

DISPUTE BOARD

PRACTICAL SITUATION IN FRANCOPHONE COUNTRIES AND PERSPECTIVES

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INTRODUCTION

- **For any regular advisor of private or public sector clients in large public infrastructure and other complex projects such as concession and PPP, especially in Francophone Africa, DRB and DAB cannot be an alien.**
- **This is in part because large and complex infrastructure projects have in most cases an international flavor and because our practice is more oriented towards upfront work and project facilitation than towards litigation.**
- **From our side, we are used to promote and organize ADR techniques but it is fair to say that so far we have little success in promoting DRB and even less DAB.**

DRB AND DAB IN THE FRANCOPHONE CIVIL LAW CONTEXT

- **By looking at the real life and in particular :**
 - ◆ at the contracting tradition and its practice and
 - ◆ at the system currently offered for resolving disputes by way of conciliation

- **It is possible to understand in part the little appetite for DB in a Francophone civil law world**

- **I propose to discuss two main reasons:**
 - ◆ an overall legal and contractual framework substantially different from common law framework
 - ◆ the existence of a quasi-public conciliation committee having a long track-record

THE UNDERLYING LEGAL DIFFERENCES IN CONTRACTING BETWEEN THE FRANCOPHONE CIVIL LAW WORLD AND THE COMMON LAW WORLD

- In the Francophone system, which applies more or less to all the former French colonies of Africa, there is a long tradition of extended liability of the contractor including joint and several liability with architects, engineers, and control agencies
- This tradition is naturally translated in the contractual obligations and the general obligations of the contractor are significantly more comprehensive than in the common law system
- The bulk of the contractual obligations which cannot easily be contracted out are enshrined into a famous concept : the « contrat d 'entreprise », which itself is one of the two main nature of contracts deriving from the Napoleonic code. The related obligations deriving from this concept are themselves referred to as « obligation de résultat »
- In other words, the contractor must perform and reach the contractual result (purpose, time, cost and price) : it is bound to organize itself to do so and its excuse for non-performance are as a matter of principle very limited

THE CONTENT OF THE MOST USUAL GENERAL CONDITIONS OF CONTRACT

- The above framework and in particular the « contrat d 'entreprise » obligations is translated into a set of general conditions of contract specially for public work contracts which are more or less the same for all civil law countries of Africa. They have generally a mandatory character for domestic contracts (based on similar provision of the respective public procurement codes). Those general conditions are known as CCAG (*Cahier des conditions administratives générales*).
- Government agencies, local public agencies, and contractors are very familiar with those conditions and their day-to-day practice.
- These CCAG which in general remain very close to the French CCAG have been adapted for large contract financed by the multilaterals and two sets of standard terms of contracts are used on a daily basis for numerous projects:
 - ◆ **The World Bank standard bidding documents for civil law countries published in 1996 and updated in 2007 which comprises some provisions also found in the FIDIC.**
 - ◆ **The European Development Fund standard conditions (FED) which are closer to the French CCAG.**
 - ◆ **Currently, the FED and the World Bank are the two main multilateral funders for public infrastructure projects in Francophone Africa.**

IMPACT OF THE LEGAL FRAMEWORK AND RELATED CONTRACT CONDITIONS ON THE DAY-TO-DAY ACTIVITY ON SITE

- Although both the World Bank standard conditions and the FED standard conditions provide for an outside engineer representing the employer, the role of the engineer is substantially different from the one of a FIDIC engineer
- The « civil law engineer » is and must be far less proactive than the FIDIC engineer: his main role is to control the performance of the contractor.
- The contractor himself in consideration for its extended liability, is given a large freedom of organization (providing it will meet the performance parameters, the milestones, delivery in accordance with the specifications, and within time and budget)
- In this contracting system, the outside engineer is often referred to as a « control mission » and those two words speak for themselves
- In such a system, disputes relating to contract interpretation during performance and relating in particular to the engineer instructions have « by construction » a more limited scope than in the common law system.
- **As a result, a DB is not a real need.**

THE EXISTENCE OF PUBLIC-PRIVATE CONCILIATION COMMITTEE WITH A TESTED TRACK-RECORD (CCRA)

- There is a long tradition of conciliation originally embedded into the regulations and in most conditions of contract (CCAG)
- This tradition derives from a French decree of the Ministry of Public Works in 1907, which has been further refined and developed in 1953, and as such applicable at the time into the French colonies and which is still in existence in several Francophone African countries
- In a nutshell, those regulations create a consultative committee for amicable settlement: *Comité de Conciliation et de Règlement Amiable* (CCRA) at a national level and at a local level
- The CCRA generally comprises three to seven members including in most cases a judge and more or less an equal representation of senior civil servants and senior industry representatives: they are appointed from a list of experts in the field proposed by the public sector on the one hand, and the industry organization on the other hand. The CCRA is only formed upon request when a dispute has arisen.
- Thereafter, several aspects of the procedure are similar to the one generally developed by a DB : however, it is useful to note some specific procedural conditions

SOME PROCEDURAL FEATURES OF THE CCRA

- The CCRA must appoint a « Rapporteur » in charge of liaising with the parties and preparing the case for the Committee : this simplifies and facilitates a lot the activity of the Committee members and the time they have to allocate to the matter
- The CCRA must propose a non-binding solution to the dispute within a given timeframe (more or less six months)
- The CCRA must take into account the most relevant legal and factual considerations and the proposed settlement may be largely based on equity
- HOW SUCCESSFUL IS THE CCRA IN ARRIVING TO A SETTLEMENT BY CONCILIATION? We have no statistic for Francophone Africa and in some of those countries, the system is no more in existence or hardly implemented in practice. In France, hundreds of cases have been submitted to CCRA and the rate of success is in the region of 80%.

