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2014 Chartered Institute of Arbitrators Dispute Board Rules

Introduction

After careful consultation, the Chartered Institute of Arbitrators (CI Arb) produced and published in August 2014 a set of international commercial Dispute Board rules.¹ Although a variety of Dispute Board rules already existed, they only focused on the construction industry. In addition, some rules are drafted as an integral part of a standard form contract (for example, the FIDIC suite of contracts²) while others can be incorporated (for example, the ICC rules³). The new CI Arb rules can now be used on any medium- or long-term project, whether construction, IT, commercial or otherwise.

Dispute Boards in Context

Dispute Boards (DBs) are created by contract and aid the parties in resolving their disagreements. In the last 20 years, there has been an increasing demand for less adversarial dispute resolution methods, such as mediation, conciliation and Dispute Boards⁴. The scope of Dispute Boards is substantial and they could be established in a range of industries worldwide; for example, in the financial services industry, the maritime industry, operational and maintenance contracts and long-term concession projects.

Well-drafted Dispute Board rules will allow parties a flexible approach in resolving disagreements which may arise during the performance of their contract. However, it has to be acknowledged that 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 DBs will mainly be suitable for mid- to high-value projects because of the cost involved.

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The cost of litigation and arbitration can be extremely high and, at the end of the process, the prevailing party may realise that it spent far more to win the dispute than the issue in dispute was ever worth. The applicable courts and arbitral tribunals are often unable to facilitate the rapid resolution of an international commercial dispute that can be crucial, particularly in a long-term contract where maintaining a commercial relationship is very important.

Comparison of Published Dispute Board Rules

Prior to the new CI Arb rules, there was no single set of international Dispute Board rules that could be used on a wide range of commercial projects. For example, the ICC Rules are the closest but they focused on the construction industry, and the FIDIC DAB procedure is woven into the fabric of the FIDIC contract. Extracting the rules required very careful drafting and the issues posed by enforcing a DB's decision under the FIDIC contract are wide-ranging. The new CI Arb rules offer a more simplistic and straightforward approach to avoid those issues and the rules can be implemented in any commercial or construction contract by the incorporation of a short precedent DB clause. The different types of Dispute Boards are examined below.

FIDIC: The World Bank and a number of other multilateral development banks (MDBs) have for many years adopted the FIDIC Conditions of Contract for Construction 1st edition 1999 as part of their standard bidding documents, which their borrowers or aid recipients had to follow, but they included additional clauses which were specific to and varied between the MDBs. This created inefficiencies and uncertainties amongst the users of the documents. The MDBs recognised this and resolved to harmonise their tender documents on an international basis.

FIDIC and the MDBs embarked upon a process to harmonise their DB provisions, and produced a special MDB harmonised edition of FIDIC 1999 Conditions of Contract for Construction for MDB-financed contracts, which was released in May 2005⁵ ("the MDB Harmonised Construction Contract"). The third amended version of the MDB Harmonised Construction Contract was published by FIDIC in June 2010⁶, which is the standard set of contract conditions adopted by the leading development banks.

In both FIDIC and the new CI Arb rules, the parties have to appoint either one sole DB member or three DB members by the date stated in the Appendix to Tender/Contract.

Where the contract is silent on the date that the DB members should be appointed by, the CI Arb rules provide that a member must be appointed within 28 days. There is no such provision under the FIDIC rules.

The appointment of DB members must be made jointly under the FIDIC rules, whereas under the CI Arb rules, the appointment is only made jointly by the parties if they are appointing a sole DB member. On the other hand, if the parties are appointing three DB members, then the CI Arb rules provide that each party must nominate one DB member each. The two appointed DB members must then appoint the third DB member as chair, subject to the approval of the parties. This can be contrasted with FIDIC where the parties must also select the third DB member (but only if they

¹ CI Arb Dispute Board Rules, August 2014, <http://www.ciarb.org/das/Dispute%20Board%20Rules.pdf>

² FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Red Book), First Edition 1999

³ ICC Dispute Board Rules; <http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/>

⁴ http://www.fenwickelliott.com/files/dispute_board_rules_-_consultation_14_oct_2013_2_.pdf

⁵ General Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition May 2005, <http://fidic.org>

⁶ General Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition June 2010, <http://fidic.org>

have agreed to have three DB members instead of one sole member).

FIDIC clause 20.4 deals with the referral of a dispute to the DAB and the binding nature of the DAB's decision.

