

The DRB/DAB : An attractive procedure if one takes certain precautions

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USEFUL FOR THE PARTIES AND THOSE WHO PRACTICE ARBITRATION

How to conciliate today the legitimate interests of the buyer, who wants to acquire a commodity or a service at the most attractive price, and those of the seller who, in a competitive context, wants to be awarded a contract at a price leaving him with a sufficient margin? A contract, therefore, is always the result of a compromise. It takes very little to transform such an unstable equilibrium into a steeplechase. Controversy is thus part of every contract, even more so if the contract is large and of long duration.

The choice of legal proceedings to solve these disputes - unavoidable in certain cases - often leaves a double taste of bitterness for the parties involved in such a procedure, regardless of its outcome: On one hand, there are the high unproductive costs and, on the other hand, there is the commercial impact on the future activities of the concerned company. Commercial usage and the mentality in certain countries are another obstacle for this type of dispute resolution.

The prevention and soft resolution of disputes which normally can also be dealt with before the tribunals, has greatly increased during the past years for the reasons mentioned above, especially in the countries with "extreme" attitudes, such as North America (fond of legal proceedings) or Asia (reluctant to have direct conflicts). Whether one likes it or not, it has become today a reality which a number of arbitration or financing institutions (such as the ICC and the World Bank) have well recognised. The DRB is one of its main motors which should be adjusted according to the specific requirements of the project.

Enlightened practitioners of arbitration will see a double interest: on one hand, they can efficiently assist their client as counsels, by orientating the strategy of their clients, and defend their interests according to the cost-efficiency criteria. On the other hand, they can actively participate in a DRB, that new means for solving disputes, which cannot be ignored any more, even if to some people it is still new.

EXAMPLES OF PRACTICAL DIFFICULTIES ENCOUNTERED BY A DRB

Many articles and writings have tried to define the different forms of DRB/DAB, its complementarity to arbitration, its role when issuing a decision or a recommendation, the procedure applied in the case of potential disputes or litigation brought formally before a DRB etc. 2 The three groups of difficulties developed hereafter have all been encountered and have led to differences of appreciation by the Parties; the result was a reduced effectiveness of the DRB at different levels.

Inadequate Implementation of the DRB

At which moment the DRB must be brought into play to be most effective?

Before signing the contract, the Parties often think that the clause concerning litigation cannot be modified afterwards and, more specifically, that the clause concerning the amicable resolution can be dealt with at a later date. For this reason, the technical and financial aspects are frequently not only the most important aspects, but the only ones which are negotiated.

In order that a DRB is able to work efficiently and without delay, it is imperative that the detailed procedure as well as the names of the DRB members figure in the main contract already. Experience

unfortunately shows that up to today this is usually not the case, in spite of the invitations made by the financing institutions.

How is a DRB set up? Is it wise for all types of project contracts?

For important projects, the DRB is set up according to the same procedure as used by UNCITRAL: each Party appoints one member of the DRB, and these two choose the third member. In general, and specifically in the case of an amicable procedure, it is admitted that the 3 members of the DRB must be approved by the Parties.

In order to increase the efficiency of the DRB, the question may be to have a panel of 2 members instead of 3. Internal coordination will in fact be easier and, in case of divergent opinions, the Parties can make a better appreciation of their respective positions.

For projects of lesser duration and costs, the designation of a DRB consisting of one person only may be an adequate solution. 3

Which are the criteria leading to the designation of the DRB? Who is to be appointed?

The DRB, referred to by one of the Parties to render a recommendation / decision, must show versatility: it must appreciate the case as a project manager (by putting itself in the place of the Parties, taking into consideration at the same time technical, financial and contractual aspects). Should the legal aspects prevail, the DRB, just like a project manager, can request legal opinions from an outside lawyer.

In important contracts it can be very useful, to have within the DRB a lawyer with a sound knowledge in construction, or an engineer-economist interested in law and with repeated experiences in arbitration and legal proceedings. Besides, this person should have prior experience within a DRB.