HOW TO EFFECTIVELY DEVELOP DB IN FRANCOPHONE AFRICAN COUNTRIES?

- The DB starts to appear on the radar screen for various reasons:
 - ◆ In some occasions which remain exceptional, the FIDIC MDB form of contract has been used but more for large private to private contracts than for public contracts: this FIDIC include as we know a DB system
 - ◆ The World Bank civil law standard conditions have been amended in 2007 in order to provide for contract above USD 50 million a system similar to DB.
 - ◆ Since the CCRA is not well-implemented and sometimes not existing in Francophone African countries, there is an avenue to promote DB
 - ◆ Large infrastructure projects are in development in Francophone Africa for various reasons and it is most likely than this trend will continue : international competitive bidding is becoming the rule and as a result, contractors not familiar with the Francophone law of contracts and related usages are carrying out a substantial amount of work. In practice, this often leads to a cultural shock and in a real world several projects are in distress just because the contractor did not appreciate the scope of their liability, their duty to warn and to advise, their overall obligations deriving from the « contrat d 'entreprise » concept, etc.
 - ◆ In this framework, when a dispute has crystallized, it is often too late and its submissions to the CCRA is not satisfactory

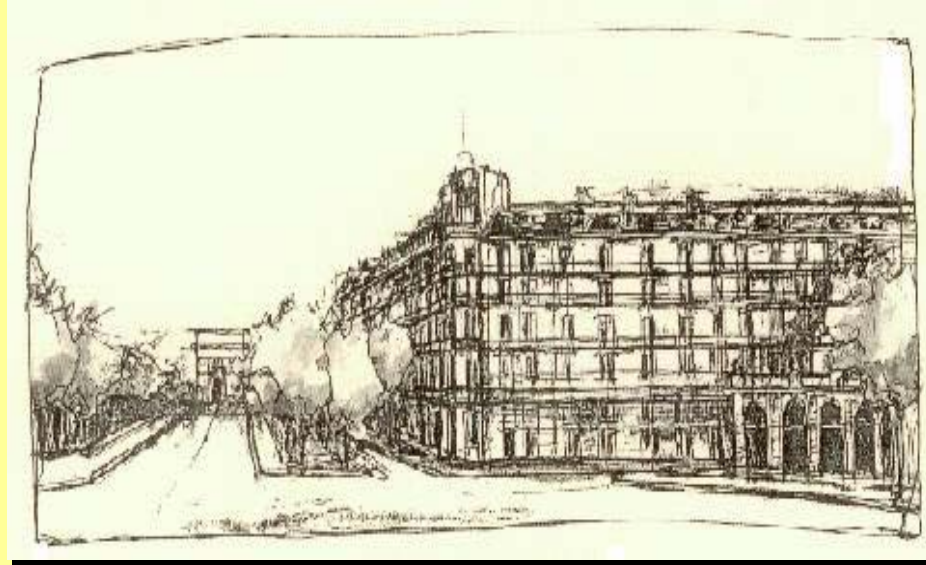
CONCLUSION

- A DB with some adjustments and taking into account the existing tradition in Francophone Africa could play in some circumstances an extremely useful role which should be promoted
- This is even more true in the relatively unchartered area of public service Concession and PPP, where in all events, some form of regulation that the contracting party cannot entirely organize in their contract is necessary
- The conditions of development of appropriate DB must primarily fit in the needs of the system or rather in its loopholes that I have attempted to outline: some considerations in this respect.
 - ◆ **It is proposed that the question of the appointment of truly professional and independent members, including their costs, takes into account to some extent the previous practice of the CCRA**
 - ◆ **The DB has best chances to be accepted if its role is limited to a conciliation proposal and simple procedures limiting the needs for the members to spend too much time individually.**
 - ◆ **It is interesting to note that in some important contractual arrangements, many in the mining sector, adopting conciliation committees, quite similar to DRB, have been organized.**

CONCLUSION

- Let me conclude by some leading questions which derive from the civil law experience in conciliation boards and that I propose for debate:
 - ◆ **Should a conciliation board or a DRB be kept as different as possible from an Arbitration board?**
 - ◆ **Do we agree that a DRB has no quasi-judicial function, and that as such, it should not impose upon itself and upon the parties the strict rule of contradictoire? Is it not advisable for a DRB to entertain separate caucus if it deems appropriate?**
 - ◆ **Is it generally acceptable that the DRB proposes a settlement taking also based in equity?**
 - ◆ **Is it not useful to promote members coming broadly from three different backgrounds : senior civil servants involved in contracting, senior private engineers or industry representatives, and senior judges or experienced lawyers in the field?**
- An ultimate consideration in relation to DAB: in order to render effective the implementation of a DAB decision, to which extent is it possible to consider that the DAB has received an irrevocable mandate from both parties to settle and that such a settlement which becomes for instance an irrevocable commitment for one party to pay the other can be enforced as an interim measure by a summary judgment (even in case of further reference to international arbitration)?

THANK YOU!



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