



The New CIArb Dispute Board Rules

by Nicholas Gould, Partner

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Introduction

In August 2014 the Chartered Institute of Arbitrators produced and published a set of international commercial dispute board rules (the “CIArb Rules”). The CIArb Rules are designed to be easily incorporated into contract by inserting one of two alternative precedent clauses, and they can be used on any medium- or long-term project, whether construction, IT, commercial, or otherwise.

Although a variety of other dispute board rules already exist, they focus solely on the construction industry. In addition, some rules are drafted as an integral part of a standard form contract from which extracting the rules requires very careful drafting (for example the FIDIC suite of contracts).

The CIArb Rules were clearly drafted with the intention of resolving some of the issues that have become evident in the existing dispute board rules, and to simplify and clarify the procedure. There is also a stronger emphasis on dispute avoidance. Some key features of the new CIArb Rules are:

1. They are the only single set of international dispute board rules that can be used in any commercial or construction contract.
2. The parties may empower the dispute board either to make binding decisions (i.e. a DAB) or to make non-binding recommendations (i.e. a DRB).
3. Only standing dispute boards are provided for.
4. Dispute boards must be involved throughout the contract, including holding periodic meetings and providing informal advice on the joint request of the parties.
5. The dispute board procedure is simplified and is subject to clear steps with default timeframes to be applied if the contract is silent.
6. DAB Decisions can be enforced summarily or by expedited relief if the parties agree.

This article discusses dispute boards as a dispute resolution mechanism, and how the new CIArb Rules apply by comparison to the other leading forms of dispute board rules.

Dispute Boards in context

Dispute boards (“DBs”) typically comprise one or three independent and impartial members, who will usually have expertise in the type of work or services to be performed in the contract, and who assist the parties in resolving disagreements arising in the course of the contract.

Although DBs are still used almost exclusively in construction projects, the scope of DBs is substantial and they are beginning to be established in a range of industries worldwide, for example in the financial services industry, the maritime industry, operational and maintenance contracts and long-term concession projects.

Well-drafted DB rules will allow parties a flexible approach in resolving disagreements that may arise during the performance of their contract, and to facilitate the rapid resolution

of disputes which can be crucial particularly in long-term contracts where maintaining a commercial relationship is very important.

The CI Arb Rules provide for standing DBs and the benefit is that the DB members may be called upon as soon as a problem arises to help the parties resolve their differences before they become polarised in their views. Resolving conflicts at any early stage, or even before they arise, is an obvious benefit that greatly minimises costs such as legal fees and reduces loss of productive time and goodwill between the parties. In addition, the resolution of disputes in “real time” usually minimises the aggregation of claims which means that the disputes can be resolved in manageable packages.

However, it must be acknowledged that a standing DB which remains in place for the duration of a contract is an additional expense for the parties. It is therefore likely that the CI Arb Rules will mainly be suitable for mid- to high-value projects because of the cost involved.

Types of Dispute Board

There are several established types of DBs and within those types the powers granted to DBs can vary widely. The key types are summarised below.

Dispute Resolution Boards (“DRBs”)

DRBs are required to make non-binding recommendations about disputes arising during a project. The DRB, usually a panel of three experienced reviewers, takes in all the facts of a dispute and makes recommendations on the basis of those facts and the board’s own expertise.

Dispute Adjudication Boards (“DABs”)

DABs issue decisions which must be implemented immediately and, unlike DRBs, the decision is binding on the parties unless revised by an amicable settlement or arbitration/litigation.

Combined Dispute Boards (“CDBs”)

CDBs are a hybrid between the DRB and DAB, whereby CDBs are empowered to issue recommendations but also, if one party requests and no other party objects, temporarily binding decisions. CDBs can create some uncertainty and there is no provision for CDBs in the CI Arb Rules.

The major forms of DB Rules compared

Over the last 20 years DBs have become increasingly prevalent and there is a growing interest in using DBs outside of construction projects. However, prior to the CI Arb Rules there was no single set of international dispute board rules that could be used on a wide range of commercial projects. The ICC Rules are the closest but they are still focused on the construction industry, and the FIDIC DAB procedure is woven into the fabric of the FIDIC contract and extracting the rules requires very careful drafting. A comparison of the leading rules is set out below.

International Federation of Consulting Engineers (“FIDIC”)

The FIDIC DB rules are included in the FIDIC Conditions of Contract for Construction, first edition 1999, which is widely used throughout the construction industry globally,

including by the World Bank and multilateral development banks (“MDBs”) in the form of the harmonised edition of FIDIC 1999 Conditions of Contract for Construction for MDB-financed contracts.