The ideal composition of the DRB might well be the contrary of that of an arbitration panel, i.e. two engineers/economists and one lawyer.

Experience shows that the Parties often encounter difficulties, especially within a multi-national consortium, to appoint their candidate: Besides the qualities mentioned above, it is in fact often requested that the members of the DRB do not have the same nationality as the Parties.

Disrupted Activities of the DRB

What are the interventions of the DRB? At which intervals the visits on site are to take place?

The mission of the DRB can in general be outlined as follows:

- Periodic site visits at regular intervals which in general should not exceed four months
- Meetings with the Parties (contradictory or not) in order to deal with the "potential" disputes.

The information of the DRB remains short and the opinions expressed by the DRB are neither final nor binding.

- Submission of site visit reports
- In case that a formal request is made for a recommendation or a decision: reading of the submitted documents (Request/Response and Comments, hearing of the parties, questions clarifications, delivery of a written report.

Is it possible to consult the DRB beforehand, outside the formal DRB procedure?

One of the most important aspects of the DRB is to assist the Parties. For this reason, the task of the DRB is not only to issue a recommendation or a decision in form of a written report, but also to allow less formal discussions with the Parties ("potential disputes).

Who must define the procedure in case of appealing to the DRB and which are the elements of this procedure?

The procedure in case of a request for a recommendation or a decision must in general first be defined by the DRB. The DRB then submits it to the Parties who approve it after having discussed it with the DRB.

The procedure to be adopted can be subdivided as follows:

- Phase 1: Presentation by the Parties and the Engineer of their respective positions
- Phase 2: Deliberation of the DRB
- Phase 3: Questions and clarifications requested by the DRB
- Phase 4: Answers to the questions of the DRB
- Phase 5: Preparation of the recommendation.

Once a decision or a recommendation is issued, which are the modalities and which steps must be taken to solve the dispute in case of disagreement?

In principle, and in order not to paralyze the procedure, the recommendation is considered to be accepted and final if the Parties do not emit any objection within a period of about 30 days. In case that a recommendation (or part of it) is considered unacceptable by one of the Parties, the unsatisfied Party must be free to choose the date at which it means to either submit the dispute to another authority of the amicable procedure, or have recourse to legal proceedings. The Parties must also be allowed to proceed with compensating negotiations.

The written report of the DRB is an exhibit that the Parties must be free to produce or not in case of legal proceedings.

Problems in the Functioning of the DRB

What to do if a DRB is truncated, unintentionally or intentionally?

Since a DRB is called to function over several years, it may happen that it is faced with a temporary indisposition of one or several of its members. In such a case, it is desirable that the DRB continues its task normally. However, in case of a formal request by one of the Parties, the entire DRB must be present at the hearing and all of them must sign the report. If this is not possible because of prolonged absence, the DRB must request the appointment of a new member.

In some projects, the contract provides for the designation of substitutes appointed at the same time as the members of the DRB.

Is the DRB mandate renewed automatically? What to do in case of obstruction by one Party or one of the members of a DRB?

It may happen that a Party asks that one of the members of the DRB be replaced, for justified or unjustified reasons, or that a Party refuses to renew the contract of a DRB member.

In principle, without the agreement of the 2 other members of the DRB, the canceling of a mandate under way must be rejected. Concerning the renewal of a mandate, each Party must be free to accept or to reject the renewal of the contract for each of the DRB members.

How to react if one or both Parties or the DRB do not respect the given deadlines, refrain from conforming to their obligations and from submitting the expected documents or use specious arguments to delay or to keep the DRB from delivering its opinion?

The DRB being an amicable procedure, the Parties should follow the instructions of the DRB, especially concerning the submittal of documents and the respect of the deadlines.

In case of repeated obstruction by one or the two Parties, the DRB, unable to carry out its assignment, must in principle issue its report, even if incomplete, in order to allow the Parties to start with the legal proceedings foreseen in the contract.

