

# Dispute Board Rules Currently in Force: A Selective Overview, Comparison and Practical Considerations

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## Introduction

Dispute boards experienced a high rise in their use as an alternative dispute resolution method from the mid-70s in America, as a concept tailored and created for dispute resolution on construction industry contracts. Not surprisingly the first international regulation of the concept was carried out by FIDIC,<sup>1</sup> which introduced dispute boards in its contract types first in 1995<sup>2</sup> and then made it an obligatory step in the dispute resolution mechanism as of the release of its 1999 rainbow suite of contracts.<sup>3</sup>

Since then, the practice and need were recognized by almost all the bodies involved in international alternative dispute resolution area: the Dispute Resolution Board Foundation ("DRBF")<sup>4</sup> and Dispute Board Federation ("DBF")<sup>5</sup> have their own recommended rules, arbitration centers such as ICC,<sup>6</sup> AAA,<sup>7</sup> CiARB,<sup>8</sup> BIAC<sup>9</sup> published (and for ICC, even revised in 2015) their set of rules and finally, the UK NEC<sup>10</sup> and ICE<sup>11</sup> forms of contract also adopted their own set of rules for dispute boards.

In this article, naturally due to space constraints, the authors will elaborate and compare only the revised rules of ICC and newly introduced rules by CiARB with FIDIC dispute board rules and practice. In this elaboration, the authors preferred to address only the major items of consideration that constitute differences with the said prominent rules.

## Revised ICC Dispute Board Rules and Recently Introduced CiARB Dispute Board Rules: Comparison with FIDIC Dispute Board Practice

One of the major points of difference between the FIDIC rules and ICC or CiARB rules lies in the parties' discretion to choose the type of the dispute board. Accordingly, both ICC and CiARB rules provide the option for the parties to constitute a dispute board that has the authority to give recommendations which are not binding in nature ("Dispute Review Boards") or a dispute board that has the authority to give decisions which are binding in nature ("Dispute Adjudication Boards").<sup>12</sup> The rules of the ICC go further than that and describe a hybrid form of dispute board that may give and recommendations and decisions ("Combined Dispute Board").<sup>13</sup> However, the issue often criticized with the Combined Dispute Board remains existent in the revised ICC rules: the board may only give a decision when it is requested to do so and if the other party does not object to it. In case there is party objection, the board has to decide whether to give a recommendation or a decision. The CiARB rules seem to

have considered this system rather less effective and do not provide a hybrid board mechanism.<sup>14</sup> FIDIC rules on the other hand, only provide for dispute boards that render decisions.

Another natural difference concerns the appointing body of the dispute board members (or the chairman) in case of parties' disagreement. The ICC and CiARB rules each refer to their own entity<sup>15</sup> for such appointments whilst FIDIC rules refer to the entity agreed by the parties in the contract data (or appendix to tender document, appropriate). Generically and in practice, though, FIDIC contracts tend to refer to FIDIC itself as the appointing body or FIDIC's local affiliates so as to provide flexibility for local content, especially for the contracts where both parties are local.

The ICC and CiARB, being institutions with administrative services, inherently provide in their dispute board rules services for appointing the dispute board members in case of parties' disagreement or inaction, removal of a member upon a party's request, or decision on the board member(s)' remuneration.<sup>16</sup> The ICC Rules further provide the option of a review of a board's decision<sup>17</sup> by the Center. All these services are charged at a fixed filing fee and relevant application whilst FIDIC does not charge sums while exercising its appointing duties.

Yet another point of concern relates to the requirements for a referral to the dispute board. The ICC Rules do not establish any condition precedent for a dispute to be referred to the board.<sup>18</sup> The CiARB Rules on the other hand refer to "pre-review requirements or prior dispute resolution process as provided for by the Contract" which is to be complied with in the first instance for a dispute to be referred to the board.<sup>19</sup> FIDIC rules are embodied in the construction contract itself and are harmonized with the contract's multi-tiered claim and dispute resolution mechanism which refer to the Engineer or the Employer Representative's determination of any sort for the purposes of defining a dispute varying upon the type of the contract.

