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The Dispute Board in International Construction Contracts

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A mio padre, nella speranza che i suoi occhi possano brillare per me come delle perle rare in quel connubio perfetto di emozione e meraviglia;

A mia madre, per essere riuscita ad infondermi l'arte dell'amore e per avermi impartito la lezione più importante che nella vita nessuna goccia può andare sprecata;

A mia sorella e ad i miei fratelli, per quella genuina ed inestimabile complicità che ci lega e ci legherà sempre;

A zia Cinzia ed alla sua inimitabile capacità di praticare l'arte dell'esagerazione negli affetti

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OVERVIEW

As Lord Donaldson, UK Master of the Rolls, claimed in 1986 <<*It may be that as a judge I have a distorted view of some aspects of life, but I cannot imagine a civil engineering contract particularly one of any size, which does not give rise to some disputes. This is not to the discredit of either party to the contract. It is simply the nature of the beast. What is to their discredit is that they fail to resolve those disputes as quickly, economically and sensibly as possible*>>.

It goes without saying that international construction contracts can often result in complex disputes and delays, which predominantly arise from the intricacy and magnitude of the work, the multiple prime contracting parties and the financial implications. On that account, the main objective pursued by the business industry is – to quote Lord Donaldson – to fight "the nature of the beast" by minimizing the insurgence of disputes and avoiding unnecessary economic and time waste. This primary ambition is translated into an adequate project management, thus combining retrospective dispute resolution with prospective and ongoing dispute avoidance.

To this end, traditional litigation in this field has been progressively superseded by alternative extra-judicial means for dispute resolution which are open to more flexible and less expensive procedures. Among them, the most effective results are those achieved by the Dispute Board (henceforth DB), namely a panel comprising one or three independent and impartial professionals, who are qualified experts in the technical field of the project and are engaged to assist the parties over the currency of the project to prevent formal disputes to arise.

The three chapters of this thesis pursue the ambition to analyse the nature and the ultimate scope of this alternative contractual machinery.

To be more specific, the outline of the thesis is as follows. The first part is dedicated to a brief analysis on the history and evolution of the regulation for international construction contracts. In particular, the focus is on the multi-tiered

dispute resolution clauses contained in the FIDIC Suite of Contracts that introduced the recourse to a Dispute Adjudication Board as a condition precedent to be fulfilled before having the matter settled by the arbitral tribunal or the competent court. Thereafter, we move on to the advent of model rules for Dispute Boards under the impetus of the World Bank, the International Federation of Consulting Engineers, the American Arbitration Association, the International Chamber of Commerce, and the Milan Chamber of Arbitration. A detailed comparison is then drawn among the three different types of Dispute Board, namely the Dispute Adjudication Board that delivers binding decisions; the Dispute Review Board that issues non-binding recommendations and the hybrid form of Combined Dispute Board encompassing both types of dispute panels.

The second chapter, instead, pursues a more practical approach by looking into the proper functioning of a Dispute Board. In particular, it describes the appointment and the selection process of the experts who will be part of the panel as well as the necessary requirements of impartiality and confidentiality imposed upon the members.

The third session of the same chapter looks upon the two different modes of activity undertaken by the Dispute Board, namely the role of dispute prevention performed through informal assistance to the parties and periodical site visits, and the role of dispute resolution. In particular, in the first scenario the DB helps the parties in unwrapping the root causes of the issues arising between them before they crystallize into formal disputes. As far as the second critical scenario is concerned, the dispute resolution procedure is examined by using a crossover approach with the regulations of the International Chamber of Commerce and the FIDIC Suite of Contracts.

Finally, the last session outlines one of the main drawbacks of the mechanism, namely the issue related to the legal nature and the enforceability of a DB determination, which is merely binding as a matter of contract between the parties and – not being equivalent to an arbitration award – it cannot be enforced under the 1958 New York Convention but only by way of an ordinary action in court for breach of contract.

In summary, the ultimate aim of this thesis is to investigate the usefulness of the instrument at a global level and to find a response to the hostility showed

by some civil law countries towards the implementation and use of extrajudicial mechanisms for dispute resolution like the one at stake. On that account, the last chapter provides a special session dedicated to the Italian case, a country with a rooted tradition in the use of adversarial systems for the resolution of civil and commercial disputes. In particular, the attention is focused on the functioning of three extra-judicial means for dispute resolution encompassing significant similarities with the DB, namely the arbitrage, the contractual arbitration and the expert determination.

By way of conclusion, the positive features as well as the shadows of the DB are outlined with a view both to justifying its global success at the international level and to explaining why there is a recent trend – starting from the US and moving forward – to rely on a more efficient and economic means for dispute prevention and resolution, the partnering.

In particular, thanks to this latter form of ADR, the culture of the construction industry has witnessed a paradigm shift from adversarial to cooperative. Central to the partnering program is, indeed, the aim to restore the spirit of trust and teamwork between the parties and the multiple stakeholders involved in the project with a view to achieving mutually beneficial goals.

