

SIEMENS

ICC Dispute Board Rules and the differences towards the FIDIC DAB provisions

24. January 2008, © Volker Mahnken



ICC Dispute Boards

ICC Dispute Board Rules of September 1, 2004

see: <http://www.iccwbo.org/court> (including Dispute Board (DB) model clause and model DB member agreement)

ICC Dispute Boards

Basic concept of ICC DB Rules:

- not limited to construction contracts / construction industry
- setting up of DB at start of project (without disputes, Article 3) and activities during project duration (Article 14, para. 2), (like FIDIC Red Book, unlike FIDIC Yellow and Silver Book no ad hoc DB as alternative)

ICC Dispute Boards

Types of Dispute Boards and their determinations:

- **Dispute Adjudication Board (DAB, s. Article 5):** Decision (Article 5, para. 1), binding as long as not overruled by court/arbitral tribunal (s. Art. 5, paras. 5 and 6), similar to FIDIC DAB decision
- **Dispute Review Board (DRB, s. Article 4):** (non-binding) Recommendation (Article 4 para. 1), becomes binding if no notice of dissatisfaction within 30 days (s. Article 4 paras. 5 and 6; no FIDIC counterpart)
- **Combined Dispute Board (CDB, s. Article 6):** normally (non-binding) recommendation, in certain cases decision (no FIDIC counterpart)

ICC Dispute Boards

Number and appointment of DB members:

- 3 DB members, unless otherwise agreed (s. Article 7, para. 2)
- All DB members jointly appointed by parties (s. Article 7, paras. 3 and 4); if no party agreement appointment by ICC
- If appointment by ICC use of National Committees, no list of DB candidates (different from FIDIC)

ICC Dispute Boards

Eligibility / qualification of DB members:

- Neutrality / Independence (s. Article 8 and in particular Article 9 para. 3 and Article 19 para. 6; see Clause 4 FIDIC General Conditions (GC) Dispute Adjudication Agreement for specific provisions)
- No formal qualification required (for example engineers and lawyers), combination of skills useful

ICC Dispute Boards

Categories of activities of DB:

- information about project and its progress and disagreements through early review of contract and of progress reports and through regular meetings, site visits (even without particular dispute, see Articles 11, 12, 13)
- informal assistance with disagreements (see Art. 1, 2nd sentence, Art. 16; not explicitly covered by FIDIC)
- formal dispute settlement, see Article 1, 2nd sentence, Articles 17-20

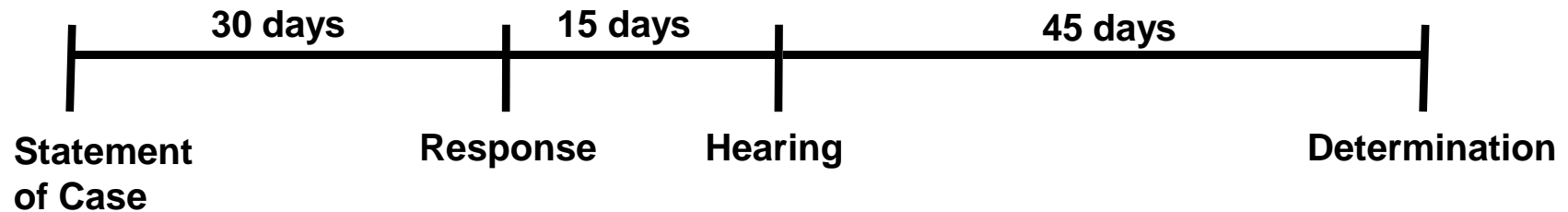
ICC Dispute Boards

Particularities of formal DB proceedings:

- Principles of fairness and neutrality (Article 19 para. 6)
- Only one (1) submission by each party (see Articles 17 and 18)
- Normally with hearing (see Article 19)
- Determination within relatively short period of time (90 days, see Article 20) as regards requirements of DB determination see Articles 22 and 23

ICC Dispute Boards

Formal ICC DB Proceeding



FIDIC Adjudication



ICC Dispute Boards

Far-reaching procedural powers of DB:

- pursuant to Article 15 para. 1 in respect of proceeding in general
- pursuant to Article 19 para. 5 in respect of hearing in particular

ICC Dispute Boards

Powers of DB in respect of establishment of facts:

- Production of documents
(Article 15 para. 1, Article 18 para. 2)
- Calling of meetings, site visits, hearings
(Article 15 para. 1)
- Questions to parties and witnesses
(Article 15 para. 1)
- In addition generic “catch all” clause in Article 15 para. 1)

ICC Dispute Boards

Confidentiality/Privacy of DB proceeding

- Important because of information rights of DB members
- Confidentiality obligation of DB members pursuant to Article 9 para. 2
- Protection orders by DB pursuant to Article 15 para. 3
- Use of DB determination in arbitration or court proceedings permissible pursuant to Art. 25

ICC Dispute Boards

Decision making by DB:

- Best efforts to achieve unanimity in respect of DB determination pursuant to Article 23, if not possible majority decision, dissenting opinion possible
- Majority decision for procedural issues, Article 15 para. 2

ICC Dispute Boards

Role of ICC DB Centre in DB proceedings - no full administration, “only“ administrative support (Article 1):

- Appointment of DB members if no agreement of the parties in this respect (Article 7 paras. 3-6) and decision in case of challenge of DB members (Article 8 para. 4; no FIDIC equivalent)
- Review of Decisions (of DAB or CDB – not in respect of Recommendations by DRB or CDB) in respect of form, if agreed by parties (see Article 21, no FIDIC equivalent)
- For administrative expenses of ICC see Article 32 and Appendix Schedule of Costs

ICC Dispute Boards

DB Member Agreement:

- Tripartite Agreement among each DB member and the parties (Article 10 ICC DB Rules and ICC Model Dispute Member Agreement, similar Section 1 FIDIC General Conditions (GC) of Dispute Adjudication Agreement)

ICC Dispute Boards

Fee Structure / Expenses:

- **Monthly Retainer Fee** (Availability; review of contract, progress reports); Article 27 ICC DB Rules; normally three times daily fee; (similar Section 3 FIDIC Dispute Adjudication Agreement + Section 6 GC Dispute Adjudication Agreement FIDIC „Red Book“)
- **Daily Fee** (meetings, site visits, travel time, activities in connection with dispute, Article 28)
- **Reimbursement of expenses** (Article 29 ICC DB Rules; Section 6 FIDIC GC Dispute Adjudication Agreement)
- Equality of DB members in respect of fees (see Article 26 para. 2, no such principle in FIDIC)

ICC Dispute Boards

Cost allocation among parties:

- Every party has to pay one half of fees and expenses (Article 26 ICC DB Rules; similar Clause 20.2 FIDIC)

ICC Dispute Boards

Example: Fixed Cost of a permanent 3 member DB (monthly retainer fee only)

Project duration: 30 months

Daily fee / member: € 2400

Monthly retainer fee: 3 daily rates

3 DB members x 30 months x 3 daily rates x € 2400

= € 648.000 : 2 parties = € 324.000 for either party

ICC Dispute Boards

Role of courts / arbitration tribunals:

- Final decision in case of notice of dissatisfaction (see Article 4 para. 6; Article 5 para. 6)
- Enforceable decision if enforcement is required (see Article 4 para. 4, Article 5 para. 4; Article 1, 3rd sentence), DB determination itself is not enforceable; if binding = contractually binding
- Full arbitration/court proceeding required

ICC Dispute Boards

Ad hoc or permanent DB?

	Permanent DB	Ad hoc DB
FIDIC Red Book	X	
FIDIC Yellow Book		X
FIDIC Silver Book		X
ICC DB Rules	X	

ICC Dispute Boards

Advantages of permanent DBs

- determination „on the spot“ possible
- faster proceeding through familiarity with project
- informal assistance with disagreements
- appointment of all DB members through agreement of both parties realistic
- no significant barrier to commence DB proceedings = immediate commencement

Disadvantages of ad hoc DBs

- delay through appointment process
- no familiarity of DB with project = longer duration of proceeding
- informal assistance not realistic
- appointment of all DB members through agreement of both parties not practical
- certain hesitation of parties in practice to commence DB proceedings = often delay in commencement

ICC Dispute Boards

Disadvantages of permanent DBs

- cost, remuneration for availability
- selection of DB members with „wrong“ qualifications, because types of disputes not exactly predictable
- sufficient number of DB members for larger number of major projects available?
- more proceedings due to lower psychological threshold (?)