SOME PRACTICAL APPLICATIONS

Some people consider the DRB/DAB to be in competition with arbitration, because it may end up in quasi-arbitration. This opinion, generally coming from practitioners of arbitration who are afraid that they might miss a deal, is not altogether unfounded: The advantage of the DRB is effectively to prevent disputes and to assist the Parties in solving them as soon as they appear. By way of such a mechanism, the DRB may function like a pre-arbitration panel which has been permanently installed for the duration of the contract. All depends on the choice of the Parties, on the wording of the clause regarding disputes and on the formulation of the assignment of the DRB.

In the field of construction (infrastructure, industrial plants), the Contractor fears, in general not without reason, all kinds of legal, court or arbitration procedures. Even if he is confident in its rights, the commercial consequences for a company can be disastrous in the concerned country (to get put on the "black list" for other works) and even in other countries (such as relations of the "milieu", commercial actions of competitors). The Employer, who is often barred from negotiating with the Contractor for reasons of principle (such as not to exceed to budget, limited financing, personal risks, fear of being accused of dilapidation of public goods), considers the DRB to be a "scapegoat" allowing him to "export" his problem and to hide behind a recommendation. With the assistance of the DRB, it will thus be possible to solve the problem at a lower level without it being too much politicized.

The litigation clause to integrate in the contract must clearly separate the amicable process from the legal procedure. In the so-called "international" contracts with outside financing and/or Parties of different nationalities, the most balanced and even unavoidable way for the two Parties seems to be in general the arbitration procedure, even if certain buyers and also sellers prefer sometimes, for other particular reasons, rightly or wrongly, the local legal procedure.

Concerning the amicable process, the frequent mistake is to set up a very general and not binding clause such as: "...the Parties agree, before having recourse to an arbitration procedure, to try to amicably solve their disputes ...". By including such a clause, the Parties give the impression of being open to an amicable settlement, but in reality they only express a pious hope and hardly contribute to an effective resolution of the dispute. For this reason, it is recommended to be more accurate when defining the willingness of the Parties.

In relation with the obligation of the Parties, the following issues must be clarified concerning which type of ADR to choose, if the process should be binding or not and which procedure to adopt.

A first choice concerns the explicit obligation to use the amicable process before starting any kind of arbitration procedure.

The second choice deals with the type of ADR to be chosen for the contract and for the concerned parties: Is it preferable to provide for a DRB/DAB or should one opt for other ADR techniques such as mediation, partnering, mini-trial or others?

The third choice is the question if the amicable process should be binding or not: Is it to be a simple recommendation given as an opinion of an independent third person, is it to be a more binding recommendation which must be accepted or rejected within a pre-established period of time, or is it to be a decision which must immediately be followed by action, but is susceptible to be revoked in case of a later appeal for an arbitration procedure? The difference between the process of a "Dispute Review Board and a "Dispute Adjudication Board is principally the form of the amicable process: the "indicative" form or pre-arbitration.

Finally, there is a 4th choice just as delicate concerning the procedure to follow:

- Is it necessary to specify in advance the more detailed modalities of the process by wording the task of the DRB/DAB more precisely (formal, informal DRB, site visits etc.), by defining the different deadlines and dates for the documents to be submitted by the Parties, for the submission of the opinion of the DRB/DAB, by specifying the procedure for the hearing of the Parties etc.?
- Is it necessary to specify the next step of the resolution of disputes, for instance in case of dissatisfaction with the opinion emitted by the DRB/DAB?

All these questions need thinking over with regard to the efficiency of the resolution process. The FIDIC, in the new test edition of the General Conditions of October 1998, has tried more or less successfully to define these choices 4. Critical comments to this process have been made for example by the Syndicate of International French Constructors - SEFI 5.

