

INTERNATIONAL DISPUTE ADJUDICATION—CONTRACTORS’ EXPERIENCES

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INTRODUCTION

For more than 20 years now “Dispute Review Board”(DRB)/“Dispute Adjudication Board” (DAB) or simply “Dispute Board” (DB) concepts have been used in the international construction and building industry in an attempt to settle disputes outside arbitration or the courts. These concepts have become more developed and adopted for wider use not only for international projects but also by individual countries for use in their domestic markets.

Very little systematic evaluation has been done, however, to analyse their practical application as well as the advantages and disadvantages for the contracting parties as “users” of such concepts. The author, on the occasion of various ICC-FIDIC seminars, has presented such an analysis on various construction and building projects. He has mainly focused on the contractor’s view, based on the experiences of his own company together with data made available by others. This article has been developed from speeches made at these seminars and at the same time updates this analysis.

Under normal circumstances it should be in the interest of both parties to a contract to find an early resolution of a problem on site. Unresolved problems create uncertainties and risks to the detriment of both parties. If a contractor has to perform works and prefinance such works without knowing what he will recover in respect of his costs, then this will at the very least demotivate him and the project will suffer accordingly.

The traditional method used internationally over many decades to resolve problems between the contracting parties has been the “engineer’s decision”. In many cases however, such decisions are difficult to accept on the part of the contractor. This difficulty does not arise owing to any perceived “incompetence” on the part of the engineer but more as a consequence of his assumed partiality, despite all possible contractual provision to the contrary. It is almost certain that an unbiased decision would not be given in regard to problems caused by a design that most likely originated from that same engineer from whom the decision is requested. The outcome is often only a rephrased party opinion known to the parties earlier and it is not the neutral opinion of an outsider causing the parties

to reconsider the validity of their respective positions. Decisions in such circumstances, particularly if, as a result of strong competition the contract price does not contain sufficient risk contingencies, inevitably lead to ultimate settlement in court.

As a way out, the DRB/DAB concept came into use. Independent experts in an accelerated procedure render unbiased decisions, which can be challenged by either party although according to recent developments, are to be followed—to the benefit of the project—until they are overturned in arbitration or court proceedings.

The DB concept is to be clearly distinguished from mediation, where the outcome is largely dependent on the negotiation skills of the parties and perhaps independent from contractual constraints. Consequently, the results of mediation may be difficult for the party representatives to defend back in their home organisation, be it a government organisation subject to statutory audits, or a joint venture contractor. For both sides a reasoned decision by independent experts is more sustainable.

This article assumes the reader has knowledge of the Dispute Board concept. The author refrains from explaining conceptual details. Procedural references are based on international practice or the FIDIC 1999 suit of Standard Conditions.

2. CONTRACTS ANALYSED

This analysis reflects contractors' experiences from a diverse range of medium and big size international projects completed over the last six years or presently under execution. They cover various types of contractual relationships: main contracts, subcontracts and joint venture agreements. A total of 22 contracts have been considered. Of these 22 contracts, 21 envisage settlement of dispute by arbitration. Only one contract allowed for disputes between the parties to be settled by civil court proceedings. From the same total, 13 contracts provide for a DRB or in more recent years for a DAB procedure to achieve settlement thereby avoiding ultimate referral to arbitration or litigation proceedings. This leaves nine (mainly earlier) contracts without such a dispute resolution concept.

In most of the main-contracts considered the DB procedure, unfortunately, is preceded by some form of "engineer's decision", either in the traditional way or, by owner's representative. In such a three-level dispute-resolution concept (engineer's decision, Dispute Board, arbitration) the engineer's decision only involves additional time and entails cost without adding any benefit to the settlement process. The real benefit normally arises to the parties only from the subsequent decision by independent experts according to step two or three (Dispute Board or Arbitration).

