DRBF Latin America Regional Conference

How NOT to Implement the Dispute Board Process?

The Do's and Don'ts of Dispute Boards: Lessons Learned from Construction Projects Globally

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Dispute Boards (DBs) have an unprecedented record of success. Yet there have been a handful of unsuccessful DBs, some of which have been characterized as "DBs from Hell". Since the DB is a relatively new dispute resolution process and it's solely a creature of contract, that term has no well-stablished industrywide meaning as, say, "arbitration" does, which has a long history in construction dispute resolution and is defined both by contract and by statutes.

Some contractual ADR procedures are labeled "DBs" that should not bear the label. The following is a list of features that have yielded less-than-satisfactory, and in some instances, even disastrous results. These have led the parties involved to swear that they would never use a DB again and have tarnished the DB's reputation as a highly effective process for disputes avoidance and resolution.

I. Waiting to form the Dispute Board until the project is well underway and disputes have already arisen

Having a DB in place from the outset of the project creates an incentive to the parties' resolving issues by themselves, in many instances not even permitting them to rise to the level of "disputes". As nature has it, people do not like to appear foolish or to be judged by their peers, especially those who are "older and wiser".

The DB is most effective when the DB members have seen the physical construction from the very start of the project and have developed relationships and credibility with key project personnel as the project progressed.

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II. Limiting Dispute Board members' fees, reimbursable expenses and the geographic area from which members can be drawn

Those limitations are penny-wise and pound foolish. The avoidance of a single dispute or the expeditious resolution of a dispute by the DB process can save the parties tens and sometimes hundreds of thousands of dollars in attorney's fees and litigation expense, let alone the time wasted by key personnel diverted from project performance.

The success of the DBs is directly related to the caliber of DB members and trust and confidence they engender in the parties. Cost savings limitations that deter service by the most highly qualified individuals as DRB members are self-defeating.

III. Removing Dispute Board members without cause

Parties sometimes seek to hedge against the possibility of an errant DB member by specifying that each party is entitled to remove its designated DB member without cause. In the face of such specification, what invariably happens is that a party against whom one or more adverse DB Recommendations are made will seek to change its DB designee in the hope of improving its chances of success. In so doing, the continuity of the DB, its familiarity with the project, the trust and confidence it has created with the parties, the working relationship the DB members have established with one another, all are impaired.

Disputes then arise over the approval of successor DB members. Mistrust and dissention is created among the parties. The right of removal of a DB member *for cause* should always be provided for, but not the right of removal *without cause*.

IV. Imposing procedural obstacles to access Dispute Board

Some contracts specify a lengthy procedural process precedent to a party's right to have a dispute heard by the DB. The earlier a dispute can be resolved, the less will be the cost of resolution and the less adverse impact the pendency of the dispute will have on the parties and on project performance.

Disputes grow stale and positions harden the longer a dispute remains unresolved. Parties should be given the right to access the DB early in the dispute process rather than late in the process.

V. Giving parties the right to be represented by counsel at Dispute Board hearings

A certain amount of anti-lawyer bias exists DB community in the U.S. which is not entirely without merit. Lawyers should be permitted a role in the DB process, but that role should be limited.

Lawyers should participate in drafting the DB specifications and three-party agreements; lawyers should counsel parties as to the legal implications of the contract documents; lawyers should assist parties to draft written submissions to the DB; lawyers should assist parties to prepare presentations at DB hearings; lawyers should be permitted to observe DB hearings and to counsel parties; lawyers should assist parties decide whether to adopt DB recommendations or to pursue further remedies such as arbitration of litigation. But lawyers for parties ought not to make presentations nor to cross examine witnesses at DB hearings. Lawyers' direct participation representing parties at DB hearings changes the essential character of the hearing and exacerbates the adversarial relationship that inevitably develops among parties to a construction dispute.