When referring a dispute to a DB, the difference between FIDIC and CIArb is that in FIDIC, the precondition for referring a dispute to the DB is that: (1) there must be a dispute (of any kind whatsoever), and (2) the referring party must notify the other party and engineer and provide them with copies of the referral.

The precondition in the CIArb rules is that the parties must comply with any contractual pre-review requirements or prior dispute resolution process as provided for by the contract, as applicable. If this requirement has been met, the parties can also (as in the case of FIDIC), at any time, give notice of its intention to refer the dispute to a DB by submitting a position statement to the other party and to the DB.

Under both FIDIC and the CIArb rules, the DB must give its decision together with its reasoning within 84 days of receiving the referral/position statement.

However, the difference between the rules is that in FIDIC, as there can only be a DAB as a type of DB, the parties must promptly give effect to the DABs. Therefore, the DAB's decision under a FIDIC contract is temporarily binding, and becomes final and binding in the absence of a valid notice of dissatisfaction which must be given by either party within 28 days of receiving the decision. This can be distinguished from the CIArb rules where, in addition to a DAB type of dispute board, the parties also have the choice of choosing a DRB as a type of dispute board where you can voluntarily comply with a Recommendation which you are not bound by.

ICC: Under the ICC Dispute Board Rules (the "ICC Rules"), the parties can choose to implement three types of Dispute Board procedures: DAB, DRB and a third type of Dispute Board, Combined Dispute Board (CDB), which was developed by the International Chamber of Commerce (ICC). CDBs are useful for those parties who cannot decide if they need a DRB or a DAB. However, a CDB can create some uncertainty. When CDBs issue recommendations with respect to disputes, they may instead issue a temporarily binding decision if one party requests this and no other party objects. The decision must be implemented immediately. If one party objects to issuing a binding decision, this leads to a period of uncertainty as the CDB then has to decide whether to issue a recommendation or decision. Due to the possible confusion that can be caused by this path, the new CIArb rules have not adopted CDB as a Dispute Board that can be chosen by the parties.

Both the ICC rules and CIArb rules provide that the DB shall comprise either one or three members, but if the parties have not agreed on the number of DB members, the DB shall be comprised of three members.

If the DB is to comprise of three persons, both the ICC rules and CIArb rules state that the third DB member is to be appointed by the two appointed DB members to select the third DB member as a chairman subject to the approval of the parties.

The parties are restricted by the time in which they must appoint a DB member under the ICC rules, which must be within 30 days, whereas this can be longer under the CIArb rules provided that you have specified the date in the contract.

The method of referring a dispute to the DB is very similar under both the ICC rules and CI Arb rules. The only real difference is the time frame in which the other party must submit their response by (30 days under the ICC rules and 28 days under the CI Arb rules). However, under the CI Arb rules, the referring party may also reply to the response within 14 days of receiving it (subject to obtaining the permission of the DB).

Unlike the CI Arb rules, parties do not have to comply with any contractual pre-view requirements before referring a dispute to DB, and the DB has a slightly longer period within which they must make their determination by (i.e. 90 days of the statement of case being received as opposed to 84 days under the CI Arb rules).

INSTITUTE OF CIVIL ENGINEERS (ICE): The ICE Dispute Resolution Board procedure was issued in February 2005. The rules consist of two alternatives: Alternative One for use on international projects and UK contracts which are not subject to the provisions of the HGCRA, and Alternative Two which is HGCRA compliant.⁷

This differs from the CI Arb rules which implement one set of international commercial Dispute Board rules that can be used on any project.

The procedure also contains a model tripartite agreement to be entered by the contractor, employer and DB member. Each DB member will enter into a separate agreement. The parties can agree on the identity of the Dispute Board member if there is to be only one Board member.

If there are to be three, each party may nominate one member for approval by the other party. The parties shall then consult both members and agree upon the third member, who shall be the Chair. This leaves the traditional arbitration procedures in the contract intact (in the case of Alternative One). This is similar to the CI Arb rules with the exception that it is the DB members who select the third member (with the approval of the parties) and not the parties.

The other difference is that the ICE rules provide that the appointment of the DB members must be made within 56 days from the date of the contract.

If the parties fail to establish a DB, the CI Arb shall, after consulting the parties, appoint the DB member or members within 28 days of the written request of one of the parties. On the other hand, the ICE will appoint the DB member or members within 14 days of the written request of one of the parties and is not under an obligation to consult any of the parties when doing so.