Appointment deadline and intervention of the relevant institution in case of non-appointment by the parties are other significant additions in both ICC and CiARB rules<sup>20</sup> as opposed to the FIDIC rules, which are silent. Both ICC and CiARB rules provide that in case there is establishment of the board by the parties within a certain time limit after the execution of the contract, any party may request ICC or CiARB to make such appointment



Finally, the authors find it useful to mention that both ICC rules and CiARB rules deal with the issue of a failure by a party to comply with the dispute board's decision. Both rules are sufficiently clear to establish that in case of one party's failure to comply with a dispute board decision, the other party may directly refer such failure to arbitration or to the courts, as the case may be,<sup>21</sup> rather than the dispute itself, de novo. FIDIC rules on the other hand, whilst seeking to do so, only expressly made this the case in the provisions of the Gold Book.

### Practical Considerations and Conclusion

A review of the main rules and comparison with FIDIC suggest consideration of the following:

**Appointing Body:** In case of a request for the appointment of a DB, FIDIC maintains a Panel of Adjudicators which has been selected pursuant to a very strict assessment procedure. This list, complete with CVs, is publicly available. In contrast, the ICC and CiARB retain discretionary power to select dispute board members or chairmen whose identity is revealed by the Centre only upon appointment. Both systems are reliable.

**Costs:** FIDIC does not charge for the appointment procedure; however, both ICC and CiARB have separate charges for registration and services they offer on the selection/appointment of dispute board members and review of the dispute board decisions.

**Broad Regulation:** Many optional provisions may be preferable to cover a global range of contracts and industries; however, specific regulations are generally required to correspond to the sectoral needs and the established practice and relevant know-how on specific type of contracts and transactions. For example, FIDIC's DB rules are fully integrated terms and conditions of the various versions of the FIDIC suite and have served the international construction industry well since their introduction. Given this, a unification of all sets of rules is not a viable argument as it would suggest ignorance of the know-how, experience, and jurisprudence in the international construction industry acquired thus far. The attraction of the adoption of the conventional wisdom on a sectoral and industry basis is preferred, as leaving matters to the discretion of the parties decisions on the various procedural issues may not turn out to be cost effective and at worst purpose-effective.

**Lessons to be learned:** On the other hand, there are lessons to be learned and therefore parts to be improved in the FIDIC suite of contracts in light of certain problems experienced since the first introduction of the dispute board concept, especially with the FIDIC 1999 rainbow suite. Certain matters left to the discretion of the parties such as term of appointment and the default authority should be addressed, for example, the term for the appointment of the dispute board at the initial stage of the

contract, and the default authority in the event of a failure of either party to appoint. Similarly, the ability to enforce an award following a party's failure to comply with a DB decision, which is binding but not yet final, should be directly referable<sup>22</sup> under FIDIC rules to arbitration/courts in the same manner as their ICC and CiARB counterpart. In this respect it is to be hoped that the new revision of FIDIC suite of contracts, currently under production, follows the correction made in the 2008 Gold Book as well as the discussions<sup>23</sup> in publications, courts and arbitral awards and which for the time being seems to be settled law for the most part.

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### Endnotes

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10. New Engineering Contract, NEC3 published in 2005, authors wish, however, to underline that the adjudication procedure envisaged by the NEC3 is slightly different than the conventional dispute board concept and rather aligns with the obligatory adjudication in the UK. For a detailed analysis and opinion please refer to Murphy, S., Spillane, J., Hendron, C., and Bruen, J. (2014). *NEC Contracting: Evaluation of the Inclusion of Dispute Review Boards in lieu of Adjudication in the Construction Industry in the United Kingdom*, J. Leg. Aff. Dispute Resolut. Eng. Constr., 10.1061/(ASCE)LA.1943-4170.0000147, 04514002.
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12. ICC Rules Articles 4 and 5, CiARB Rules Articles 3 and 4.

13. ICC Rules Article 6.
14. In this view, Nicholas Gould, 2014 Chartered Institute of Arbitrators Dispute Board Rules, DRBF Forum Newsletter, Volume 18, Issue 4, December 2014/January 2015.
15. ICC Rules Article 7 and CiARB Rules Article 6.
16. ICC Rules Article 34 and CiARB Rules Article 18.
17. ICC Rules Article 34/4.
18. ICC Rules Article 18 which states that: "Any Party may at any time formally refer a Disagreement to the DB for a Conclusion, at which point the Disagreement becomes a Dispute [...]."
19. CiARB Rules Article 13.
20. ICC Rules Article 7 and CiARB Rules Article 6.
21. ICC Rules Article 5, CiARB Article 4.
22. Christopher R. Seppälä, *Sub-Clause 20.7 of the FIDIC Red Book Does Not Justify Denying Enforcement of a "Binding" DAB Decision*, Construction Law International, Volume 6 Issue 3 October 2011.
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