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What Users Expect From Dispute Resolution

The Contractor's View

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Goals of Dispute Resolution (1)

„... The arbitral tribunal ... shall conduct the proceedings so as to **avoid unnecessary delay and expense** and to **provide a fair and efficient process** for resolving the parties' dispute.“

(Article 17, 1. para. UNCITRAL Arbitration Rules 2010)

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Goals of Dispute Resolution (2)

- Proportionality – bigger disputes may take longer and may be more costly, smaller disputes should be resolved more expeditiously and less costly
- Cumulation of claims should be avoided, in particular problem of construction disputes
- Enforcability of decision (?)

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Assessment of construction arbitration some years ago

- Expeditious
- Inexpensive
- Small strain on business relationship
- Neutral arbitrators
- Specialized arbitrators
- Flexible proceedings based on party autonomy
- No formal service of process
- International enforceability of award
- Hearings are not public

Assessment of construction arbitration today

- Neutral arbitrators
- Specialized arbitrators
- Flexible proceedings based on party autonomy
- No formal service of process
- International enforceability of award
- Hearings are not public
- **Therefore: Arbitration only last resort**

What ADR mechanisms can be used in construction?

- Mediation – Siemens success rate not overwhelming in construction
- Expert opinion – not easy to negotiate, should not be limited to technical, non-legal issues

Advantages of Dispute Boards

- Combination of non-lawyers (in particular engineers) and lawyers (= normally 3 DB members)
- Strict time limit
- Possibility of solving disagreements informally
- Case management by Dispute Board
- No document production

Types of Dispute Boards and their determinations

- **Dispute Adjudication Board (DAB, s. Article 5 / ICC DB Rules):** Decision, binding as long as not overruled by court/arbitral tribunal, similar to FIDIC DAB decision
- **Dispute Review Board (DRB, s. Article 4): (non-binding)** Recommendation, becomes binding if no notice of dissatisfaction within 30 days
- **Combined Dispute Board (CDB, s. Article 6):** normally (non-binding) recommendation, in certain cases decision
- Slight Siemens preference for DABs, but DRB or CDB is also acceptable

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	
DIS ADR Rules	X	X

Ad hoc or permanent DBs (2)

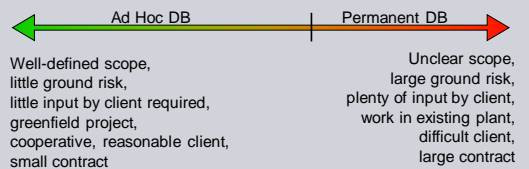
Advantages of permanent DBs	Disadvantages of ad hoc DBs
<ul style="list-style-type: none"> determination „on the spot“ possible faster proceeding through familiarity with project informal assistance with disagreements appointment of all DB members through agreement of both parties realistic no significant barrier to commence DB proceedings = immediate commencement 	<ul style="list-style-type: none"> 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

Ad hoc or permanent DBs (3)

Disadvantages of permanent DBs	Advantages of ad hoc DBs
<ul style="list-style-type: none"> 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 (?) 	<ul style="list-style-type: none"> 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 (?)

Ad hoc or permanent DBs (4)

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



Ad hoc or permanent DBs (5)

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?

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?

Difficulties

- Will state as owner / employer use Dispute Boards?
- Scepticism of lawyers (in particular outside counsel)
- In a couple of cases (preliminarily binding) decision by Dispute Adjudication Board is not honoured

Positive developments

New ADR Rules of German Institution of Arbitration (Deutsche Institution for Schiedsgerichtsbarkeit, DIS) including ad hoc adjudication („Schiedsgutachtenordnung“) and (permanent) Dispute Adjudication Board (DIS-AVO, Verfahrensordnung für Adjudikation), in effect since May 1st and July 1st 2010 respectively

www.dis-arb.de

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 only as last resort;

→ Normally DB rules of an institution (in particular ICC, DIS) are preferable because of administrative support and backing by institution;

→ Normally an ad hoc DB is sufficient, permanent DB as an exception.
