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Dispute boards and other ADR – the legal context

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Introduction

Who is who ?

- The Swiss Institute of Construction Law
- The Swiss Symposium on Construction Law
- The present mandate of Swiss Experts
- Experiences from various DBs

Focus on the legal context

DB-standards are international. The
underlying law remains national

An incentive for the discussion



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Binding legislation?

Perspective: international or national

As a matter of principle, DBs are based on
national legislation (if any):

- Statutes with general scope (either material provisions or procedural orders)
- Statutes applicable to specific matters (important development in insurance law)

One example in private law: art. 189 of the new
(1.1.2011) Swiss Civil Procedure (CPC)
(Appendix)

One example in public law: art. 33b of the Swiss
Federal Administrative Procedure (PA) (Appendix)



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Art. 189 CPC on Dispute Adjudication

Key elements of the institution:

- The parties formulate the terms of reference and promise to accept the sentence of the adjudicator. In case of violation of the commitment, remedies are only contractual
- The sentence of the adjudicator has binding effect for the court (provided that the conditions of validity are fulfilled)
- Art. 189 CPC focuses on facts. Terms of reference on legal elements are also accepted under Swiss law

Art. 189 CPC is part of the DB philosophy, as a tool to limit or stop judicial procedures



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Art. 33b PA

A good example of the problems related to DBs, ADRs and arbitration in administrative cases:

- As a matter of principle, the State is bound only by the law
- It is entitled to participate to non-judicial procedures only with respect to cases at its free disposal (basically: financial cases such as concessions, expropriations or damages)
- The DB procedure cannot ban the State from reopening the judicial procedure in any conditions



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DB (non State) regulation

Examples are numerous and strongly developing:

- International examples: adjudication, partnering; medarb; medaloa; procedure of mediation (WIPO)
- National examples: « Streiterledigung » (VSS; Appendix)

These regulations are always support by the contract:

- Ad hoc solutions
- Standard forms (ICC; FIDIC; AlpTransit and other SBB large project)



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The example of SBB large projects

Basis: a specific provision within all contracts + an appendix dedicated to DB

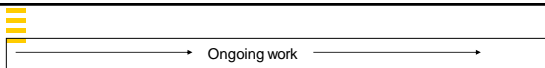
Key elements:

- The board members are nominated in the contracts
- Ongoing work
- Co-investigation of the DB
- The parties are the masters of the case
- Short time-limitations
- The DB is mediator for all cases and adjudicator up to SFr 100'000.--

A 3-step procedure



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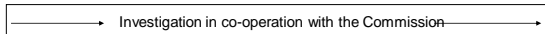


On-site Co-inspections

Meeting of the Project Managers

Conciliation Commission

Judicial procedure



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Some legal problems surrounding DBs (1)

Impact on the contract at stake:

- Method of incorporation of the DB procedure (also within the procurement procedure)
- The DB sentence equals to a modification of the contract. It can generate some moral hazard (lump sum contract)
- How to deal with all the claims arising after the DB closing?
- Time-limitations can hardly be complied with during the DB procedure; if the contract (or the law) foresees some strict limitations to act on the merits, the demand thereto after an unsuccessful DB procedure can be definitively blocked



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Some legal problems surrounding DBs (2)

Procedural elements:

- No binding effect in the ultimate judicial procedure, but a certain influence is de facto unavoidable
- The execution of the DB sentence is either similar to arbitration (also with the possibility to appeal to the court) or a mere contractual procedure (demand on the merits)
- How to deal with the non co-operation of one party during the DB procedure (example: refusal to designate the commissioners). There is no possibility to force the intervention of the court
- Similar problem with respect to temporary injunctions





Future?

DBs will certainly continue to grow

This will create new legal problems:

- Procedural law
- Contract law

They should not be an obstacle for the parties but an incentive for better contracts and some guidances in the legislation