The FIDIC rules allow parties to use either standing or ad hoc DABs and they are therefore empowered to make binding decisions. The parties are required to jointly appoint either one or three DAB members by the date stated in the contract. However, there is no provision for what is to happen where the contract is silent on the date for appointment of the DAB.

In order to refer a matter to a DAB, Sub-clause 20.4 of the FIDIC Contract states as a pre-condition that there must be a “dispute (of any kind whatsoever)” between the parties. Provided this is satisfied, the DAB must proceed to adjudicate the dispute and give its decision together with its reasoning within 84 days of receiving the referral.

Because the FIDIC rules only provide for a DAB (i.e. not a DRB or CDB), the DAB decision is binding and the parties must “promptly” give effect to it. However, the decision is only temporarily binding and it will not become final and binding unless neither party serves a “notice of dissatisfaction” within 28 days of receiving the decision, or if a notice of dissatisfaction is served, then upon final determination by arbitration/litigation.

Although DAB decisions under the FIDIC rules are expressly stated to be binding on the parties, the wording of the rules creates some ambiguity about the effect of this prior to finality being achieved, and the issues posed by enforcing a DAB decision under the FIDIC contract are wide-ranging.

International Chamber of Commerce (“ICC”)

Under the ICC Dispute Board Rules 2004 (the “ICC Rules”) the parties can choose to implement any of the three types of DB: DAB, DRB or CDB. CDBs were developed by the ICC as a middle ground between DABs and DRBs, and although they may be useful for parties who cannot decide on a DAB or DRB, they can create some uncertainty.

ICC DBs comprise either one or three members, and like the CI Arb Rules, if the DB is to comprise three persons then the two DB members appointed by the parties must appoint the third DB member as chairman, subject to the approval of the parties. The DB must be appointed within 30 days of the dispute being referred and, unlike the CI Arb Rules, this timeframe cannot be extended in the contract.

The procedural steps are otherwise relatively standard; the other party must submit its response within 30 days of the statement of case being received and the DB must issue a determination/recommendation within 90 days.

Institute of Civil Engineers (the “ICE”)

The ICE Dispute Resolution Board Procedure 2012 (the “ICE Rules”) consists of two alternatives: Alternative One for use on international projects and UK contracts which are not subject to the provisions of the Housing Grants, Construction and Regeneration Act 1996, and Alternative Two which is HGCR compliant.

The parties may choose either one or three DB members who must be appointed within 56 days of the date of the contract. If the parties fail to establish a DB in this time, the ICE will appoint the DB member(s) within 14 days of the written request of one of the parties and it is not required to consult the parties when doing so. By comparison, the CI Arb Rules

provide that if the parties fail to establish a DB by the time required, the CI Arb shall, after consulting the parties, appoint the DB member(s) within 28 days of the written request of one of the parties.

There is no contractual precondition to referring the dispute to a DB and the DB must give its decision with reasoning within 84 days of receiving the referral.

American Arbitration Association (the "AAA")

The AAA Dispute Resolution Board Guide Specification 2000 (the "AAA Rules") is focused on party autonomy and therefore it provides only for the appointment of a DRB (not a DAB) to "assist in and facilitate the timely resolution of disputes ...". The DRB cannot make binding decisions but rather will issue written non-binding recommendations.

The AAA Rules are quite restrictive in that the DRB can only be comprised of three members who, while appointed by the parties, must be chosen from a list of individuals provided by the AAA. The DRB must be appointed within 14 days from the date of the contract; however, the rules make no provision for what happens if the contract is silent as to the date.

In order to refer a dispute to the DRB the parties must comply with certain contractual preconditions. The procedure is then fairly standard and results in the DRB providing its recommendation within 14 days of a hearing taking place. Unlike the CI Arb Rules, the AAA Rules do not specify whether the DRB is required to give reasons for its determination, although either party may request clarification.

The AAA Rules do not specify what can be referred to arbitration or court proceedings, and the parties are not permitted to obtain the advice or informal opinions of the DRB members.

The CI Arb Rules

The CI Arb Rules are able to be incorporated into any commercial or construction project by inserting one of two alternative sets of dispute board clauses, one for DABs and one for DRBs, thereby giving the parties the choice of appointing a DB to make non-binding Recommendations or binding Decisions.