Chapter 1 THE DISPUTE BOARD AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN INTERNATIONAL CONSTRUCTION CONTRACTS

1.1 Brief notes on the concept and characteristics of international construction contracts

International construction contracts concern the execution of projects of considerable importance aimed at satisfying a public interest, which involve multinational participants from a different political, legal, economic, and cultural background.

The construction industry is complex and multidimensional given the fact that international projects normally require a longer time span to be executed and they often involve multiple parties linked through a chain of different contracts on a single work[1]. What is more, the major construction projects are likely to be performed in developing countries and they are often carried out in joint ventures with construction companies coming from

[1] In this regard, see (Draetta, 2010)**.** In particular, the Author claims that a single project can be documented in a set of linked contracts, including at least some of all of them:

(i) a main contract between the Owner and the Main Contractor;

(ii) an Owner-Architect Agreement (or Owner-Engineer Agreement);

(iii) one or more bilateral agreements (Supply Contracts) between the Main Contractor and the Suppliers;

(iv) one or more bilateral agreements (Subcontracts) between the Main Contractor and Subcontractors, which generally undertake towards the Main Contractor the obligation to perform part of the scope of work of the Project;

(v) a Consortium Agreement or a Joint Venture Agreement among all the participants in the Project aimed at defining the respective scope of works, identifying the responsibilities for ensuring the correct technical interconnections between them and achieving some form of risk sharing.

developed countries. In particular, in this last scenario international collaboration between the concerned parties can offer relevant benefits to less-developed and developing areas by ensuring the most up-to-date expertise and knowledge in a cost-effective manner.

As a matter of fact, international construction contracts are genetically exposed to a series of risks ranging from technical uncertainties, environmental conditions, material costs and political instability.

It is just for these specific and recurring features that they have been defined as <<*individual transactions with a complex structure and/or duration*[2]>>.

Looking at the subjects, the status of Contractor may be held – depending on the case – by a single company or by a group of companies that have entered into a cooperative relationship (for example in the form of a consortium or an international joint venture).

On the other hand, the Employer is often either a State or a body governed by public law, interested in carrying out the project in a given area. When the project is to be executed in developing countries or in economies in transition, which do not have sufficient resources to meet the related costs, it becomes necessary to involve several parties including international investment banks, insurance companies, engineering companies and other subcontractors.

Generally speaking, a construction contract is to be considered "international" anytime it shows one or more points of contact with other national law systems. The connecting factor may be found either in the nationality of the Employer and the Contractor, or in the "*locus aedificandi"* (*i.e.* the place where the project is carried out) or in the place where both the supplies and the services envisaged in the contract are destined to. To make few examples, it is international a construction contract implying that the building site is to be located in a State other than the one in which the Contractor has its habitual residence or a contract that involves cross-border payments expressed in different currencies or a contract where the project

[2] (Kleckner M. , 1995, p. 925)

is funded by an International Financial Institution, such as the World Bank.

1.2 The regulation of International construction contracts: the development of standard model contracts. History and evolution of the FIDIC Suite of contracts.

It is precisely the international nature of construction contracts, which in fact establishes one or more points of contact with several national law systems, to raise the issue of identifying the legal framework intended to regulate the underlying contractual relationship between the parties. It is crucial to point out that, despite the undoubted influence exercised by the international construction market, the substantive rules governing the relationship between the Owner and the Contractor have never been laid down by an international convention of uniform substantive law.

A genuine harmonization effort has been undertaken only with respect to the procedures governing the awarding of public sector contracts, given their crucial impact on the national economy of States.

However, the absence of uniform international conventions in this field as well as the obstacles posed by the overlapping existing national borders have been partially overcome thanks to the work of some International Organizations with a general economic vocation that came up with a set of standard contract models, whose use is extremely widespread in practice.

This is a remarkable example of the paradigm shift in the exercise of the law making power from States to transnational and supranational organizations which led to the development of what has been defined as a particular form of "*lex mercatoria aedificandi*" or "*lex constructionis*" in

the international law of commerce[3].

Indeed, the "self-made law industry" created by these private institutions cannot account as a *lex mercatoria* in the strict sense, given that it does not constitute a "common construction law" nor a "global law of construction[4]" and it cannot thus replace the will of the parties. Anyway, the importance of these sources should not be underestimated since they fulfill an essential supplementary role in interpreting the controversial clauses of an international construction contract[5].

In particular, the model rules released from the FIDIC[6] have played a leading role in this respect. Indeed, it goes without saying that FIDIC contracts nowadays dominate international development construction projects [7] and are accepted as reference standards worldwide. The International Federation of Consulting Engineers (commonly known as FIDIC) is an industry group that was established in 1913 and it is comprised of engineers coming form 104 different countries.

FIDIC represents globally the consulting engineering industry[8] and has progressively drafted several model contracts tailored to international

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[3] In this regard, see (Calabresi, 2009). The notion of *lex mercatoria* dates back to the ancient *"ius mercatorum"* created by merchants during the Middle Age in Europe and it refers to a body of commercial custom and best practice, which was enforced through a system of merchant courts along the main trade routes.

