

Lead document on draft CI Arb Dispute Board Rules

The Chartered Institute of Arbitrators (“CI Arb”) has given potential users of dispute boards the opportunity of having an input in what should be in the rules. The recent CI Arb’s consultation on dispute board rules (“the Consultation”) produced feedback from a range of respondents including several senior dispute board members with significant experience on dispute boards.

The responses received under the Consultation have been taken into account in the draft CI Arb Dispute Board Rules (“the Rules”) and the draft CI Arb Tripartite Agreement for a Dispute Board (“the Tripartite Agreement”).

A summary of the issues raised is set out below.

1 Types of dispute boards

1.1 The first question of the Consultation “*Should the CI Arb DB Rules make alternative types of dispute boards available to parties?*” was answered with “Yes” by all respondents, except two. The Rules are therefore based on two types of dispute board: dispute review boards (“DRBs”) and dispute adjudication boards (“DABs”).

1.2 The Rules are drafted as a stand-alone dispute board process and equally apply to both types of dispute board procedures. The only difference arising from the parties’ choice of a DRB or a DAB is that DRBs issue non-binding recommendations, whereas DABs issue binding decisions.

1.3 Under the Rules, DRBs and DABs, collectively referred to as DBs, comprise one or three independent and impartial members who assist the parties of substantial projects in resolving disagreements arising in the course of the contract.

2 No notice of dissatisfaction (“NOD”)

2.1 Question 23 (“*Should a NOD procedure be excluded from the CI Arb DB Rules?*”) was answered with “Yes” by 70% of the respondents. The reasons given ranged from “*The entire NOD concept is alien to an original DRB*” to “*a NOD procedure is not necessary*”.

2.2 A notice of dissatisfaction (“NOD”) procedure has been excluded from the Rules. We have focused on the specific DAB and arbitration provisions of the FIDIC Red Book 1999 Edition¹ in order to consider the enforcement of a DAB decision under English

¹ FIDIC clauses referred to herein are are clauses of the FIDIC Red Book: FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, first edition 1999.

law.² The enforcement of DAB decisions is not necessarily a simple matter under FIDIC contracts.³

- 2.3 Under FIDIC contracts,** a DAB's decision is temporarily binding on both parties if a valid NOD has been given by either party; and it is final and binding in the absence of a valid NOD. The referral of the DAB's decision to arbitration can be made under FIDIC clause 20.6 or clause 20.7, depending on the circumstances. The timely service of a NOD is a condition precedent to arbitration under clause 20.6.⁴ Arbitration under FIDIC clause 20.7 is the route to enforcement where there has been a failure of either party to "promptly give effect to" the DAB's decision; and it is this "failure itself" that is referred to arbitration.
- 2.4** There are a number of arbitral awards confirming the enforceability of non-final DAB decisions by ordering the losing party to pay immediately to the winning party the amounts ordered by the DAB even though a NOD had been given in respect of those DAB decisions.⁵ The decisions from the High Court and the Court of Appeal of Singapore in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* ("the Singapore case") sent a confusing message to parties dealing with the FIDIC form of contract.⁶
- 2.5** The findings of the courts in the Singapore case show that the interpretations of FIDIC clauses 20.4, 20.6, and 20.7, and in particular the implications of a NOD, lead to jurisdictional pitfalls, which may prevent a winning party from obtaining in arbitration the amounts awarded by the DAB.
- 2.6** The CI Arb has therefore decided to exclude a NOD procedure from the Rules. A more simplistic and straightforward approach could avoid many of the problems faced in the past with regard to DAB's decisions.

3 Appointment of the Dispute Board

- 3.1** The CI Arb recommends standing DBs over *ad hoc* DBs.⁷ The great benefit of using a standing dispute board is that its members may be called upon as soon as a problem arises and help the parties resolve their differences before they become polarised in their views. With a dispute board in place, it appears that parties are less inclined to adopt an adversarial attitude and will make an effort to resolve potential disputes.

² The Consultation document contains a summary of the NOD and enforcement issues under FIDIC; see <http://www.ciarb.org/news/hid-dispute-board-rules-consultation/dispute-board-rules-consultation.php>

³ See Gillion, Fred (2011), Enforcement of DAB decisions, *The International Construction Law Review*, October issue. A summary of this article can be found in the Annual Review 2011/2012 on www.fenwickelliott.com See also Gould, N (2012) *Enforcing a Dispute Boards' Decision: Issues and Considerations*, *The International Construction Law Review*, p 442 - 478.