3. SOME SPECIFIC EXPERIENCES

3.1 Different concepts

From the 13 contracts identified above stipulating a DB, in 10 of these contracts the panel is to be established in the early days of a project. At that time, when no dispute exists, the largely co-operative formation of the panel is normally relatively easy. The panel is able to follow the project and is able to make itself familiar with the project before it has to decide on a dispute. Consequently in case of a dispute the panel is able to decide quickly. Another benefit of this procedure is that during the regular site visits of these panels, problems are discussed between the parties and the panel and often can be resolved before these problems develop into a dispute between the parties.

By way of contrast on three more recent contracts “*ad-hoc*” panels are foreseen which are only to be established at the time a dispute actually arises. Under this *ad-hoc* procedure, on the face of it the parties may achieve cost savings, however, they will ultimately incur additional costs owing to additional time necessary to establish the panel in a time of conflict. In most of these contracts the bulk of disputes will be decided by the panel only after project completion.

From the 13 contracts providing for a DB, 10 empower the panel to give a recommendation only, while three contracts, again the more recent, provide for at least provisionally binding decisions. We will consider the effect of this later in the article.

Interestingly enough two contracts out of the 13 that provide for the DB panel to proceed in two steps, namely: (1) mediation and (2), in case of failure to settle, to continue with adjudication. No details are given as to how to organise and achieve this except that some time frames are stipulated. With the common law jurisdiction in the background the parties quietly “softened” the requirements when drafting the particular procedures, such that these provisions were actually not complied with.

The panel size normally includes three members. Two contracts foresee a single member only (a joint venture agreement and a construction contract with a value of about €21m.). One early contract that foresaw a two-member panel, selected from the parties’ respective organisations, is certainly to be considered as something of a curiosity or even a *faux pas* on the part of the parties.

3.2 Time required

One essential feature of the DB concept is time. First, the panel can and should be called in as early as practicable to resolve a dispute and should decide within a limited time for the benefit of the project during its remaining duration. The ideal situation is to settle the bulk of disputes before the completion of the project.

Regarding DAB, the FIDIC Standard Conditions identify two periods of significance:

- (1) 28 days within which to appoint the DAB; and
- (2) 84 days within which the DAB should give its decision on a dispute.

Compliance with these periods concerning matters of such fundamental importance is, of course essential, however, according to the author's experiences these periods are often exceeded. The reason for this delay in appointing the DB is normally due to the fact that at the beginning of a project other urgent steps are also required by the parties to mobilise for the start of the works. The appointment of the most suitable experts for a particular project, which are able to work together without potential conflicts of interest is one of the most crucial steps in a DB procedure. The joint appointment of the panel inevitably invokes considerable attention and time by the parties. This is particularly true when contracting parties are of different nationalities. As a result of the foregoing, during the process of nomination the parties jointly agree to extend the 28-day appointment period.

Similarly, the 84-day period within which the panel should render its decision is commonly exceeded. On international projects, complex problems often arise involving people of various nationalities, which inevitably require considerable time for a reasonable decision that can be appreciated by the parties and serve to facilitate a final settlement between the parties. Furthermore, in many cases, in order to make the procedure more effective by reducing travel costs for a hearing, several disputes are often submitted by a party at one time. Consequently in the author's experience it normally takes 90 to 180 days before a DB is able to render a reasoned decision. This may still be considered as being reasonable, seeing that arbitration cases in which the author has been involved required between one and a half and five years (and in one case nine years).

The author is not advocating that the original appointment and decision periods should be increased from the outset. On the contrary, it is considered to be of benefit to the procedure and the parties involved to work to a tight time schedule.

3.3 Cost incurred

On some of the international contracts the author has analysed the costs associated with a three-member DB following a project, including regular site visits and rendering written decisions on disputes. Of course these costs very much depend on the individual project and the number of disputes to be resolved as well as on their complexity. Generally, however, the DB costs remain at below 2% of the contract value. This is of considerable economic

benefit if an arbitration is avoided where costs are normally in excess of 5% of the contract value (considering always the total cost for two parties).