[4] (Tieder, 1998)

[5] In this regard, see article 1.9, UNIDROIT Principles- Usages and Practices.

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such usage would be unreasonable.

[6] The acronym stands for the French name Fédération Internationale Des Ingénieurs Conseils.

[7] (Swiney, 2007)

[8] http://fidic.org/about-fidic

construction projects. The very first edition was released in 1957 under the title of "Conditions of Contract (International) for Works of Civil Engineering Construction", widely known as "the Red Book". It was inspired by the model contract drafted by the British Institution of Civil Engineer (ICE), therefore influenced by a *common law* approach. The Red Book was amended several times until the fourth edition was released in 1987. Following this path, the FIDIC laid down many new models tailored to different construction contracts in relation to their objective and structure: Conditions of Contract for Electrical and Mechanical Works (*i.e.* the Yellow Book) published for the first time in 1967 and amended for the fourth time in 1987, designed for the supply of plant installation and machinery made at the Contractor's premises and delivered to the Owner; Conditions of contract for design-build and turnkey (*i.e.* the Orange Book, 1995), where the term "turnkey" places the design and construction responsibilities solely on the Contractor in a way that, once the project is completed, the Employer only needs to "turn the key" to commence operations of the construction facilities.

In 1999, after an in-depth review and harmonization of the three contracts mentioned above, FIDIC came up with "The Rainbow Suite", an entirely renewed set of standard forms which takes its name from the colored covers of the corresponding books. The Suite comprises four main models (the Red, the Yellow, the Silver and the Green Book) that differ from each other not only due to the object of the contract, but also having regard to the allocation of liability and risks arising from it. The new standard forms pursue the objective of achieving better uniformity of the contractual clauses as well as of devising a new handy content both for reading and understanding.

The ultimate outcome is the achievement of a stable balance between the legal technicalities and the widespread practice developed in the construction field.

In 2017 the FIDIC came up with the second edition of the Rainbow Suite (Red, Yellow and Silver Books) and the 2017 suite of agreements

(fifth edition of the White Book and the second editions of the Sub-Consultancy and JV Agreement).

To be more specific, a brief description of the main models currently in force is detailed below:

- *Conditions of Contract for Construction For Building and Engineering works designed by the Employer (The Red Book)*

  It is intended for use on projects where the Employer carries out the predominant part of the project design and bears the risks and responsibilities arising from it. Another crucial role is played by the Engineer who is appointed by the Employer and is entrusted with the task of ensuring the project administration and management. Besides, the Engineer is responsible for issuing instructions, certifying payments and determining completion. Payments are normally determined by measurement, applying the rates and prices from the bill of quantities (henceforth the "bill of quantities method"). However, there is also an option for payment to be made on the basis of a lump sum.

- *Conditions of Contract for Plant and Design-Build For electrical and mechanical plant, and for building works, designed by the Contractor (the Yellow Book)*

  It deals with Design-Build (DB) contracts, i.e. contracts that also include the design. This is the model used for the design and construction of buildings and engineering works, where the Contractor acts in accordance with the requirements of Employer, which may ultimately entail any combination of civil, mechanical, electrical and/or construction works. Once again, the Engineer is required to administer the execution of the contract, to monitor the progress of the construction work, and to certify payments. In this model it is established that payments are to be made on a lump sum basis and the verification procedures are more complex than those

included in the Red Book due to the nature of the project. On the other hand, the discipline of the risk sharing, claims and dispute procedure is fully analogous.

- *Conditions of Contract for EPC/Turnkey Projects (the Silver Book)*
  It is suitable for use on process, power and private-infrastructure projects where a Contractor is to take on full responsibility for the design and execution of a project. It is particularly tailored to "turn-key" projects where the Contractor carries out all the engineering, procurement and construction. Risks for completion to time, cost and quality are therefore transferred to the Contractor, this makes the Silver Book only suitable for those who are familiar with sophisticated risk management techniques. In fact, it is particularly recommended for projects in which the Employer is not willing to be involved in day-to-day management and the parties are prepared to pay for the additional risk endorsed by the Contractor.

- *The Short Form of Contract (the Green Book)*
  The Green Book addresses the need for a much simpler and shorter contract to suit projects with a relatively low contract price (under 500.000 US £) and short time duration (less than six months). It provides an extremely flexible contractual model, which can be adopted either in the case where the design is to up to the Contractor and when it involves several activities. Unlike other standard forms, it is composed of only fifteen clauses, it is very short (with a total of ten pages) and easy to understand. This model does not ascribe any role to the Engineer, even though the Contractor can appoint a Representative. Payments in favor of the Contractor can be made either according to the Bill of Quantities method or on the basis of a lump sum.

In addition, several other model forms have been added over time,

among which the followings deserve to be mentioned:

- *Conditions of Contract for Design, Build and Operate Projects (the Gold Book)*

  The Gold book fulfills the growing need for a construction contract to combine a design-build obligation with a long-term operation commitment. Indeed, it represents a contract period of over 20 years and the Contractor bears no responsibility for both the project financing and for its ultimate commercial success. It is particularly suited for projects on which the Contractor is also concerned with the management of the project after it has been released.