Unlike the CI Arb rules, parties under an ICE agreement do not have to comply with any contractual pre-review requirements before referring a dispute to the DB. Either party may at any time give notice of its intention to refer a dispute to the DB and must provide copies to the other party.

Under both the ICE rules and CI Arb rules, the DB must give its decision with its reasoning within 84 days of receiving the referral/position statement.

AMERICAN ARBITRATION ASSOCIATION (AAA): The AAA Dispute Resolution Board Guide Specification⁸ provides for an independent DRB that 'will assist in and facilitate the timely resolution of disputes ...' The focus of the AAA procedure is on party autonomy.⁹ Therefore, there is only one type of dispute resolution platform, the DRB, which can be implemented, unlike the CI Arb rules which offers the option to choose a DRB or DAB. The DRB will assist the parties to resolve their differences. It will not make a binding decision, but will issue written non-binding recommendations.

The AAA will help the parties to identify the members of the DRB, but will not appoint them in default. However, the appointment of DRB members can be viewed as being limited as it can only be made from the list of individuals provided by the AAA, unlike the CI Arb rules. Also, the DRB must consist of three members and the parties do not have the option for the DRB to consist of a sole Dispute Board member.

There is also a restricted period in which the DB members must be appointed by (i.e. 14 days from the date of the contract), and unlike the CI Arb rules, there is no provision for when the appointment must be made by if the contract is silent on the date.

Both the AAA rules and CI Arb rules are similar in that contractual pre-review requirements must be met before parties can refer a dispute to the DB.

The DB's recommendations in writing is due within 14 days of hearings, unless the parties agree for this time to be extended. Unlike the CI Arb rules, the AAA rules do not specify whether the DB must give reasons for the determination, but either party may request clarification if it does not understand the recommendation, and also request the DB to reconsider if new information becomes available.

Under the CI Arb rules, if a party rejects a recommendation they may submit the dispute to arbitration, or if the parties agree, to the courts. The AAA rules on the other hand do not specify what can be referred to arbitration or court proceedings.

The AAA rules do not allow the parties to obtain the advice or informal opinions of the DB members whereas the CI Arb rules do make a provision for this provided that the advice and/or opinion is obtained jointly.

The new CI Arb rules are considered in more detail below.

Appointing Dispute Board Members

A DB should ideally be established at the outset of a contract (at or around the time of the commencement of the works on site) and remain in place throughout the project duration. This enables DB members to become familiar with the contract and its performance, and also be acquainted with the parties, making the DB an effective dispute resolution mechanism with “real-time” value.

The provisions requiring the establishment of a DB must be contained in the contract between the parties. The process of establishing a DB is challenging. Identifying, agreeing upon and appointing individuals with the appropriate skills and experience can be time-consuming. It is recommended that the parties co-ordinate their selection of DB members and chairperson in a way so as to provide the maximum of appropriate skills for the project that is relevant to the circumstances, including the availability of the DB member for the duration of the project.

The contract between the parties should state whether the DB will comprise of one or three members. If the contract is silent on this, or if the parties do not agree, then there shall be three members on the DB.

⁷ ICE Dispute Board Procedure, Institution of Civil Engineers; <http://www.ice.org.uk/getattachment/c55bd400-4b50-463d-a836-a266d3315691/ICE-Dispute-Board-Procedure.aspx>

⁸ AAA Dispute Resolution Board Guide Specification; https://www.adr.org/aaa/faces/services/disputeavoidanceservices/disputeresolutionboards?_afLoop=381718472279925&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D381718472279925%26_afWindowMode%3D0%26_adf.ctrl-state%3D12bmtcv6g_181

⁹ Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members, Nicholas Gould, Society of Construction Law, December 2006.

If the parties agree to have a sole DB member, they must appoint the member by the date stated in the contract or within 28 days of the contract if the contract is silent on the date.

If, on the other hand, the parties wish to appoint three DB members, then each party nominates one member for the approval of the other party. The third member is then selected by the two members (subject to approval by the parties) who will act as chairperson. As before, the three members must be established by the date stated in the contract or within 28 days of the contract if the contract is silent.

One party cannot terminate the appointment of a DB member unilaterally. The appointment can only be terminated by the agreement of both parties and a new DB member must be appointed in the same way as the replaced member was required to have been appointed.

If there is a conflict of interest, or if a DB member fails to comply with the Tripartite Agreement, either party can apply to the CI Arb, at any time, to remove the DB member in question. The CI Arb also has the power to appoint a DB member if the parties fail to do so in the manner set out above.

