FROM ARBITRATION TO DISPUTE BOARDS – A RIGHT STEP FOR DISPUTE RESOLUTION IN AFRICA

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In the mid or long term contracts concluded in the context of international commercial exchanges, there is usually a clause referring either to State courts or to arbitration for the settlement of the disputes arising between the parties and concerning the interpretation and execution of the said contracts.

In the contracts of construction mainly, the settlement of dispute clause proposed by FIDIC states that the parties will submit their disputes to arbitration or to a court if they are not satisfied by the solution proposed by the Engineer.

The inconvenience of this system comes from the fact that the Engineer, in such cases, is generally recruited only by the employer, that is to say the owner of the construction, and might not be as independent as he should be, to make an objective assessment of the dispute, whereas he is the person that should solve the said dispute. The Engineer might even, sometimes, be at the origin of this dispute because of its instructions that do not meet the builder's agreement.

Conceived to replace the Engineer in the settlement of dispute clause exposed above, the Dispute Board will be presented (I) before being commented from an African perception (II).

I) **THE DISPUTE BOARD**

The institution will be outlined from the ICC rules thereto (A) before giving rise to some comments (B).

A – The ICC Dispute Board

In its will to “provide the business community with dispute resolution services adapted to its various needs[1]” the International Chamber of Commerce (ICC) has adopted rules on Dispute Board in 2004.

According to the Foreword of these ICC rules, “Dispute Boards are normally set up at the outset of a contract and remain in place and are remunerated thorough its duration. Comprising one or three members thoroughly acquainted with the contract and its performance, the Dispute Board informally assists the parties, if they so desire, in resolving disagreements arising in the course of the contract and it makes recommendations or decisions regarding disputes referred to it by any of the parties. Dispute Board have become a standard dispute resolution mechanism for contractual disputes arising in the course of mid or long term contracts”.

The ICC document then specifies that there are three alternative types of Dispute Board under the ICC rules. They are as follows:

1) The Dispute review Board (DRB)

The Dispute Review Board issues Recommendations with respect to any dispute referred to it and constitutes a relatively consensual approach to dispute resolution. If no party expresses dissatisfaction with a recommendation within a stated time period, the parties contractually agree

[1] Foreword , ICC Dispute Board Rules in force as from 1 September 2004.

to comply with the Recommendation. If a party does express dissatisfaction with the Recommendation within such time period, that party may submit the entire dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties may voluntarily comply with the recommendation but are not bound to do so.

2) Dispute Adjudication Board (DAB)

The ICC rules foreword defines the Dispute Adjudication Board is an organ that "issues decisions with respect to any dispute referred to it and constitutes a less consensual approach to dispute resolution.

By contractual agreement, the parties must comply with a decision without a delay as soon as they receive it. If a party expresses dissatisfaction with a decision within a stated time period, it may submit the dispute to final resolution by arbitration, if the parties have so agreed, or the courts, but the parties meanwhile remain contractually bound to comply with the decision unless and until the arbitral tribunal or court rules otherwise. If no party expresses dissatisfaction with a decision within the stated time period, the parties contractually agree to remain bound by it".

3) Combined Dispute Board (CDB)

Concerning the Combined Dispute Board, it is reputed to issue "Recommendation with respect to any dispute referred to it but may issue a decision if a party so requests and no other objects.

In the event of an objection, the Combined Dispute Board will decide whether to issue a Recommendation or a decision on the basis of the criteria set forth in the Rules. The Combined Dispute Board thus offers an

intermediate approach between the Dispute Review Board and the Dispute Adjudication Board".

The Dispute Board so outlined in its three variants cannot leave Africa unconcerned.

B) Africa and the Dispute Board

The Dispute Board appears to be an important evolution in the settlement dispute system and cannot leave Africa without any reaction.

Africa is part of the world and the African community of business is part of the international community of business. Therefore, the Dispute Board having being conceived to rationalize the settlement of the disputes that could arise between the parties and, so, prevent those parties from submitting the said dispute to arbitration or to the State courts, there is no reason that the African community of lawyers and business does not adhere to this institution.

In this respect, it must be stressed that the FIDIC clause was already widely accepted in the construction contracts in Africa. Therefore, conceived to counter the drawbacks revealed when those disputes were settled only by the Engineer, the Dispute Board, which is instituted by the parties at the starting of the contract, will, without any doubt, be accepted in Africa.

That said, the Combined Dispute Board seems more accurate for Africa, because it is half way between the Dispute Review and the Dispute Adjudication Board, bearing so the usual approach to Dispute Resolution.

Indeed, disputes are usually solved by contentious way after the parties have failed to solve it by mutual agreement way. Now, the Recommendation or the Decision that could be issued by the Combined Dispute Board recalls this gait or walk.

In one world and otherwise said, to look for a Decision after one has failed to comply with a Recommendation seems to me close to the African nature, the African wisdom being reputed to prefer at first dialogue assorted with recommendation before eventually looking for a binding Decision.

It seems useful to stress that the Recommendation or Decision made by the Dispute Board could be considered by the parties to be the final decision on the dispute and, thus, be enforced.

In this respect, it must be mentioned here that in the African countries where the legal framework includes a regulation allowing the enforcement of the parties agreement, the Combined Dispute Board recommendations or decision could be enforced and prevent the parties to evolve in arbitration or before the state courts with the disputes.

To illustrate these affirmations, one will mention that the OHADA[2] Uniform Act relating to simplified recovery procedures and enforcement measures cites in its article 33 the enforceable rights, between which "a decision which, under the national law of an OHADA member States, has the same effect as a court decision".