- *Conditions of Contract for Construction, MDB edition, 2016 (the Pink Book)*

  It builds upon the Red Book and it provides for several amendments in order to meet the demands of the main International Financial Institutions. It fulfills the ambition of harmonizing the standard clauses used by Multilateral Development Banks in their standard bidding documents related to construction contracts of infrastructure, which – in turn – are inspired by the Red Book. The Pink Book's significant amendments are justified by the fact that the project is financed by a third party (a MDB), it is intended to ensure the presence of economic resources for the Contractor as well as to grant necessary powers of control to the MDB.

- *The Blue Book (or Turquoise Book as it is sometimes called – fourth edition released in 2006)*

  This form is designed specifically for use in connection with dredging and reclamation projects. It was drafted in close collaboration with the International Association of Dredging Companies (IADC). This contractual model differs considerably from the main standards forms, given that it is not voluminous

(fifteen clauses for approximately 16 pages) and it is extremely flexible. One of the main differences is given by the structure of the document, in which the model agreement is placed before the General Conditions. Besides, the role of the Engineer is recalled, but the responsibility for the design can be attributed both to the Contractor and to the Owner. The methods of payment in favor of the Contractor are also extremely flexible, they can follow the Lump Sum, the Re-measurement or the Cost Plus method[9].

In addition, the FIDIC released several "non-Works Contracts". Among them, there is the White Book – Client/Consultant Model Services Agreement. The drafters of this consultant model contract are predominately engineers who sought to create conditions of agreement suited for the pre-investment and feasibility studies, the design phase and the administration of a contract.

The real added value brought by the FIDIC Rainbow Suite lays in drafting model rules concerning the substantial content of the contract, mainly rights and obligations imposed upon the parties, as well as rules on the dispute resolution mechanisms, including the Dispute Adjudication Board and the Dispute Review Board.

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[9] FIDIC model contracts provide for three different ways to define the contract price which is to be paid to the Contractor for carrying out the works. These are accurately defined by (Jaeger & Hök, 2009, p. 72-73):

(i) *Lump sum: The Contractor agrees a fixed price (a lump sum price) for the execution of certain specified construction works established in the main contract. The Contractor agrees to bear the risk of any additional quantities compared with its estimation.*

(ii) *Cost Contracts: The Contractor is paid for the works that are expended together with an additional payment called a fee to cover profit and overheads of the contractor. The contracts are not based on pre-agreed prices.*

(iii) *Re-measurement Contracts: They are based on a combination of unit prices and measured quantities. The parties agree the rates of remuneration per unit but not the price of the work as a whole.*

The general structure of the three main models is composed of three sections: the first section deals with the General Conditions, the second section provides a guide to the parties for drafting the Particular Conditions and the last section includes examples of letters of tender, contract agreements and DAB agreements.

To be more specific, the Conditions of Contract govern the rights, liabilities and obligations of the parties and they comprise both the standard General Conditions and the Particular Conditions. The formers are intended to be used unchanged for every project, whereas the latter are provisions tailored to the specific object and nature of the work[10].

The success of these models has rapidly increased when, beginning in 2000, the World Bank and the other International Financial Institutions (IFIs) adopted and included them in their bidding documentation for works co-financed by the same institutions. These documents have been partially modified compared to the original FIDIC model contracts in order to meet the demands of the IFIs. In particular, they impose precautions to prevent and punish cases of corruption, they establish higher burdens for the Contractor so as to ensure that the project is carried out within the deadlines and the costs previously established. To make an example, the World Bank has implemented the 1999 FIDIC Red Book by introducing some changes to the original derivative model, which eventually resulted in the Conditions of Contract for Construction for Building and Engineering works designed by the Employer – Multilateral Development Bank Harmonised Edition – whose latest edition dates back to June 2010.

The standard approach pursued by FIDIC contracts offers several advantages, yet this is not without limits. While some commentators believe that those contracts need to be valued because they ensure a balance between the parties' mutual obligations – in particular after the versions of 1999 – others have pointed out that they imply a bias in favor of the Contractor[11].

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[10] (Baker, Mellors, Chalmers, & Lavers., 2009)

[11] In this regard, see (Wade, 2001). The Author claims that << *While contractors are active and well organized, employers are not organized and*

Among the benefits of standardization, there is the fact that contractual conditions are clearly expressed and are based on a long tradition. What is more, they provide for uniform expressions given that the models are accepted worldwide and they have been adopted by States and International Institutions in their calls for tender.

Looking at the limits of standardization instead, the "one size fits all" strategy implies that models are difficult to adapt perfectly to all the features of a given legal system. Moreover, the use of international models can encourage the parties to be assisted by more sophisticated consultants who are familiar with those documents, resulting in higher costs. Besides, the adoption of standard contracts also creates an advantage for large international companies that are accustomed to the use of such documents and are able to deal with the main risks involved, thus having an impact on fair competition in call for tenders as far as the participation of small local operators is concerned.

