (ICC Art.20)

8. ICC DB's RULES and FIDIC RULES

- Cases in construction industry applicable to any mid/long term contracts (one member DB)
- Main differences:
 - (i) Alternative approaches like DRB and CDB (non-binding recommendation/ contractually binding decisions).
 - (ii) Development of informal assistance (Art.16)
- No “ad hoc” DBs, it is adjudication
- Perspectives for FIDIC and ICC DAB Rules

9. Initiatives for better use of DB

1. Preparation of well documented tender
2. Detailed contract negotiation, risk management
3. Analysis of the DB approach to be selected
4. Selection of competent DB Members
5. Agreement on additional procedural rules
6. Improvement of continuous dialogue between the parties
7. Drafting of structured and concise submissions
8. Use of informal assistance (issues of principle)
9. Adjustment of timing for rendering a determination according to the case complexity