

DRBF 8th International Conference

Cape Town 2-4 May 2008

THE DIFFERENT TYPES OF DISPUTE BOARDS

All types of Disputes Boards have the same finality: they are mechanisms of prevention and/ or provisional dispute resolution.

However, all of those mechanisms do not operate in the same way. For reasons probably linked to history, some are rather turned toward the search of a consensus while others are rather turned toward the delivery of an authoritarian decision.

Traditionally, one differentiates two main types of Dispute Boards or DBs. The first type appeared during the seventies in the United States under the form of « Dispute Review Boards ». Later, in the nineties, a second type appeared in the United Kingdom under the form of « Dispute Adjudication Boards ». The latter were imposed by the British legislator in construction disputes in order to unblock the courts.

Still today, those two types of DBs are used in different geographical zones. DRBs are mainly used in North America whereas DABs are mainly used in Great Britain and in countries influenced by English law.

Those two “classical” forms of DBs are described in different bodies of rules, such as:

- the standard contracts published by FIDIC, particularly its « Red Book »,
- the general conditions of various multilateral development banks such as the World Bank, the African Development Bank and the Islamic Development Bank,
- the Dispute Board Rules of the International Chamber of Commerce

The existence of those written rules, to which anybody can refer, was instrumental in promoting a rapid development of DBs in the world. Today, DBs are in the process of becoming a common mechanism of prevention and dispute resolution in long term contracts.

1. The options available

The parties to the contract can choose between two « classical » types of DBs:

- the Dispute Review Board or DRB, an organ that issues recommendations, which, in principle, are not binding for the parties,
- and the Dispute Adjudication Board or DAB, an organ that issues binding decisions.

Since 2004, the International Chamber of Commerce (ICC) offers a third type of DB: the “Combined Dispute Board” or CDB, a hybrid mechanism designed to combine the advantages of the two classical types of DBs. The CDB normally issues recommendations but it can also issue binding decisions if one of the parties requests it, and if it seems justified to the CDB.

1.1. Common points between the different types of DBs

1.1.1. The composition of the DB

Most DBs are composed of 3 members. However, in small projects, DBs can be composed of only one member. In all cases, the DB must be composed of an odd number of members in order to avoid a deadlock.

The parties enjoy a total liberty to appoint the members of the DB. The method that is most often used is the following one:

- each party appoints one member of the DB,
- and the two members thus appointed nominate the third member, their choice having to be approved by the parties.

Other methods can be chosen if the parties wish so. For example, the parties can stipulate in the contract that all three members will be chosen by mutual agreement.

The FIDIC contracts and the ICC rules consider the possibility of a disagreement between the parties when they have to appoint the members of the DB. In such a case, provisions are made for an external authority to substitute the parties and appoint the members of the DB in the parties' place. In the ICC rules, for example, the “Dispute Board Centre” can be called upon by either party or both to proceed with the appointment.

The conditions to be a DB member are not precisely defined in standard documentation. It is obvious that the members of a DB have to be independent, fluent in the language of the contract and to have some experience in the type of project to be carried out. For the rest, the parties pick out whoever they want. Practical experience shows that most DBs are composed of several professionals of various specialties, for example two engineers and a lawyer, or an engineer, an economist and a lawyer.

1.1.2. The continuity of the intervention of the DB

The DB is not an external organ that is called upon only in the event of a conflict. The DB forms an integral part of the project as well as, for example, the Engineer, the lender or subcontractors.

The standard documentation strongly recommends that the parties set up the DB from the very beginning of the project, even if, at this early stage, there is no disagreement or dispute, in order for the DB to become familiar with the project right from the outset, follow its performance step by step and be immediately operational in case a dispute arises.

As soon as the DB is set up, the parties must provide the DB with regular information. In particular, the parties must communicate to the DB the essential part of their correspondence, the progress reports issued and the minutes of their meetings. They must facilitate periodical site visits by the members of the DB. Finally the parties must inform the DB as soon as possible of any current or potential disagreement.

1.1.3. Challenging DB determinations

Whatever the form of the DB, the DB is neither a judge nor an arbitrator. The DB's role is only to settle disputes temporarily, in order to prevent the paralysis of the project.

If a party does not agree with the solution suggested or imposed by the DB, that party can refer the dispute either to a judge or to an arbitrator in order to obtain a judgment or an award that will definitively settle the dispute (possibly against the DB's opinion) and be legally enforceable.

While waiting for the judgment or the award, a party cannot be forced (in the strict sense of the term) to comply with a recommendation or a decision of the DB. However, a party who refuses to comply can be deemed in default under the contract and be sentenced to pay damages. In practice this threat acts as an effective deterrent: a vast majority of DB recommendations and decisions are carried out spontaneously by the parties, even when they are not satisfied with it.