[2] OHADA is the French acronym of the Organisation for the Harmonization of Business Law in Africa. It was created by the Treaty signed in Port Louis (Mauritius) on the 17th of October 1993. To date, OHADA is made up of 16 countries that are: Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad, Ivory Coast, Comoros, Congo, Gabon, Guinea Bissau, Guinea,, Equatorial Guinea, Mali, Niger, Senegal and Togo.

On the Ground of this article 33, OHADA States parties may make a ruling according to which contractual agreements made by parties in dispute can be enforced and become enforceable rights, so preventing the parties to submit their dispute to arbitration or to courts.

It's important to keep in mind that the purpose here is not to prevent the parties from going to arbitration but to allow them adopting "a settlement of dispute system they deem best suited to their particular needs"[3].

If the Dispute Board appears to be an accurate way for the parties to solve their Disputes, there is no objective reason that they do not adopt it, even in Africa.

II) THE PROSPECTS OF THE DISPUTE BOARD IN AFRICA

The history of the Dispute Board in Africa might look like the history of arbitration in the said continent. Therefore, a parallel could be made between the two institutions (A) before the indication of the actions to be undertaken for the trivialization of the Dispute Board in Africa (B).

A) The Dispute Board nearly on the same way as Arbitration in Africa

The history of arbitration in Africa teaches that for a long time, arbitration was nearly not known in Africa and, therefore, very scarcely or even not used at all.

Made up of countries that were generally colonised by France, the Great Britain and other European countries like Portugal or Spain, Africa has inherited of the perception of arbitration that had its colonizers.

[3] Foreword ICC Dispute Board Rules, p. 5

Indeed, arbitration was considered at that time in France as an institution not to be encouraged. Therefore, the suspicion entertained on arbitration in France was exported in its colonies.

Despite the suspicion mentioned above, the French law of 31 December 1925 that authorises compromissory clauses in commercial matters was extended to its colonies and territories.

At the same time, the provisions of the French civil procedure code relating to arbitration were not extended to the said colonies and territories.

When they became independent States in the sixties, these African countries previously colonised by France had inherited of the French law extended to them during the colonial period.

This explains why the rules on arbitration existed in some of these African countries and not in the others, at the time these countries acquired their international sovereignty.

Concerning the former Belgium colonies (Rwanda, Burundi and the Democratic Republic of Congo), the Belgium colonizer had extended in these colonies the practice of arbitration with necessary adaptations.

As for countries previously colonized by Great Britain, which colonial policy consisted to transplant English law in its colonies or in the territories under its administration, they were more familiarized to arbitration.

A long time after the African states independence and due to the growing interest of the international community towards arbitration, the African countries have, either individually or in the context of regional

organisations like OHADA, adopted arbitration for the settlement of business disputes, drawing their inspiration either from the UNCITRAL model law on arbitration, the French model, the Swiss model or the ICC rules.

The practice of arbitration be it domestic or international, is a reality in Africa nowadays.

Arbitration is henceforth widely accepted in Africa because African lawyers and the African business community have understood the necessity to take their whole part in the globalization of arbitration.

Indeed, most of the African countries have modernised their regulation on arbitration and designate more and more African lawyers as arbitrators in the disputes implying them.

Further more, Africa is more and more chosen as the seat of arbitral tribunals, even when the arbitral proceeding implies non African countries.

Fore sure, the Dispute Board is something new in Africa but it will not take the same long time that arbitration took to be accepted in Africa. In this respect, the drawbacks registered to introduce arbitration in Africa could serve to prepare the better anchorage of the Dispute Board in Africa. But this calls the bring into play of some actions.

B) Some of the actions to undertake for the trivialization of the Dispute Board in Africa

Sessions of information and of training on the Dispute Board will help the Institution to be known and accepted in Africa.

The Conferences in Africa on the same topic will also help to better understand and adopt the Dispute Board.

In this regard, This Cape Town Conference seems to me an important step for the promotion of the Dispute Board in Africa. But the French African speaking countries also deserve to host such conferences.

During these Conferences and sessions of training, the advantages of the Dispute Board for the settlement of dispute will and should be raised. For example, one should not avoid to stress that in the FIDIC clause systems, the Engineer is recruited only by the Employer and might be at the origin of the dispute between the parties.

Whereas, the Dispute Board as above mentioned is jointly put in place by the parties (the Employer and the Builder) and will probably be more independent than the Engineer alone, to manage the pre-arbitral dispute between the parties.

The Dispute Board having the possibility to visit or to evaluate the constructions from time to time, and so, to prevent disputes that could arise between the parties, its intervention on the field could have a positive impact on the implementation of the building contract and lead to its good end, at the satisfaction of the parties.

The second action that could be undertaken is that the African lawyers and Experts should also be integrated as members of the Dispute Board.

This integration of Africans in the composition of Dispute Board will let the other Africans understand that the Dispute Board is not and

Institution conceived by foreigners and managed only by foreigners, without any possibility for the Africans to take part to that experience.

The third action to do seems to me to create a fund for the Dispute Board in Africa.

I must say that I have being pleading since a long time, for the creation of such a fund for the promotion of ADR as a whole and for arbitration particularly, in Africa.

The Dispute Board being like arbitration a paying allowance, if a party does not have money to pay for it, this lack of money could be an impediment for its setting up.

The creation of a fund to which the parties may resort will probably permit to avoid situations where the Dispute Board cannot be put in place because these parties have no money to pay the members of the said Dispute Board. Therefore, the fund so created will indirectly and surely contribute to promote Dispute Board in Africa.

If the actions above mentioned are implemented, there is no doubt that they will help to better implant the culture of the Dispute Board in Africa.