⁴ Clause 20.4, paragraph 6 states that "neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause."

⁵ See Gillion, Fred (2011), Enforcement of DAB decisions, *The International Construction Law Review*, October issue.

⁶ *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202; and *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33.

⁷ The DRBF also has a policy of recommending standing DBs over *ad hoc* DBs.

- 3.2 Accordingly, Article 6 of the Rules emphasizes the importance of appointing the dispute board early, i.e. by the date stated in the contract or, where the contract is silent, within 28 days of the effective date of the contract. If the parties fail to establish a DB in accordance with Article 6, then the CIArb shall, after due consultation with the parties, appoint the DB member(s) or the whole DB if needed within 28 days of the written request of one or both parties.
- 3.3 It has to be acknowledged that a standing dispute board which remains in place for the duration of a contract is an additional expense for the parties. It is therefore likely that dispute boards will mainly be suitable for mid- to high-value projects because of the cost involved.
- 3.4 Only three respondents to the Consultation requested to include the option of a five-member DB. In view of the cost implications of such a large DB, the CIArb has decided against this option. A dispute board under the Rules shall comprise either one or three DB members.

4 Remuneration of DB Members

- 4.1 About 50 % of the respondents think that the use of monthly retainers has been a major deterrent to the adoption and use of dispute boards, especially in developing countries. The principal objection of borrowers from MDBs is the cost of boards. The respondents who voted against a monthly retainer stated that the DB should be paid for actual work carried out, regardless of the size of the project. Consequently the CIArb should promote a system of billing for time spent (plus expenses).
- 4.2 The Tripartite Agreement gives users of dispute boards a choice between two alternatives. If Alternative 1 is chosen, the DB member shall be paid a monthly retainer plus a daily fee and expenses. If Alternative 2 is chosen, payment made to the DB member shall be for services rendered plus expenses, without a monthly retainer fee. The hourly rates and the retainer and daily fees are to be agreed between the parties and the DB members prior to signing the Tripartite Agreement.

5 DB Member's Impartiality and Independence

- 5.1 All respondents to the Consultation regarded the dispute board member's impartiality and independence as vital
- 5.2 Under Article 8 of the Rules, a DB member shall provide a written declaration that there is no conflict of interest and disclose any facts or circumstances which in the eyes of the parties may give rise to justifiable doubts as to the member's impartiality or independence. Any doubt as to whether a DB member should disclose certain facts or circumstances should be resolved in favour of disclosure.

6 Informal Advice

- 6.1 Resolving conflicts at an early stage, or even before they arise, is an obvious benefit that greatly reduces costs such as legal fees, and reduces loss of productive time and goodwill between the parties.
- 6.2 Under the Consultation, several respondents highlighted the dispute avoidance and advisory role of the standing board. It was also suggested to devise a consultative and advisory procedure similar to the DRBF rules, where the board is not required to give legally binding decisions. Surprising as it may seem, DRBs issuing non-binding recommendations have been extremely successful in the USA since they were created over 20 years ago to ease the construction of projects involving international parties from different jurisdictions and differing standards of practice. People used to working with FIDIC contracts, which require binding decisions from adjudicators, might however be less inclined to use a set of rules based solely on non-binding recommendations.
- 6.3 Article 12 of the Rules states that the true mission of a dispute board is not judicial; rather it is to prevent formal disputes. The parties may at any time jointly refer a matter to the DB for it to give an informal advisory opinion as a means of dispute avoidance.

7 Recommendations and Decisions

- 7.1 The Rules equally apply to both types of dispute board procedures. The only difference arising from the parties' choice of a DRB or a DAB is that DRBs issue non-binding recommendations, whereas DABs issue binding decisions.
- 7.2 If the parties have chosen the implementation of a DRB, they are not bound by the DRB's recommendations. If one party rejects the recommendation, either party may submit the dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties may voluntarily comply with the recommendation.
- 7.3 The Rules avoid the construction (to be found in other dispute board rules) where a recommendation with lapse of time and no objection becomes contractually binding.
- 7.4 If the parties have chosen the implementation of a DAB, they are bound by the DAB's decisions. If one party rejects the decision, either party may submit the dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties must comply with the decision.