1.1.4. The cost

Whatever the form of the DB, the costs and fees paid by the parties are similar. The difference, if any, is not due to the type of DB, but to the number of members composing the DB. It is obvious that a DB composed of only one member will be less costly than a DB composed of 3 members.

1.2. Differences between the three principal types of DB

1.2.1. The Dispute Review Board (DRB)

The principal function of the DRB is to issue recommendations - formal and written - inviting the parties to act in such or such manner to settle their dispute.

In theory the recommendations of the DRB are not mandatory for the parties.

However if, following the handing down of a recommendation, neither party notifies its disagreement within a predetermined time (30 days in the ICC Rules), the recommendation becomes binding and irrevocable. It can no longer be challenged before a judge or an arbitrator.

It should be noted that a secondary but not negligible function of the DRB is to help, in an informal way, the parties to solve the difficulties that can arise during the performance of the contract. The parties can use the DRB in a preventive way before any dispute breaks out. Any party may at any time request the opinion of the DRB in the presence of the other party. The DRB will then deliver an informal advice, one that can be purely oral.

1.2.2. The Dispute Adjudication Board (DAB)

The DAB issues decisions - formal and written - in case of an overt dispute between the parties.

Unlike the recommendations of the DRB, the decisions of the DAB are immediately binding for the parties, whether they agree or not.

The parties have the right to challenge a decision of the DAB before the judge or the arbitrator, but while waiting for the judgment or the award, they remain bound to carry out the contested decision.

It is important to note that, if a party wants to contest a decision, it must notify its disagreement within a given period of time, failing which the decision becomes irrevocable. In this case the decision acquires almost the same force as a judgment or an award.

1.2.3. The Combined Dispute Board (CDB)

The CDB is an innovation that appeared in the ICC Dispute Board Rules of 2004.

Normally, the CDB issues more recommendations, but it can, at the request of one or both parties, issue full-fledged decisions.

Cases in which the CDB can issue a decision are not defined precisely in the ICC Rules. However, the rules refer in general terms to cases of emergency, threats of interruption of the contract or the need to preserve evidence (Article 6.3). One can suppose, for example, that the CDB will issue a decision if the contractor threatens to stop the works or if the project owner notifies his intention to cancel the contract.

If a party requires a decision and the other party objects to the request, the CDB has the discretionary power to solve the dispute in the manner that it considers suitable, i.e. by issuing a recommendation or by handing down a decision.

The recommendations and the decisions issued by the CDB follow the same rules than the recommendations of the DRB and the decisions of the DAB. They can be challenged before a judge or an arbitrator in the same way.

2. Advantages and disadvantages of each type of DB

Some advantages are common to all types of DBs.

The intervention of a DB, regardless of its form, makes it possible to defuse conflicts before they take an acute turn.

Indeed, meetings between the DB and the parties, periodic site visits by the DB and the personal links that are progressively established between the members of the DB and the individuals in charge of the project make it possible for the DB to detect any potential conflict and to try to

conciliate the parties before the situation worsens.

Experience proves that a problem that can be addressed immediately is very likely to be solved through an amicable agreement. This is a very important aspect of the DB's action because in a long term contractual relationship an atmosphere of co-operation has to prevail in order for the parties to work together quickly and efficiently.

For the surplus, each type of DB has its own specific advantages and drawbacks.

2.1. The Dispute Review Board (DRB)

2.1.1. Advantages

The choice of this type of DB tends to solve the disputes in a consensual way, not in an antagonistic way. The two parties' support of a recommendation of the DB makes it possible to maintain a minimum of harmony between the parties and thus to facilitate the subsequent performance of the project.

Secondarily, the choice of this type of DB inclines the parties to be reasonable and moderate in their requests. Indeed, since the recommendation of the DRB is not binding, the chances that a recommendation be accepted by the "losing" party are all the greater that the request referred to the DB was not excessive.

2.1.2. Drawbacks

The DRBs have the defect of their qualities, namely the recommendations they issue, being not binding, can be rejected by the "losing" party. However this remark must be nuanced, particularly because the party who refuses to comply with the recommendation has to notify its disagreement in writing within a given period of time, failing which the recommendation becomes binding. Experience shows that instances of a party rejecting a recommendation without a serious reason are quite rare.

2.2. The Dispute Adjudication Board (DAB)

2.2.1. Advantages

This type of DB permits the quick issuance of a mandatory decision. Thus the performance of the contract will continue even if one of the parties is not satisfied by the decision of the DAB. The great advantage of the DAB, at least in theory, is that it prevents a paralysis of the project due to the bad will of one of the parties.