1.3 The multi-tiered clauses and the escalation of dispute resolution methods in the FIDIC suite of contracts

Taken everything into account, international construction contracts share some specific and recurring features that make them particularly exposed to disputes. Among all, the long-lasting execution, both the multiple parties and linked contracts, and the high risk of unforeseen or otherwise unforeseeable events which are likely to arise work in progress.

The international construction sector is therefore << *a "minefield"*

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their interests are not well represented in relation to FIDIC's forms of contract, other than by development banks>>.

for uncertainty and conflict[12] >>.

As a reaction to this peculiar nature of international construction contracts, FIDIC models included a set of "fast-track procedures" among their dispute resolution clauses aimed at avoiding the recourse both to arbitration and court. The first step may imply the devolution of the dispute to the determination of the Engineer acting as a facilitator in proposing possible non-binding solutions to the parties. If such conciliation fails, the second stage may provide for the resort to a Dispute Adjudication board (DAB) as a condition precedent for triggering arbitration in the event of a dissatisfaction with the Board's decision.

The first versions of FIDIC contracts ascribed a fundamental role to the Engineer who was regarded as a proper contract manager. The portrayal of a trusted, independent and *venerable*[13] Engineer has long been criticized by continental jurists in particular on a conflict-of-interest ground[14].

Among all, the main criticism concerns the Engineer's lack of impartiality and independence, given that the latter is generally chosen by the Owner and such an arrangement implies a bias in favor for the Owner. What is more, several other issues have been raised with respect to the Engineer's determinations that bear credibility problems. First of all, the Engineer is accused of being a *judex in rem propriam*[15] and, second of all, his determinations are backwards-looking and disconnected from the construction project itself. This can be even worse when the Engineer is foreign and not accustomed with the trade practices in the host country.

In the reform of FIDIC models, in particular with the Supplement to

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[12] (Netto, Ping, & Christudason., 2003, p. 517)

[13] This adjective has been used by (Wade, 2001, p. 500)

[14] In this regard, see (Sammartano, 1998)

[15] In particular, see (Ziccardi, 2002). The Author underlines that <<*What, juridically and psychologically defects the Engineer, is precisely the impartiality, both with respect to the parties, being he a representative of the Owner, and in relation to the project under construction, being him the main designer*>>.

the fourth edition of the 1996 Red Book that is particularly concerned with the role of the Engineer, there has been a shift in thinking that led to the replacement of the Engineer with a board of independent experts appointed by both parties. A compromise solution has been reached: on the one hand the relationship of dependence has been made clear by including the Engineer among the Employer's Personnel pursuant to art 3(1) of the Red Book and by requiring him to act under the name and on behalf of the Employer without prescribing any duty to be neutral or impartial; on the other hand by emphasizing his role as conciliator with the obligation to issue a *fair* determination in compliance with the ultimate object of the contract and taking into account all the relevant circumstances at stake.

For the time being the Engineer acts as the Owner's representative and still holds several powers ranging from the initial contractual stage to the contract execution and implementation. Indeed, the Engineer (i) verifies the regular course of the project; (ii) adopts any variation in progress albeit not being able to modify the terms of the contract; (iii) provides the Contractor with the necessary instructions for the proper completion of the work; (iv) marks the various stages of progress and execution of the contract by issuing the various certificates of payment; and (v) acts as a conciliator.

In fact, when a party makes a claim under Sub-clause 20(2)(1) of the Red Book, the issue has to be referred to the Engineer by giving him a notice *as soon as practicable* and no later than 28 days after the claiming party becomes aware or should have become aware of the event or circumstances. After receiving the fully detailed claim, the Engineer must consult the parties in an endeavor to reach a binding agreement. In the event that job level negotiations have reached an impasse and should the conciliation effort fail, the Engineer is required to issue a fair determination within 42 days.

The agreement or determination is binding until it is reformed by a DAAB or by means of an arbitral award. The party who is totally or partially dissatisfied with the Engineer's determination may transmit a Notice of Dissatisfaction (NOD) and proceed according to Sub Clause 21.4 obtaining

a DAAB decision.

In the event that none of the parties expresses a willingness to challenge the determination, this will be accepted finally and conclusively by both Parties.

In short, as a result to the paradigm shift adopted by the FIDIC suite, the Engineer has given way to a board of qualified experts with deep knowledge on how the project is progressing, thus favoring the *global dejudicialization*[16] in business disputes.

1.4 The inclusion of the Dispute Board among ADR mechanisms in International construction projects

1.4.1 Perks and drawbacks of the Arbitration mechanism

Looking back over the history of dispute resolution mechanisms in the construction field, arbitration has always played a leading role, being regarded as a quicker and less expensive alternative to ordinary jurisdiction. As a matter of fact, arbitration became a *conditio sine qua non* of construction contracting[17] by virtue of the arbitration clause contained in all general terms and conditions of standard international contracts.

The preference expressed for the arbitration mechanism was particularly justified by the fact that arbitral awards have more chances to be executed abroad rather than rulings from foreign tribunals, given that the

[16] The term *global dejudicialization* has been recently used by (Ghodoosi, 2020) as a way to describe the process of outsourcing disputes to private dispute resolution.