3.4 “Success”

The success of the DB concept may be expressed in terms of the proportion of contracts, where such a concept has been adopted and where settlement has been achieved, without resort to arbitration/court proceedings.

First, it has to be stated that in most cases a DB decision is not expressly accepted by both parties. However in 10 out of the 13 contracts that provide for a DB concept, i.e. in about 76% of the cases, the parties were able to settle their disputes finally on the basis of the decision rendered. That is surprisingly high in light of the fact that more than 70% of the decisions were given under the earlier concepts providing for a recommendation type of decision only (see above) and were not (provisionally) binding. Conversely that means that only in three contracts, or about 24% of the cases, was DB followed by arbitration. However, that compares to five contracts out of the nine contracts (i.e. in about 55% of the cases) where no DB concept was agreed and on which arbitration took place.

This clear success of the DB concept roughly confirms the statistics of the Dispute Resolution Board Foundation, reporting a success rate even of 80% from the US.

3.5 Problems experienced

In parallel to these obvious successes, some problems also came to light. These problems mainly relate to one of the major features of the concept: the tight time periods prescribed for the individual steps of the procedure. These issues have been mentioned earlier in this article, i.e. the delay:

- (1) in agreeing on the tripartite agreement between parties and members of the panel;
- (2) in producing written statements;
- (3) from delay tactics by one party during a hearing.

Such problems require a competent panel to limit the potentially detrimental effects to the proceedings.

Another time-related problem, the (surprisingly) still widely adopted provision of the time-consuming three-step dispute resolution: engineer's decision, Dispute Board, arbitration (court). As already explained before the first step (engineer's decision) does not contribute in any meaningful way to a final settlement and may be considered as purely a waste of time and money (for both parties).

All of these above issues may considerably reduce the parties' benefit from the full potential of the DB concept.

The production of written statements, referred to in (2) above, is viewed negatively by some practitioners. Admittedly, such statements, in which the parties have to explain their position in writing to a third body, require some considerable effort, i.e. substantial resources and money. It is not sufficient, as was often the case with a request for an engineer's decision, merely to submit letters from the past to the engineer's representative from which an "insider" is able to identify and understand the arguments. Submissions to a DB require greater effort, i.e. more resources, when drafting a structured and comprehensive document. The author has noticed in practice, however, that such a requirement works as a "filter", first, ensuring a proper compilation and submission of the documents and arguments and, secondly, in deciding whether the dispute is worth pursuing. Normally only those disputes which are considered to have a reasonable prospect of success are submitted by a party for a decision by a DB.

4. RÉSUMÉ AND EXPECTATION

In summary DBs are viable remedies available to resolve disputes, even if the DB only provides a recommendation, i.e. no provisionally binding decision. The reason for this is that the DB, for the first time in a particular dispute, provides the parties with the opinion of an independent expert. This is achieved within a reasonable time and at reasonable cost. It thus assists the parties in reaching settlement of their dispute, without the need to revert to arbitration or court proceedings.

The author knows of companies in the industry for which—when tendering—the non-existence of a Dispute Board clause constitutes a "deal breaker". They will not submit a bid if there is no prospect of introducing a DB clause within the final contract.

It is hoped that, in future, "*ad-hoc*" DBs are limited to circumstances where the potential areas of dispute are so broad as to ensure due selection of a panel at the beginning of a project in advance of any dispute.

It should also be mentioned that the DB concept requires some careful contractual consideration, depending on the prevailing law, and has to go beyond the standard rules, tripartite agreements or DB agreements offered by the relevant, recognised organisations. As an example, prescription (potential time limitations) might have to be investigated in particular where an "*ad-hoc*" DB is foreseen, which may involve the deferment of dispute resolution until after completion of the project.

The author is confident, however, that the DB concept will also be more widely used in areas other than construction and building projects, such as long-term IT developments, insurance contracts, concessions, financing agreements, etc. But the author is also confident that such a concept can and will be used more widely on local projects once adapted to the special requirements of local jurisdiction.