
Dispute Resolution Board and Adjudication, Offshoot of Arbitration

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Nature of Dispute Boards (I)

- A Dispute Board (DB) is a board of impartial professionals, usually formed at a project's outset to encourage dispute avoidance and assist with dispute resolution throughout the project's lifetime.
- Can be standing body or formed *ad hoc*
- Different forms – Dispute Adjudication Boards (DABs) adjudicate disputes. Dispute Review Boards (DRBs) issue recommendations. N.B. DRB is often used as an umbrella term for DBs
- Essential aim – to resolve disputes speedily without recourse to full international construction arbitration
- First used in the USA in 1970s on the Eisenhower Tunnel project. First used internationally in connection with the El Cajón hydroelectric dam project in Honduras in 1980s
- Typically used on very large projects in construction and infrastructure sectors (featured in all FIDIC contracts), but expanding in other fields

Nature of Dispute Boards (2)

- DBs are creatures of contract
- Resort to DBs is often included as a Condition Precedent to arbitration
- DBs are usually not regulated by legislation or national arbitration laws
- Most importantly – DB conclusions are not directly enforceable under NYC
- Accordingly, concerns are sometimes raised about whether DBs are worth the expense
- Historically, DBs were not commonly used in the UK because of the availability of statutory adjudication

Procedural aspects

- Notice of intention to refer matter to DB
 - Usually brief – parties’ details, summary of claims and relief sought, and proposal concerning nomination of DB members (if DB is not already in place).
 - The same principles of natural justice and independence/impartiality apply as in normal arbitration
- Constitution of specific DB (by party agreement or reference to third-party institution)
- Identification of precise issues required to be determined
- Many institutions have developed procedural rules that might be adopted for DBs:
 - ICC Dispute Board Rules (first adopted 2004, revised 2015)
 - AAA Dispute Resolution Board Guide Specifications (2000)
 - CIArb Dispute Board Rules (2014)

Specific features

- Unlike international arbitration, the adjudicative body is often known and/or appointed in advance (as a matter of contract) – potential for conflicts of interest to arise where same people fulfil roles in relation to the DB and to the project itself
- DBs can take an active role in “*avoidance of disagreements*” and “*informal assistance with disagreements*” (see, e.g. Articles 16-17, ICC DB Rules 2015)
- DBs can receive regular fees to cover their coordination activities and the act of “*becoming and remaining conversant with the Contract and the progress of its performance*” (Article 29, ICC DB Rules 2015)

Common rules

- In other respects, DBs can become much like “mini arbitrations”.
- DBs, like arbitral tribunals, have broad procedural powers, including as to:
 - Requiring information from the parties
 - Conducting meetings and site visits
 - Determining language of their proceedings
 - Ordering document production
 - Questioning of parties, witnesses and representatives
 - Appointment of experts
 - Issuing provisional relief/conservatory measures
 - Protecting trade secrets and confidential information

Concluding observations

- DBs can be of great utility on large infrastructure projects where many disputes are likely to arise over the lifetime of a project – and where constant reference to costly international arbitration would be disruptive
- DBs are of less utility on smaller projects, or where less expensive forms of dispute resolution are available
- Given the lack of direct enforceability, the success or failure of a DB's output depends upon the parties' attitudes towards their conclusions and decisions