The contract between the Parties and the DRB/DAB is essential for the smooth development of the amicable process. There are many other questions besides those relating to the right definition of the assignment of the DRB/DAB and to the remuneration of its members. For example, should the DRB/DAB have the possibility to assist the Parties and to have informal discussions on "potential" disputes before any formal request is submitted to the DRB? Must such discussions follow the principle of the contradictory or is it preferable to have separate discussions? At what intervals must the DRB/DAB visit the construction site? Is its mission to be limited in time? If yes, how to go about the renewal of its members? At what moment and in which form does the assignment end? What happens in case of defection of one or several members of the DRB/DAB? These are a number of questions which it would be presumptuous to answer without taking into account the specific context of the contract under consideration.

However, it should be pointed that the principal objective of the DRB/DAB is to assist the Parties in finding an amicable settlement of their disputes. For this reason, the value of the informal discussion on site cannot be denied and represents one of the essential assets of the DRB/DAB.

PRINCIPAL CONCLUSIONS

Unfortunately, the majority of the DRBs/DABs working on international contracts have been implemented after the signature of the main contract by the Contractor and the Employer, at a moment when the project was already in progress or even after the disputes had appeared. The initial role of the DRB/DAB, which consists in preventing disputes and in assisting the parties to resolve disputes right after they appear, is in such cases substantially modified: The DRB must do two things at the same time:

- "make up for the lost time", by trying to solve "old" disputes where the positions of the Parties may already have become rigid and where the DRB/DAB has not been able to offer its assistance at the right time;
- get implicated in and follow the "new" disputes which may be linked directly or indirectly to the "old" disputes. The result is that the efficiency of the DRB/DAB will be partially diminished.

For this reason, one of the most important principles for an optimum functioning of the DRB/DAB is its appointment at the moment of the contract signature or at least before the effective commencement of the construction/erection works.

Another aspect deserves to be pointed out, namely the complementary nature between the so-called smooth methods for the prevention and resolution of disputes (ADR techniques) and the legal procedures. A 2-step clause is for instance used by the World Bank⁶. This complementarity can even be extended to two types of ADR techniques applied by the same contract, such as for instance a DRB/DAB followed in the amicable process by a mediation before resorting to the arbitration procedure. A 3-step clause of the following type could be taken into consideration:

"In case of litigation and prior to all arbitration procedure, the Parties convene to have recourse first to a "Dispute Review Board (DRB) consisting of ... experts. The appeal will be made conforming to the conditions stipulated in annex.....The written recommendation of the DRB shall], become final and binding for the Parties, except if one party expresses its disagreement in writing within a delay of 30 days following the reception of such recommendation.

In case of disagreement with the recommendation issued by the DRB, one or both Parties can request a mediation procedure. This mediation will be conducted by two mediators, one of which is appointed by the Claimant and the other by the Defendant. The task of this two-mediator panel, after having received in writing the respective position of each Party and after having heard both of them, is to formulate a motivated Recommendation. If this Recommendation is not rejected in writing within a delay of 30 days following its reception by the Parties, it will be considered accepted.

In case that the Recommendation has not been issued within the agreed delays or if it is contested by one of the Parties, each Party will be free to resort to the arbitration procedure as defined hereafter.

After the end of their assignment, the mediators must not act neither as arbitrators nor as counsels for a Party. Their hearing as a witness of the tribunal remains open.

In case that the mediation procedure does not succeed, all disputes ensuing from the present contract will be definitively settled, according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or several arbitrators appointed in conformity with these Rules. "

A third aspect to be considered is that the principle of the DRB/DAB can be applied to contracts of short/medium duration as well as to large projects stretching over many years. The mini-DRB consisting of only one member and the DRB constituted of 2 members may turn out to be the appropriate solution because they might be more direct and better adapted to the costs of the project.

Concluding it is to say that it is in the interest of both the Buyer and the Seller to include the DRB/DAB process already in the bidding documents and/or to discuss the modalities during the contract negotiations, so as to benefit from this service right from the beginning of the works. The appropriate utilization of the DRB/DAB is part of the contract management and allows to prevent disputes or to limit the financial consequences of disputes which are unavoidable in most industrial implementations and projects of infrastructure.

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