[17] (Stpanowich, 1996)

arbitration agreement is recognized at least in all the Contracting States of the New York Convention[18].

All things considered, the real added value brought by arbitration lays in allowing the parties to select arbitrators with expertise in the relevant industry or subject matter of the underlying construction contract, thus reducing the amount of time and evidence necessary to prove certain facts of the case before ordinary judges. What is more, parties can have the dispute heard in a forum which they perceive to be more neutral than a national court by benefiting of greater procedural flexibility compared to court proceedings. Indeed, disputes can be rapidly decided given that the possibility of appeal is minimized and costs can be lower or, at least, more predictable.

All arbitrations must be conducted following arbitral rules and the usual choice is between "ad hoc" arbitration and "institutional" arbitration. In the former arbitral rules are chosen by the parties, whereas in the latter a specialized institution provides a framework and takes on the role of administering the arbitration process[19].

In the construction field, arbitration administered by the International Chamber of Commerce tends to be preferred. The advantages of institutional arbitration are numerous: (i) institutional rules are designed to regulate the proceedings comprehensively from the beginning to the end; (ii) the institutions are better suited to cater for contingencies that might arise even if the respondent fails or refuses to co-operate; (iii) they provide parties with an established format with a proven record; (iv) parties can avoid the time and expense of drafting a suitable ad hoc clause; (v) the fees and expenses of arbitration are, with varying degrees of certainty, regulated.

[18] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to The Convention requires courts of Contracting States to recognize and enforce arbitral awards made in other Contracting States.

[19] (McIlwrath & Savage, 2010)

On the other hand, the main concern raised by arbitration is linked to the technical nature of disputes that arise in large-scale construction projects due to their overall high estimated value as well as their long-term duration.

In addition, another non-negligible practical aspect is the voluminous documentation that the parties must attach to their claims as well as the difficulty for the arbitrators to acquire a deep knowledge of the facts of a case which has often taken place several years before. Besides, the issue of multi-party arbitration that involves persons coming from different political, economic and cultural background as well as multiple linked contracts is also a thorny one, and it may lead to a concrete risk of parallel arbitration proceedings.

What is more, as dispute resolution processes have acquired an international dimension and are no longer restrained by national borders or culture, 'cultural unity' is disrupted[20] and international arbitration is said to be a <<*true clash of legal cultures*[21]>>.

As a consequence, traditional arbitration practices have been replaced by various innovative schemes and practices in construction disputes, which are open to more flexible and non-adversarial processes.

The main trend is toward conflict management, thus combining retrospective dispute resolution with prospective and ongoing dispute avoidance.

1.4.2 History of international Dispute Boards

Due to the high degree of uncertainty and disputes, the construction industry has turned out to be one of the most dynamic and innovative one in devising new forms of Alternative Dispute Resolution (henceforth ADR) mechanisms for dispute avoidance and prevention, which have been widely accepted among experts in this field due to their effectiveness, lower costs

[20] (Chan & Tse., 2003)

[21] (Shilston & Hughes, 1997)

and expeditiousness. In particular, the rising star of ADR in international construction contract is the Dispute Board[22] (henceforth DB).

It consists of a panel of experts, generally established at the beginning of a mid- or long-term contract, which remains in place throughout its duration and is entrusted with the task of assisting the parties during the contract implementation by preventing or resolving disputes arising between them either by means of non binding decisions (that is the case of a Dispute Review Board-DRB) or contractually binding decisions (Dispute Adjudication Board – DAB).

The emergence of Dispute Boards in the construction industry can be ascribed to several factors. The first reason is to avoid the legal expenditures and delays of arbitration and litigation. In addition, the peculiar nature of construction disputes that in fact are a mixture of both technical and legal issues often requires the involvement of technical experts in order to give a proper answer to technical matters. Another important reason is the tendency in construction litigation to initiate proceedings only after the project has reached an advanced stage in relation to disputes that transpired during their implementation and that are not dealt with right away.

By most accounts, the first Dispute Board was used in 1975 in the Eisenhower Tunnel Project in Colorado and gained later recognition at the international level. One of the first examples of a DB in the international context was during the construction of El Cajon Dam and Hydropower project in Honduras back to the 80s.

This project was funded in part by the World Bank and involved an Italian contractor, a Swiss Engineer and an Owner – the Honduras Electricity Company – that was not used to large scale constructions involving multiple international contractors.

Hence, the World Bank, eager to see the project completed on time and to budget, set a panel of experts[23] entrusted with the task of delivering

[22] (Kohnke, 1993)

[23] In this regard, see (Chapman, 2015)**.** The World Bank took the inspiration from the US-style DB. Indeed, the concept of DB concept originated

non-binding recommendations to the parties and preventing the insurgence of potential disputes. The panel was an overall success, it worked in cooperation with the parties, no dispute proceeded to arbitration or litigation and the legal costs were minimal compared to the final cost of the project.