Advantages of ad hoc DBs

- lower cost, no remuneration for availability
- selection of DB members with right qualification for respective dispute
- smaller number of candidates for DBs needed
- less proceedings because of high psychological threshold (?)

ICC Dispute Boards

Ad hoc or permanent DB?

How likely are disputes of the kind for which DBs are useful (combination of non-legal, especially technical and legal issues requiring prompt determination)?



Well-defined scope,
little ground risk,
little input by client required,
greenfield project,
cooperative, reasonable client,
small contract

Unclear scope,
large ground risk,
plenty of input by client,
work in existing plant,
difficult client,
large contract

ICC Dispute Boards

Permanent or ad hoc DB? – questions to be asked:

- Will there be a sufficient number of disputes in a project to justify a permanent DB?
- If you opt for permanent DB, will there be a time period when an ad hoc DB is sufficient (for example defects liability period)?
- Are permanent DBs necessary for all contracts in connection with the project (for example subcontracts, consortium agreement)?
- Can DBs be used outside of construction? Would ad hoc DB normally not be sufficient in these cases?

ICC Dispute Boards

	ICC DB	FIDIC DAB
DB clause	See standard ICC DB clause	Sub-clauses 20.2 – 20.4 of Conditions of Contract and Appendix to Tender
DB procedure	ICC Dispute Board Rules + Appendix Schedule of Costs	Sub-clauses 20.2 – 20.4 + Annex Procedural Rules
DB member agreement	Model DB member agreement	Dispute Adjudication Agreement + General Conditions of Dispute Adjudication Agreement
Where to find it	http://iccwbo.org/court/ or ICC brochure Dispute Board Rules	FIDIC Conditions of Contract

ICC Dispute Boards

Questions to be answered and problems to be solved when negotiating DB provisions and/or setting up a DB:

- Acceptance of idea of DB or rejection in general? For example because threshold for formal dispute settlement proceedings is lowered or other ADR mechanisms are preferable?
- Appropriate for what types of contracts? Consortium contracts, subcontracts? Long term service contracts? Even contracts outside of construction ?
- Ad hoc or permanent DB?
- One or three DB members?
- What qualifications should DB members have? Engineers, lawyers, others? Difficulty to find non-lawyers with DB/adjudication experience outside of common law countries
- What type of DB / its powers ? DRB, DAB or CDB?

ICC Dispute Boards

The party requiring that the dispute be solved by DB proceedings shall nominate a DB member in writing when submitting its statement of the case. The other party shall nominate its DB member in writing within a period of thirty (30) days after it has been notified of the nomination of the first DB member.

have been proposed/appointed within the time limits stated in Article 7 para. 3 of the ICC DB Rules or should a party not nominate a DB member within the time limits mentioned before, the respective DB member shall be appointed by the Dispute Board Centre of the ICC pursuant to the ICC DB Rules.

Articles 7 para. 4, 11, 12, 16, 21 and 27 of the ICC DB Rules shall not apply.

ICC Dispute Boards

Advantages ICC DB Rules

- well-structured text/
proceeding, clearly defined
steps
- administrative support by ICC
DB Centre, appointing
authority
- can be used for many types of
contracts (also outside
construction)

Disadvantages FIDIC Adjudication

- relevant provisions are not so
clearly structured, steps in
proceeding not so well defined
- FIDIC only acts as appointing
authority if explicitly agreed
(see subclause 20.3 Particular
Conditions/Appendix to Tender),
no provision in respect of
challenge of DB members
- use limited to FIDIC contracts

ICC Dispute Boards

Advantages FIDIC Adjudication

- differentiation between ad hoc and permanent DB
- only one type of determination = decision by DAB (preliminarily binding)

Disadvantages ICC DB Rules

- only permanent DB; ad hoc DB requires considerable modifications
- complicated through three types of DBs with different powers in respect of determinations, no "default" clause, if no clear choice by parties

ICC Dispute Boards

Summary/Siemens position in respect of DBs:

- DBs are in principle an ADR instrument which is useful for construction contracts (contracts with clients, consortium agreements, subcontracts) and may also be considered for other types of contracts; international arbitration as last resort;
- The ICC DB Rules (and the FIDIC DAB provisions in respect of FIDIC contracts) provide in principle a good framework but require some modifications and amendments;
- Normally an ad hoc DB is sufficient, permanent DB only in exceptional cases.