

**DRBF Conference on
The Use of Dispute Boards in Europe**
Expectations, Concerns, Experiences
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Nicholas Gould
Partner, Fenwick Elliott LLP
President DRBF Region 2

Dispute Resolution Board Foundation. *Moving projects forward* since 1996.



Enforcing the Dispute Board's
decision: issues and problems

DRBF - Statistics

- 1975-2010
- 2150 projects
- Tunnels, highways, bridges, airports, buildings, schools, hospitals, stadiums, metro systems, rail, pipelines, water, treatment, pumping stations, process plant, ports.



Issues

- In what sense is the DB's decision binding?
- Final decision, or a final and binding decision?
- Enforcement by Arbitration?
- Interim Awards, Partial Awards and Final Awards.



- Court enforcement?
- Notice of dissatisfaction?
- Contractual procedures?



Dispute Boards Worldwide

1. DRB's – North America
2. DAB's – The FIDIC and World Bank Model
3. Expert Determination – by contract e.g., IChemE
4. Adjudication by Contract



5. Adjudication by Legislation:

- England, Scotland and Wales
- New Zealand
- Australia
- Singapore



FIDIC Clause 20.4

“If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion, or evaluation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.”



Some other Key Provisions

“The DB shall be deemed to be not acting as arbitrator(s).”

“The DB shall give its decision, which shall be reasoned...”

“The decision shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award ...”



Notice of Dissatisfaction

“If either Party is dissatisfied with the DB’s decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration.”



Condition Precedent

“ 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.”



“ If the DB has given its decision as to a matter in dispute to both parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB’s decision, then the decision shall become final and binding upon both parties.”



“ Any dispute which has not been settled amicably and in respect of which the DB’s decision (if any) has not become final and binding shall be finally settled by arbitration.”



Final and Binding

Shell Egypt West Manzala GmbH v Dana Gas Egypt Limited [2009] EWHC 2097 (Comm) – “Shall be final, conclusive and binding on the parties.” However: did not exclude the right of appeal.



ICC Rules, Article 28.6 – Waiver of Rights to any form of recourse

Beaufort Developments (NI) Ltd v Gilbert Ash NI Limited & Others (20 May 1998, HL) – A judge can open up, review or advise a final certificate or could award damages as compensation if the certificate were incorrect. A 2-tier dispute resolution procedure seemed to make little difference.



Parsons Plastics (Research & Development) Limited v Purac Limited [2002] EWCA CIV459 – the adjudicators decision was “final and binding”. Amounts could be set-off against an adjudicators decision because the adjudicators decision dealt only with part of the disputes arising under a contract and not the entirety of the issues between the parties.



Reference to Arbitration

- Clause 20.6 – Notice of Dissatisfaction – amicable settlement procedure – ICC Arbitration
- Clause 20.7 – Failure to comply with the DB's decision may be referred to ICC Arbitration



ICC Case 10619

- FIDIC Red Book, 4th Edition, Clauses 11 and 67
- 4 engineers decision
- Referred to Arbitration
- 2 enforced, 2 engineers decision out of time.



→ Careful application of the procedures set out in the contract, in particular timetables and deadlines.



Singapore Decision - *PGN v CRW*

- The last DB decision was not honoured.
- A notice of dissatisfaction was issued by the paying party.
- Referral to Arbitration for:
 - Review of or confirmation of the DB's decision
 - Payment of the DB's decision



The Judgement

- Majority Award decided the DB decision should be paid but not reviewed or revised.
- As a NOD had been served, Clause 20.6 applied requiring a DB decision to be reviewed or revised.
- Clause 20.7 could not apply



Other procedures

- Fast track arbitration procedure
- 100 day arbitration procedure
- ICC's pre-arbitral procedure
- Court enforcement?



Traps for the unwary

- Inadequately expressed claim
- Nebulous dispute
- Failure to substantiate the claim
- Payment procedure
- Clause 3.5 determination



- Failing to comply with conditions precedent
- Uncertain notices of dissatisfaction
- Limited notices of dissatisfaction
- Dispute Boards acting outside of their powers.



- Dispute Boards failing to give a decision on all of the dispute.
- Failing to provide reasons.
- Issuing a Dispute Board decision late.
- Inadequate referral to arbitration.
 - Clause 20.6 (interim payment)
 - Clause 20.7 (immediate payment)



Nicholas Gould Questions?



Dispute Resolution Board Foundation

**19550 International Blvd., Suite 314
Seattle, WA 98188
Phone: 206-878-3336
Fax: 206-878-3338
Email: info@drb.org
www.drb.org**
