



Session 2/Advanced FACING CHALLENGES IN DB OPERATION



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CASE for Discussion

- Central America – Civil Law Country
- Employer: USA based developer
- Contractor: European based



- Hydropower Project financed by Developer on the basis of PPA
- Conditions of Contract: EPC
- Dispute Board according to ICC Rules, three Members
- Preparatory works constructed under specific ad hoc agreements pending financial closure
- Work performed by local Subcontractor



A) Project advance after financial closure (1/2)

- EPC Contract signed
- Contractor requested formal approval to subcontract some civil works to same subcontractor who performed preliminary works during one year
- Employer initially procrastinates approval (while subcontractor continues to work) then denies approval, justifying it because of the sub workers affiliation to a specific Union.



A) Project advance after financial closure (2/2)

- Contractor under protest decided to change Subcontractor as required by Employer, but requested additional cost and time due to unwarranted denial of subcontractor approval
- Claims rejected by Employer
- The Contractor referred the matter to the CDB



B) Discussion (1/4)

1. Jurisdiction: may the CDB deal with such dispute? (the Employer's lawyer defined the dispute "non technical" and therefore the CDB has no jurisdiction)

Reactions from the present
Actual action by the CDB



B) Discussion (2/4)

2. DB power/duty in this type of claim
(Employer's lawyer advised the DB: The only possible CDB decision is to decide that the correct forum in such situation is Arbitration.)

Reactions from the present
Actual action by the CDB



B) Discussion (3/4)

3. Proceedings: Hearings, discussion on jurisdiction and facts review.
4. Challenge of Chairman to ICC; ICC rejection of challenge
5. CDB decision timing. Refusal to extend the specified 90 days period (by the Contractor)



B) Discussion (4/4)

6. CDB decision – award of compensation of all additional costs, assessed by the CDB , plus interest for delayed payment

Reactions from the present

Actual action by the CDB

7. CDB follow-through
(chairman's resignation and replacement)

C) Conclusions (1/2)

- Knowledge of the Parties of local condition, including local Laws, is essential. (May the CDB could do something about it, before the dispute arises?)
- Attitude of the Contracting Parties in DB application is most important.
- The CDB (under my chairmanship) failed to convince the Parties on their interest to work in favour of the PROJECT



C) Conclusions (2/2)

- In this case, having a clear understanding of one Party's lack of confidence, the Chairman resigned (and suggested a new chair take over).
- No regrets, but could one have acted somewhat differently to avoid reaching such a painful conclusion? A matter to consider all the time



The “Ad”

Those individuals or corporations wishing to know more about Dispute Boards or wishing to assist in their development are encouraged to join the Dispute Resolution Board Foundation (DRBF)

Details can be found at
www.drb.org