1.5 The advent of model rules for Dispute Boards under the impetus of the World Bank, the FIDIC, the American Arbitration Association, the International Chamber of Commerce, and the Milan Chamber of Arbitration

The positive experience brought by El Cajon Dam and Hydropower project in Honduras set the stage for the widespread endorsement of DBs by several international organizations that came up with a variety of model provisions contemplating their use.

The DRB was officially introduced for the first time in the 1995 version of the Standard Bidding Documents – Procurement of Works (SBDW) by the World Bank that made its use mandatory for Owners and Contractors working on its financed projects, estimated to cost more than US $10 million.

This has been later replaced by the MDB Harmonised Model with a DB entitled to deliver a binding determination following the lead of the DAB provided by the 1999 FIDIC Red Book.

However, the DB introduced by the MDB Harmonised Model brought several innovations with respect to the 1999 Red Book. First of all, the wording refers to a DB rather than to a DAB. In addition, in relation to

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in the USA where it has now been used for several years as a means of avoiding and resolving disputes in civil engineering works.

The earliest domestic reported use of a DB was on Boundary Dam in Washington in the 1960s, where the technical 'Joint Consulting Board' was asked to make decisions regarding conflicts.

the designation of the members, those who are appointed by the parties are later required to suggest them the name of a third member.

Finally, if either party is dissatisfied with the DB's decision, then the party may, within the time limit of 28 days, give notice both of its dissatisfaction and intention to commence arbitration. The arbitration may be either the institutional arbitration administered by the ICC or an *ad hoc* arbitration chosen by the parties.

Following the lead of the World Bank, during the same years, the FIDIC included a DAB as a condition precedent in the escalation clauses of its model construction contracts. The DAB was conceived as a valid alternative to the semi-adjudicatory role performed by the Engineer with a view to cope with the related impartiality and independence problems.

A DAB was introduced in the FIDIC Orange Book in 1995, followed by the Supplement to the fourth edition of the Red Book published in 1996 and the Yellow Book. After the development of the new Rainbow suite in 1999, the new edition of the Red Book contemplated a DB with the authority to make adjudicative determinations instead of mere recommendations that would immediately bind the parties, notwithstanding their ability to later challenge those determinations before an arbitral tribunal.

Lastly, the new Red Book edition of 2017 outlined the importance of dispute boards as means of avoiding disputes – now called Dispute Adjudication/Avoidance Boards as defined in Sub-Clause 1.1.22 – and it dedicated two separate clauses, the number 20 and 21, respectively to claims and disputes resolution.

In view of the numerous advantages brought by the toolkit for dispute resolution introduced under the FIDIC model rules[24], around the year 2000 the most noteworthy intergovernmental organizations, namely the International Chamber of Commerce (henceforth ICC) and the American Arbitration Association (henceforth AAA) started to develop model provisions on DBs.

[24] See *supra* Chapter 1.3

The AAA first published its DRB Guide Specifications in 2000 for dispute avoidance and prevention. Among the major features of the DRB introduced under the AAA's rules there is the panel's authority of issuing only non-binding recommendations and the very intrusive powers afforded to the AAA itself in the panel formation and in the procedure management.

In fact, the AAA can provide the parties with a list of potential members based on their needs, it can broker the relationship between the DRB and the parties by planning site visits and meetings, by managing the payment of fees and reimbursement of expenses, and by giving them notice of the minutes of the meetings and of the final determination[25].

However, one of the most useful sets of model rules regarding the composition and implementation of DBs was that published in 2004 by the ICC in the Marrakesh congress, after approximately three years of works carried out by the ICC Dispute Board Task Force. In 2015 the ICC has gone through a revision of its procedural rules that entailed expert consultations and drafting by a working group of the ICC Commission on Arbitration and ADR.

All in all, the ICC pursued an innovative and comprehensive approach in order to provide the parties with a variety of options to fit their needs. The main innovation brought by the ICC rules is the provision of three alternative types of DBs: a DAB, similar to the mechanism of the FIDIC model contracts which issues binding opinions, a DRB similar to the AAA mechanism, which issues non-binding recommendations; or a Combined DB, which typically issues recommendations but may issue decisions upon request of the parties if there is no objection[26].

However, the real added value brought by ICC rules lays in their capacity of raising awareness on the existence of the DB as a form of ADR particularly suited in international construction disputes, especially in relation to civil law countries where this mechanism is almost unknown and

[25] In this regard, see (Jenkins & Stebbings, 2006)

[26] For a more detailed description of the three types of DB, see below (paragraph 1.7).

it acts as a complement to arbitration.

Lastly, the Milan Chamber of Arbitration (CAM) is the first Italian institution to have introduced a Dispute Resolution Board Regulation since January 2016. In short, it establishes that the parties may agree to appoint a Dispute Resolution Board (*i.e.* Consiglio Tecnico Consultivo) in accordance with the Rules laid down by the CAM Dispute Review Board Regulation. Any dispute arising from or in connection with the construction contract will be referred to the DRB for a recommendation. In the event one or both parties do not accept the recommendation, the dispute will be settled by arbitration in accordance with the Rules of Arbitration of the Milan Chamber of Arbitration.