Secondarily, the fact that the DAB issues a binding decision has a psychological advantage: for the individuals in charge of the project, it is easier to convince their superiors or the supervising authorities to comply with a binding decision than to carry out spontaneously a simple recommendation.

2.2.2. Drawbacks

The appeal to the DAB is rather aggressive since it leads to an authoritarian decision. From this point of view, the system is more likely to increase the hostility between the parties than to prompt them to seek an agreement.

Moreover, this fast procedure with potentially irreversible consequences may not be the most appropriate way to solve complex disputes requiring a detailed review.

Finally, the decisions issued by the DAB are binding only because the parties have agreed in the contract to be bound by them. Nevertheless the decisions of the DAB are not judgments nor arbitral awards, so that they cannot be enforced by law. Therefore, in the event (very rare to be sure) when one of the parties behaves in bad faith and refuses to abide by the decision, the other party does not have any way of coercion.

2.3. The Combined Dispute Board (CDB)

2.3.1. Advantages

As shown by its name, the CDB is intended to combine the advantages of the DRB and of the DAB.

Normally, the CDB issues mere recommendations which are similar to a negotiated resolution of the dispute, and which preserve the good relations between the parties. However, where a serious or urgent dispute jeopardizes the continuation or the proper performance of the contract, or else the conservation of some evidence, one of the parties can request the CDB to hand down a binding decision. It is up to the CDB, in its wisdom, to determine whether the situation requires a decision or not.

The CDB thus allows at the same time:

- to privilege the consensus in normal circumstances,
- while offering the possibility of an authoritarian solution in the event of urgency or absolute necessity.

2.3.2. Drawbacks

The disadvantage of the CDB is that there is no precise dividing line between the ambit of the recommendation and the ambit of the decision. The parties do not know in advance whether the determinations of the CDB will be optional or mandatory. In this respect, they have to rely on the soundness of the judgment of the members of the CDB, which is a factor of uncertainty.

Moreover, deciding whether or not it is necessary to issue a decision in a given case is a question that can be difficult to solve. This is likely to cause much debating between the parties and to entail a significant loss of time for the CDB and the parties. This kind of discussion can hinder the promptness that should characterize the action of the CDB.

2.4. Conclusion

We submit the idea that the differences that exist between the different types of DB are perhaps more theoretical than practical. Indeed experience shows that:

- a) a large majority of the recommendations issued by DRBs are accepted and complied with the parties spontaneously; as a result, the recommendations have almost the same effect as the decisions of DABs,
- b) while neither the recommendations nor the decisions are final, the parties almost always accept them and refrain from referring them to a judge or an arbitrator, which makes irrevocable *de facto* the solutions reached by the DB; therefore, in a majority of cases, the determination of the DB, regardless of the form of the DB, solves definitively the dispute.

Both DRB and DAB are thus effective systems of dispute resolution. The choice between these two forms depends on considerations perhaps more psychological than practical. In some cases, the parties will privilege the consensual approach of the DRB because they view the good quality of their commercial relationship as a most important target per se. In other cases the parties will favor the authoritarian approach of the DAB because they are not prepared to take the least risk of interruption of the contract, or because from the onset they do not trust the good will or the solvency of the other party.

Logically, the CDB system should receive unanimous support since it cumulates the advantages of the DRB and the DAB. However this mechanism appeared only very recently and we do not have enough hindsight to judge its effectiveness. Actually, no meaningful statistics are available presently on the use of the CDB. It is still too early, therefore, to say if the business community will adopt it or, on the contrary, ignore it.

3. Practice of the Dispute Boards in French-speaking Africa

3.1. DBs in general are widely used in English-speaking Africa, but they are practically unknown in French-speaking Africa. To date, we are aware of only one project in which a DB was set up: it concerns a harbor project in Madagascar.

3.2. An evolution is certainly about to take place in French-speaking Africa. Indeed, many construction projects are financed by multilateral development banks. A significant number of these institutions have inserted in their general conditions the harmonized version of the clauses FIDIC which provide for the constitution of DAB, thus compelling the borrowers or beneficiaries to resort to this dispute resolution mechanism.

3.3. The DAB is the type of DB which undoubtedly will prevail in construction projects. However, the other types of DB can prove to be attractive for other complex long term contractual arrangements, for example the operation of joint-ventures, the acquisition of companies or intellectual property licenses. In such transactions, the psychological and commercial stakes and objectives are not identical to the stakes and objectives in construction

projects. The future will say if the American concept reflected by the DRB, the English concept reflected by the DAB or rather the international concept reflected by the CDB will appeal to the companies carrying on their activity in Africa.

Jean-François Boucly
09/04/2008