DB Member's Obligations and Ethics

The DB members must treat all information provided to them during the course of their service as confidential or, if they have to disclose the information, this must only be for the purpose of avoiding or settling a dispute unless they have the consent of the parties or a right by law.

The DB members are also under an obligation to adhere to the ethical obligations set out in the rules or in the Tripartite Agreement.

The DB member, and any subsequently appointed replacement DB members, must be impartial and independent at all times and confirm that there is no conflict of interest. In the event that there is a conflict, the member must disclose it to the parties immediately. If the parties wish to express an objection with regard to that member, they must do so within 21 days otherwise they will be deemed to have waived any potential conflict of interest.

Deriving from the principle that no person can be his or her own judge, the following situations preclude a person from serving as DB member:

1. There is an identity between a party and the prospective member, or the prospective member is a legal representative of one of the parties.
2. The prospective member is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.
3. The prospective member has a significant financial or personal interest in one of the parties or in the matter at stake.
4. The prospective member regularly advises one of the parties or an affiliate of one of the parties, and the prospective member or his or her firm derives a significant financial income therefrom.
5. The situations listed in this clause are non-exhaustive examples of specific situations which give rise to justifiable doubts as to a person's impartiality and independence. Disclosure of any of these situations cannot cure the objective conflict of interest.

Referring a Dispute

If there is a dispute, the first thing that parties must do is comply with any contractual pre-review requirements or prior dispute resolution process which may be required under the contract.

In circumstances where a dispute arises, either party can, at any time, give notice of its intention to refer the dispute to the DB by submitting a Position Statement to the other party and to the DB. The referring party must include in the Position Statement a summary of the dispute, a list of the issues and their position together with the redress sought. This must be submitted with any supporting evidence.

Following the submission of a Position Statement, the responding party must submit a response within 28 days of receiving the Position Statement. The response must include a summary of their position, supporting evidence and a statement of what they request the DB to determine.

The referring party may, with the DB's permission, reply to the response within 14 days of receiving it.

Throughout this process, the parties are still free to settle the dispute at any time, with or without the DB's assistance.

Enforcing a Decision

The DB's decision must be made within 84 days of the DB receiving the Position Statement.

The parties are only contractually bound by the DB's decision if they have chosen to implement a DAB. If, on the other hand, the parties chose to implement a DRB they would not be bound by it as it would only be a Recommendation as opposed to a Decision.

If a DRB issues a Recommendation, each party must either accept or reject the recommendation within 21 days. After the 21 days, either party can either voluntarily comply with the Recommendation or submit the dispute to arbitration, or if the parties agree, the courts.

The recommendations made by the DRB are admissible in subsequent arbitral or judicial proceedings.

The Structure of the Dispute Board Rules

The CI Arb rules are written in a way which, unlike the rules under FIDIC, allows it to be implemented in contracts in any industry and not just construction. It has one set of rules for DABs and one set of rules for DRBs, thereby giving the parties the choice of obtaining a non-binding Recommendation or a binding Decision and is, therefore, not restrictive (like FIDIC which only uses DABs) or uncertain (like the ICC which offers three different types of Dispute Boards).

The rules also offer clarity. For example, the rules in AAA and ICE do not specify what can be referred to arbitration or court proceedings, whereas this is clearly set out in the CI Arb rules.

The CI Arb rules also create certainty in that it specifies when a DB member must be appointed if the contract between the party is silent on the date. By contrast, the AAA and FIDIC rules do not make any provision in circumstances where there is no date specified in the contracts regarding the appointment of DB members.

Furthermore, the purpose of the CI Arb rules is to assist the parties as much as possible in order to avoid disputes, which, in turn, enable parties to focus on the delivery of the project. The CI Arb rules do this by allowing parties to jointly obtain the informal advice of DB members without having to refer a dispute, which can be contrasted with the rules under the AAA.

Conclusion

Due to the recent introduction of the new CI Arb rules, it is difficult to tell at this stage how successful it will be in terms of its implementation in international contracts. However, what is certain is that it can be used in any commercial contract and is not specific to a particular industry. Therefore, parties to the contract do not have to query whether the rules will work for their bespoke contracts nor will they have to be concerned with any rigid rules or areas of uncertainty as the rules offer two types of Dispute Boards, whilst, at the same time, avoiding confusion by not offering a combined dispute board which can hinder parties' ability to decide on the suitability of a Dispute Board.

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