

DISPUTE AVOIDANCE: WHAT DOES THE DB PROCESS OFFER?

By Gordon Jaynes

There is no avoiding disagreements in commercial activity, especially if the activity involves risks of unforeseeable circumstances. But it is possible to avoid those disagreements becoming disputes that lead to arbitration or litigation.

Dispute avoidance should be the goal of every Dispute Board. It is a requirement for Dispute Boards established under the MDB Harmonised Edition of FIDIC's Conditions of Contract for Construction, and is foreseen as a Dispute Board activity in Article 15 of the ICC Dispute Board Rules.

The DB process offers something which no other dispute resolution technique offers. It puts expert assistance in place *before* any disagreements have arisen, and empowers the DB to assist the contract parties to avoid future disagreements escalating into formal disputes.

The benefits which flow from dispute avoidance are clear: focus is maintained on successful completion of the contract; personal relationships are protected from the animosities which can arise from protracted and expensive arbitration or litigation, and the persons can devote their energies to progressing the work under the contract; cordial corporate commercial relationships are preserved for future work together; and the costs, delay, and uncertainty of outcome in arbitration and litigation are avoided.

For the Multinational Development Banks, another valuable aspect of the DB process is its remarkable record of resolving disputes amicably by the time performance of the contract is complete. Such an outcome avoids the banks having to keep their financial books open on the contract.

DBs have been in use for decades, but initially they featured only in the USA, and only in construction projects. The appearance of the DB on the international scene is comparatively recent. There are two forces which are accelerating the use of the DB process. The first is the adoption of the DB process by FIDIC, and most recently, through FIDIC, by the Multilateral Development Banks. The second is the decision of the ICC to offer the DB process worldwide on any long term or complex business contract relationships.

This morning our first two speakers each reflect one of these two forces. Mr. Beaumont is managing the creation of a new port in Madagascar, and the port construction contract (being performed by one of the sponsors of this Conference, Daiho Corporation) receives some financing from The World Bank, and thus is required to have a DB. The new port is related to a major mineral development in Madagascar, which Mr. Beaumont will explain.

Ms Meilhac is a key person at the ICC for its DB process. The ICC Dispute Board Rules foresee three kinds of DBs, including one which is unique, the Combined Dispute Board or "CDB," which has been chosen for use under the new ICC Model Turnkey Contract for Major Projects. We are fortunate indeed to have these two speakers.