

## IGOR LETO & GORDON JAYNES

### "WRITING THE DECISION"

The DAB written decision is the culmination of the DAB process. If successful, it will lead to amicable settlement of the dispute; if not, it almost certainly will be used as evidence in arbitration. It follows that in writing the decision, the DAB must keep several key points in mind:

#### **Aim to persuade the Parties**

To persuade people who are in dispute, it first is necessary to reassure them that you have heard and understood their arguments. Using the written submissions of the Parties and your notes of oral presentations, re-visit the various arguments made by each Party. This does not require extensive quotations from the written submissions, nor does it require the recording of every remark made in support of an argument *what* is required is a sufficient reference to the arguments presented to you to establish that you have heard and understood.

Meet each argument. Do not record an argument then fail to state the DAB's view on the argument. Such omission may give the impression that the DAB is evading the argument. In stating the DAB's view on the argument, explain why the argument was accepted or not accepted. Such explanation is the essence of providing the Parties a "reasoned" decision.

At no time should a DAB decision make derogatory remarks about any argument of either Party, or the manner in which such argument has been expressed or presented: angering a reader is not the way to persuade a reader. Although it may seem obvious, nevertheless experience suggests that we should mention that a decision also is not a place for attempts at humour, the issues put to a DAB are of great seriousness to the Parties and deserve serious treatment

At the same time that the DAB should aim to persuade the Parties, the DAB should keep in mind that it may prove impossible to prevent one or both Parties from referring the dispute to arbitration, and therefore the DAB decision should be aimed also at providing maximum assistance to a possible future arbitral tribunal. Having been in place since the outset of the performance of the contract, having been agreed by the Parties to be impartial and independent experts, the DAB has an authority which will carry great weight with an arbitral tribunal, provided that the DAB's decision deals comprehensively with the issues in dispute and presents clear reasons for its determinations on those issues.

Be prompt. Historically, Dispute Boards have sought to issue their determinations at the conclusion of the Board's time on Site in connection with the dispute. Especially for busy DAB Members, it is tempting to postpone the writing of the decision until "later". However, the difficulties of reaching an agreed text are compounded when the Board Members have left the Site and proceeded to their respective other commitments, and delay ensues. You will be familiar with such delays in arbitral proceedings; avoiding such delays is one of the aims of an effective DAB.

## **Structure of the DAB decision**

There is no specified or standard structure which must be followed. However, experience of persons serving on DABs has provided some valuable suggestions.

First, use a uniform structure for all of the decisions. There have been a few DABs which never had to produce any decisions because the Parties were able to resolve all arguments without resorting to the DAB, but you are unlikely to be that lucky! More likely you will have to make several decisions during the course of service. Adopting a uniform structure for all decisions gives an impression of orderliness and organisation.

What structure should you adopt? It is recommended that you use a uniform format for the heading, identifying the project, the contract: and the dispute. Many DABs number the lines of the text of a decision, and certainly if line numbering is not used, paragraph numbering should be, for ease of future reference. Even if you number lines or paragraphs or both, always paginate. Adopt uniform terminology; generally it is shorter and somewhat more objective to use the terms Contractor, Employer, Engineer, rather than the trading names of the entities.

It is recommended that each page of the decision be initialed by the DAB members, and the final page have their signatures in full, with the date of the decision.

A recommended sequence is to begin with the substance of the decision, as that is the first thing which the Parties will look to find. The decision can be elaborated at the end of the document, but a succinct statement of the decision is a useful opening. The decision should note the date of receipt of the request for decision, and recount the events which followed, including written submissions by the Parties, with dates, so that it is evident from the face of the decision that the DAB provisions of the contract have been followed. Most disputes will involve hearings, and the dates and durations of those should be noted, including appropriate references to any submissions by expert witnesses, and any special documents submitted during the hearing. Unlike an arbitration, it is virtually unknown for a DAB hearing to have a transcript; making it important for each DAB Member to keep careful and detailed notes during hearings, and to compare such notes with co-Members when dealing with matters arising in hearings.

Next, the text of the decision should set forth the facts relevant to the decision, and then address the contract provisions which are relevant to those facts. The arguments of the Parties should be set forth succinctly, assuring that each point of argument is noted, and the DAB's responses given to those arguments. Finally, the text of the decision should elaborate how the DAB reached its decision, including reference to the relevant facts, documents (especially the relevant parts of the contract documents) and any oral evidence in the hearing on which the DAB has relied.

## **Writing style**

While it is especially true in international contracts where Parties have different first languages, it is generally true that the Parties are best served by brief sentences. Avoid complex sentence structures. Avoid the use of long words where short words will suffice. Avoid legal maxims, especially in Latin. Dealing with technical matters necessarily will involve use of technical terminology, but do not write in a way that may give the appearance

of flaunting your technical knowledge or vocabulary. (Also, by to keep technical discussion accessible to a lay reader, remember that the decision may be read by an arbitral tribunal, and some members of that tribunal may not be technically knowledgeable.)

Just as short sentences are helpful, so are short paragraphs. The aim of the suggested brevity is not omission of important points but rather clarity of presentation of those points.

### **Quantum**

Just as a DAB's reasoning on issues of liability and responsibility must be clearly presented, so also must its analysis of the amount of time or money decided. Usually a DAB decides quantum without the benefit of independent expert advisors such as often are used in arbitration. It follows that it will be helpful in the preparation of the decision if the DAB has assured that it has in written form the Parties' respective calculations in sufficient detail to enable the DAB to proceed from those calculations to its decisions on quantum. Discussions of Parties' calculations often forms a major part of the hearing on the dispute., and may include parties' expert witnesses, such as independent quantity surveyors or independent delay analysts, or both, and their respective written reports.

Again, the guiding principle for the DAB decision is to persuade, and this applies especially to DAB calculations of money and time awarded in its decision.

### **Pause before release**

No DAB decision should be released the moment its typing is completed. The DAB should "take a break", preferably overnight, and then come fresh to the text for a final review. Apart from increasing the likelihood of catching typing errors, such pause gives extra time for reflection and private discussion, and for a final and careful reading before release, thus making sure that the text is as clear and convincing as *the* DAB can make it.