

2<sup>nd</sup> Bucharest DRBF Regional Conference  
– Understanding Dispute Boards  
10-11 June 2010

David Brown  
Partner, Clyde & Co

9 June 2010



2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

## 2<sup>nd</sup> Bucharest DRBF Regional Conference

- Understanding Dispute Boards  
10-11 June 2010

### CURRENT THINKING

- DABs vs DRBs
- Ad hoc vs. Standing

David Brown

Clyde & Co LLP, Paris

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- THE OBJECTIVE
  - Dispute prevention
  - Effective dispute resolution
  - Avoidance of arbitration and the Courts!

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- DISPUTE PREVENTION
  - By definition, only standing DBs
  - Standing DBs
    - FIDIC Red, Gold
    - ICC Dispute Board Rules
      - expected for new editions of Yellow and Silver Books
    - DBRF Rules ?

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- REGULATION OF DISPUTE RESOLUTION
  - The range
    - Red Book: almost silent
    - Gold Book: 20.5 'Avoidance of Disputes' if parties agree
    - ICC Dispute Board Rules – Article 16 if parties agree

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- WHAT ACTUALLY HAPPENS?
  - The DB may act effectively as mediator / facilitator / catalyst
  - Limited role for written rules
    - interpersonal skills, not 'procedure'
  - How far can you go?
    - Clash with decision-making role?

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- WHAT IS THE FUTURE FOR 'AD HOC' DBs?
  - Original justification: more construction site related disputes under Red Book anticipated
  - Advantages
    - Cost
    - Parties simply do not want permanent role for a neutral
    - Choice of individual with expertise for dispute in question
  - If decision-making only, this needs to be effective

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- DABs vs DRBs
  - The difference: whether the decision is contractually binding regardless of notice of dissatisfaction
  - ‘Adjudication’ option: contractually binding
    - FIDIC
    - ICC ‘Decision’
  - ‘Recommendation’: not necessarily binding
    - World Bank original preference
    - ICC DRB / CDB ‘Recommendation’

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- THE TREND TOWARDS ADJUDICATION
  - Move away from US preference for recommendations – even though decisions generally implemented
  - Key issue – does adjudication enable parties to avoid further dispute resolution proceedings eg arbitration

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- THE PROBLEM OF ENFORCEMENT
  - Decisions may be contractually binding, but are they respected?
  - Issues with enforcement by arbitration
  - Steps to persuade parties to comply with decisions:
    - changes introduced in FIDIC Gold Book

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

- CONCLUSION – CURRENT QUESTIONS
  - Are the conciliatory and decision-making functions of a Dispute Board really compatible?
  - Given the difficulty of enforcing Decisions in some jurisdictions, why not give Recommendations a chance?
  - In any event, is the Recommendation not more suitable where the Dispute Board seeks to play an active dispute prevention role?

2nd Bucharest  
DRBF  
Regional Conference  
10-11 June 2010

David Brown  
Partner, Clyde & Co Paris  
Tel. +33 1 44 43 89 71  
Fax +33 1 44 43 88 77  
[david.brown@clydeco.com](mailto:david.brown@clydeco.com)