

Decision or uncertainty?

Combined Dispute Boards under the ICC Dispute Board Rules

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A Combined Dispute Board will normally issue a non-binding Recommendation. However, if one party requests a binding Decision and the other party objects, it falls to the Combined Dispute Board to choose whether to give a Recommendation or a Decision. This article focuses on the uncertainty that this decision creates.



Introduction

The ICC published its Dispute Board Rules in 2004. These Rules are innovative in several respects. Not only do they give parties a choice of what type of Dispute Board (DB) they can select from, but among the three choices, there is one known as the 'Combined Dispute Board', which had not existed before. The first possibility parties can select is a Dispute Review Board (DRB), which invariably makes non-binding Recommendations concerning any dispute brought before it. The second is the Dispute Adjudication Board (DAB), which will make an immediately binding Decision in respect to a submitted dispute. The third is the Combined Dispute Board (CDB). The CDB normally issues non-binding Recommendations but, if requested by a party, it may issue a binding Decision. The question now is: why would parties agree to leave something as important as the question of whether the Board issues a Decision or a Recommendation to be resolved later, when they may be at war with each other, thereby putting the Dispute Board in a difficult position and creating uncertainty in a key area, namely whether one of the parties can get relief immediately or not?

The DRB – DAB Controversy

In the Dispute Board community, there has long been a controversy whether it is better to have DRBs, which recommend non-binding solutions, or DABs, which impose a resolution with a binding Decision. Proponents of DRBs point out that the non-binding nature of a Recommendation preserves a consensual and less adversarial spirit between the parties. In making a Recommendation, the Board is not strictly bound by the provisions of the contract or the law, but can also take into consideration the interests of the parties. This genuinely contributes to avoiding a real falling out between the parties, because even when the Board has come to a conclusion about a given dispute, its Recommendation is not necessarily the final word, but a signpost helping the parties find an amicable settlement of their difference.

But, retort the proponents of DABs, if the determinations of a DB are not binding, then a party with the urgent need for a solution may not be able to obtain a definite result until the dispute has been determined by an arbitrator or judge. Moreover, the immediately binding nature of a Decision will compel Boards to base their decisions on the

Article 6.1

CDBs issue Recommendations with respect to Disputes, pursuant to Article 4 [DRB], but they may issue Decisions, pursuant to Article 5 [DAB]

ICC Dispute Board Rules of 2004

applicable contractual and legal provisions, thereby producing a determination that is not only binding but also predictable.

The price for predictability, on the other hand, may be a more adversarial attitude of the parties before the Board, which may not be conducive to fostering long-term cooperation between the parties. Moreover, the more adversarial nature of DAB proceedings may not be in tune with the cultural expectations of parties in certain parts of the world, such as the Far East.

Generally speaking, it appears that Contractors seeking certainty in respect of matters like extensions and additional payments prefer binding Decisions, while Employers, usually in a stronger negotiation position because of their control over the funds, prefer non-binding Recommendations.

By offering Rules, which gave the parties the possibility of choosing either a DRB or a DAB, the ICC avoided taking sides in the controversy. The fact of the matter is that DRBs predominate by a large margin in the United States, where the Dispute Board concept was first established in the 1970s. Anecdotal evidence also suggests that DRBs are favoured in the Far East and have been used very successfully on projects in China and other places. On the other hand, FIDIC and the World Bank, as well as most other Development Banks, have opted for DABs in projects funded by them.

Article 6.3

If any party requests a Decision and another Party objects thereto, the CDB shall make a final decision as to whether it will issue a Recommendation or a Decision

In so deciding, the CDB shall consider, without being limited to, the following factors:

- whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party;
- whether a Decision would prevent disruption of the Contract; and
- whether a Decision is necessary to preserve evidence.

ICC Dispute Board Rules of 2004

The Combined Dispute Board

By creating the CDB as a third alternative, the ICC sought to give parties a DB that combined the advantages of both DRBs and DABs – see Article 6.1.

This means that the normal operational mode of a CDB is as a review board. As such, it issues Recommendations. According to Article 4.1, *'the Parties may comply with [a Recommendation] voluntarily but are not required to do so'*. If neither of the parties files a notice of dissatisfaction with the Recommendation within 30 days of receiving it, the Recommendation becomes binding and enforceable like any other term of the contract. By choosing the Recommendation as the default type of determination, the drafters intended that CDBs should normally adopt and encourage the cooperative and less adversarial approach commonly associated with DRBs.

However, because under certain circumstances, a party may require a determination that has 'teeth' and that will have an immediate legal impact on the opposing party, Article 6.2 provides: *'If any Party requests a Decision with respect to a given Dispute and no other Party objects thereto, the CDB shall issue a Decision.'* The request for a Decision would normally be made in the requesting party's first submission referring a dispute to the DB and would contain the reasons for requesting a Decision. (Articles 17 – Statement of Case and 18 – Response) If there is no objection, the Board must issue a Decision, which according to Article 5 *'is binding on the Parties upon its receipt. The Parties shall comply with it without delay, notwithstanding any expression of dissatisfaction pursuant to this Article 5.'*

Thus, if one of the parties objects to the dispute being determined by a Decision, the DB must resolve the question if the parties disagree about the type of determination to be issued. That determination will be final. The parties cannot contest the fact that the CDB issued a Recommendation rather than a Decision or vice versa. Of course, a party can always refer the whole dispute to arbitration if it is not satisfied with the way that the Board has determined the matter.

When a CDB must rule on whether to issue a Decision, it must follow the guidelines contained in Article 6.3. These factors, which are not exhaustive, were originally inspired by Article 2.1 of the ICC Pre-Arbitral Referee Rules, but have been adapted to fit the requirements of the ICC DB Rules.

Nevertheless, it shows that, within the context of a CDB, a Decision operates more like a conservatory measure. As the Decision is the exception rather than the norm, it is intended to be used in situations where the circumstances warrant a departure from the normal *modus operandi*, imposing on the parties an immediately binding Decision. The burden of proof to show that the circumstances warrant such an exception falls on the party requesting the Decision. Thus, in a dispute about whether one of the parties is entitled to call a performance bond or not, the party opposing the call may request a Decision by the CDB enjoining the other party from calling the bond in order to preserve it from substantial loss or harm.

Conclusion

The creation of the CDB was intended to combine the advantages of the less adversarial and more consensual DRB procedure with the advantages of a process that results in an immediately binding Decision, when the circumstances so warrant.

Parties who choose a CDB do not postpone the question of how a Board will issue its determination; they opt for a Board that will

usually issue non-binding Recommendations and reserve the possibility to obtain immediate relief through a Decision in exceptional circumstances. If there is a controversy about whether the Board should issue a Recommendation or a Decision, the Rules very clearly empower the CDB to make that call. Will this put the Board in a difficult position *vis-à-vis* the parties? A DB is composed of members that the parties supposedly trust and feel comfortable with. There is thus no reason why they should not also entrust those people with the choice of whether the Board's determination is to be complied with on a voluntary basis or whether it will be binding on the parties as soon as issued.

On the other hand, parties choosing to submit their differences to a CDB must realise that this option implies a certain degree of uncertainty about whether any given determination of the CDB will provide immediate relief or not, because in selecting a CDB they have delegated this choice to the Board.

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