The parties can decide whether the DB will be comprised of one or three members, although if the contract is silent on this or if the parties are unable to agree, there shall be three members. In addition, if the contract is silent as to the time period for appointment, it shall be 28 days from the date of the contract.

Upon selecting the DB members, the parties are required to enter into a "Tripartite Agreement" with each DB member, setting out the terms of the DB member's appointment. The agreement confirms: that the DB members have expertise in the type of work or services to be performed in the contract and will remain impartial and independent of the parties throughout the appointment; that all information provided during the course of the appointment is confidential; and remuneration as agreed between the parties.

The CI Arb Rules only provide for standing DBs (i.e. no ad hoc DBs). This reflects the ideal that DB members become familiar with the contract and its performance, and acquainted with the parties, in order to be an effective dispute resolution and avoidance mechanism with "real-time" value. Further to this, the DB members are required to hold an initial meeting with the parties "as soon as practicable" after the commencement of the contract,

and conduct periodic meetings thereafter, and the parties may at any time jointly refer a matter or dispute to the DB for it to give an “informal advisory opinion”.

If there is a Dispute, the first thing that the parties must do is comply with any pre-conditions which the parties have included in the contract (if any). Once done, either party can refer the Dispute to the DB by submitting a Position Statement to the other party and the DB. The Position Statement must include a summary of the Dispute, a list of the issues and the referring party’s position, the redress sought, and supporting evidence.

After the referral of a Position Statement a series of procedural steps will follow, namely:

- the other party will have 28 days to submit its Response;
- the referring party may, with the DB’s permission, reply to the Response within 14 days of receiving it;
- the DB will set out a timetable leading up to a hearing or meeting; and
- the DB must provide its Decision or Recommendation, with reasoning, within 84 days of receiving the Position Statement.

Throughout this process the parties are still free to settle the dispute at any time, with or without the DB’s assistance.

In terms of enforcement, DRB Recommendations are non-binding and therefore neither party can be compelled to comply with the Recommendation. However, each party is required to either accept or reject the Recommendation within 21 days, after which time either party may submit the Dispute to arbitration (or, if the parties agree, the courts).

In the case of a DAB Decision the parties are contractually bound to comply with it “without delay”. If either party fails to comply with the Decision, or provides a written notice rejecting the Decision within 21 days of receiving it, then either party may submit the Dispute to arbitration (or, if the parties agree, the courts). The CI Arb Rules make it clear that pending any appeal the parties must comply with the Decision and the parties can expressly provide for expedited or summary relief in the contract. The rules have been drafted to avoid the enforceability issues inherent in some other forms, such as the FIDIC Rules.

Practical Considerations

The increasing popularity of DBs reflects a global trend towards less adversarial dispute resolution mechanisms, and the dispute avoidance benefits of DBs are obvious. However, if not used correctly DBs can be ineffectual, time-consuming and costly. Parties should take care to select a DB, and incorporate terms, suitable to their needs and those of the project.

A DB should ideally be established at the outset of a contract and remain in place, and active, throughout the contract duration. However, retaining a DB throughout the duration of a project is an additional expense for the parties, and for this reason the CI Arb Rules may not be appropriate for lower-value projects. In all cases when parties are considering incorporating a DB, the cost should be assessed against the potential cost and risk of dealing with disputes that might otherwise have been avoided (both the direct costs of dispute resolution and lost productivity on the project, and indirect costs such as damaged commercial relationships and time spent in dispute).

Appointing suitable DB members is also critical to the effectiveness of a DB. Identifying,

agreeing upon and appointing individuals with the appropriate skills can be time-consuming. It is recommended that the parties coordinate their selection of DB members and chairperson in a way so as to provide the maximum of appropriate skills for the project relevant to the circumstances, including the availability of the DB member(s) for the duration of the project.

Conclusion

It is too early to tell how successful the CI Arb Rules will be in terms of implementation in international and domestic contracts. However, the Rules clearly demonstrate a step forward for DB resolution. In particular, the CI Arb Rules are free from many of the issues found in other existing rules, they can be easily incorporated into any commercial contract, and they reflect a global trend towards greater upfront investment in dispute avoidance in order to minimise and avoid the often extremely costly consequences of disagreements escalating into arbitration and litigation.

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Nicholas Gould
Fenwick Elliott LLP
UAE M: +971 56 971 5993
UK M: +44 7957 613 660
Skype: ngould1967

ngould@fenwickelliott.com
www.fenwickelliott.com