Adversarial hearings are important to fully protect the rights of parties in binding dispute resolution. Adversarial proceedings are at the core of our legal system and are essential to fully protect parties' constitutional right of due process. But full-blown, due process, adversarial hearings are time consuming. Because DBs issue only recommendations, not final and binding decisions, expediency outweighs full constitutional protections in the conduct of DB proceedings. Speedy dispute resolution, even at the possible sacrifice of complete correctness of result, is an important attribute of the DB process. Therefore, the role of lawyers representing parties at DB hearings should be proscribed.

VI. Appointing lawyers lacking adequate construction experience to serve as Dispute Board members

Experienced construction lawyers serving as DB members add value to the process by providing to non-lawyer DB members the legal implications of contract provisions, by exercising their training and experience in conducting hearings, and by providing their expertise to assist drafting DRB recommendations. But since DBs only issue recommendations, the effectiveness of the DRB is entirely dependent upon the parties' trust and confidence in the DB.

Lawyers lacking adequate construction experience are not likely to engender such trust and confidence.

VII. Imposing limitations on the Dispute Board's jurisdiction

Attempts have been made to limit the types of disputes that can be brought before the DB, such claims for wrongful termination of contract. Disputes over whether the DB has the jurisdiction to consider a particular dispute have been taken to court. Limiting the DB's jurisdiction creates more problems than it solves and should therefore be avoided. DBs should be given jurisdiction to consider all disputes arising out of or in connection with the construction contract.

VIII. Creating hybrid Dispute Boards

Attempts have been made to use DBs to serve as arbitration panels issuing final and binding decisions as to disputes under a certain dollar amount and issuing only recommendations as to disputes exceeding that dollar amount. This creates particular problems for DBs whose members lack legal training. When the result is final and binding the parties ought to be given greater procedural protections than when the result is merely a recommendation.

The entire character of the DB hearing changes when a dispute is conducted as a due process, adversarial proceeding. For that reason, traditional arbitration should be conducted by trained arbitrators and where there is to be a final, binding decision, and the DB process be reserved for the issuance of non-binding recommendations.

Outside the US we notice a tendency to use Dispute Adjudication Boards (DABs), especially in Latin America. We believe that Recommendation boards (DRBs) show the true essence of the method as an expression of the trust of the parties in the board member but, when opting for Hybrid and Adjudication board, parties must bear in mind a president skilled in the conduction of hearings and decision-making processes are essential for the success of the DB.

IX. Chose Dispute Board members with an arbitration mindset

It is more usual that parties involved in construction projects have participated in arbitrations than used DBs. It tends to drive their mindset when considering the profile of professionals to

serve on the DBs, seeking them in the universe of technical assistants, experts, and arbitrators without pondering their knowledge on DBs best practices. DBs are intended to be proactive rather than reactive, with the emphasis on avoiding disputes but with an arbitration mindset, the DB members loses focus on the activity of preventing disputes, which requires greater energy from professionals in monitoring the project's routines and interacting with the key professionals of the project, making the relationship with the parties more distant, bureaucratic, and hierarchical.

It's also noticed an increase in the number of disputes that are submitted to the committee, as the parties understands the committee as a Tribunal, with lawyers gradually hijacking the meeting routines, with ordinary meetings becoming mini arbitration hearings with long and excessively detailed meeting minutes. Technical members more used to work in arbitrations tend to see themselves as Technical Assistants instead of independent members of the committee, disregarding the necessary neutrality and impartiality in favor of the interests of the party who indicated it.

X. **Innovate in the rules of procedure**

We have several sets of rules drafted by arbitration institutions and also those that are part of standard contracts developed by FIDIC and NEC. Those rules perfectly meet the needs of projects and can be safely adopted by the parties. Despite this, we still see cases in which the parties create contractual annexes with a whole new set of rules, in some cases a combination of available rules, what is not just unnecessary but also risks to weakens procedure and sometimes the decisions of the DB.

Some owners are fearful of relinquishing their traditional authority to truly neutral DBs. They seek to "tilt the table" in their favor by invoking one or more of the features described above. This reduces the success and effectiveness of the DB process. It has likewise tarnished the public perception of the DB process, and in some instances, it has created "DBs from Hell". An owner ought not adopt the DB process *at all* if it lacks confidence that the process will add significant value to the project.