1.6 The concept of Dispute Board: nature and aim

A Dispute Board is an alternative dispute resolution mechanism which typically consists in a panel comprising one or three independent and impartial professionals, who are qualified experts in the technical field of the project and are appointed by the parties at the initial stage so as to advice over the currency of the project and to prevent formal disputes to arise[27].

In their attempt to find a proper definition, commentators have generally depicted a DB as a "job-site" dispute adjudication process that is set in the middle ground between amicable settlement and arbitration[28].

As a matter of fact, it is a neutral and flexible mechanism that monitors the project regularly and continuously in all its phases and that can be consulted in a rapid and effective manner at the occurrence of a dispute.

Hence, the Board pursues a double-hatted function: on one side acting as a dispute avoidance mechanism with the view of preventing a mere

[27] (Bunni, 2005)

[28] In this regard, see (Panetta, 2016)

disagreement from escalating into a formal dispute between the parties, on the other side acting as a dispute resolution mechanism which pursues a litigation reduction logic in order to limit the recourse to arbitration or to the court.

1.7 Different types of Dispute Board: salient features and a comparison between them

Generally speaking, it is possible to list two main types of DBs: the Dispute Review Board and the Dispute Adjudication Board, which are mainly distinguishable in relation to the legal nature of the final decision issued by the Board.

To be more specific, a third valid alternative has been put forward under the ICC Dispute Board Rules that enriched the business community with the inclusion of the Combined Dispute Board.

The salient features of these three different types of DB are described in more detail as follows:

a) The Dispute Review Board (henceforth DRB)

A DRB is set up at the beginning of the project and thus prior to any dispute. It normally consists of three members, but it may also have just one.

Members are often appointed at the beginning of the project and they make regular visits to the site, receive submissions, and may also hold informal hearings. What is more, their presence throughout the construction process enables them to become key components of the final project as well as to influence parties' behavior[29].

The salient feature of the DRBs lays in their power to issue non-

[29] (Freedman & Farrell, 2014)

binding recommendations with respect to a dispute referred to them by the parties, which may either be ignored or spontaneously observed by them.

According to both the ICC DB Rules, the recommendation issued by the DRB finally becomes contractually binding and therefore it has to be executed as if it were a decision unless a party expresses dissatisfaction within a prescribed time-limit after the recommendation has been issued[30].

Basically, recommendations are not preliminarily binding but they finally become part of the contract if no party files a timely notice of dissatisfaction.

On the other hand, if a party rejects the recommendation, the dispute is then referred *de novo* to arbitration or to the competent court as set forth in the contractual determinations.

According to the AAA rules instead, the recommendation issued by a DRB can never acquire binding nature and it needs to be accepted or rejected within 14 days[31].

All things considered, the DRB is an amicable mechanism for dispute management and resolution that fulfills a consensual approach and implies a full confidence in the professional skills of the board's experts as well as an underlying good relationship between the parties. The choice is always left up to the parties, they can either comply with the recommendation or have recourse to a different mechanism for dispute resolution. Moreover, some legal scholars have pointed out that DRB's recommendations have a strong persuasive character even in the event of a future adversarial proceeding [32] and they are more likely to be accepted by the parties, given that they are the ultimate outcome of the information mutually shared with the board during the implementation of the construction project.

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[30] In particular, the time frame is of 30 days under art 4.3 of the ICC DB Rules.

[31] See art. 104 AAA Dispute Resolution Board Guide specifications.

[32] (Marston, 2001)

b) The Dispute Adjudication Board (DAB)

Compared to the DRB, the DAB adopts a less consensual approach which makes it a "decision-making means[33]" of dispute resolution and avoidance rather than an amicable one.

It is crucial to outline that adjudication panels have been included in international construction standard contracts by the various International Organizations under different terms[34].

FIDIC introduced the Dispute Adjudication Board (DAB) for the first time in the 1996 Supplement to the fourth edition of the Red Book as a way to replace the quasi-adjudicatory role of the Engineer, it was later transposed into the 1999 edition and it was substituted by the "Dispute Adjudication/Avoidance Board" in the latest 2017 edition, whilst the World Bank in its Standard Bidding Documents – Procurement of Works generally refers to Dispute Boards. Regardless of the designation used, the most remarkable feature which distinguishes the DAB from the DRB is the interim binding effect of the Board's decision. In particular, this feature allows the parties to resolve their disputes on an interim basis whilst the project construction proceeds without any damage or delay. Thanks to this mechanism, momentary difficulties between the parties may easily and rapidly be overcome since the decision issued by the Board preliminarily and immediately binds the parties unless and until they decide to submit the dispute, within a stated time period, to the final resolution of an arbitral tribunal or to the relevant court.

As a consequence, the DAB's decision provides for a prompter solution whose binding nature has been contractually agreed by the parties themselves who will comply with it irrespective of any notice of dissatisfaction (NOD). However, each party is always free to challenge the

[33] (Bunni, 2005)

[34] In this regard, see (Panetta, 2016)

Board's decision that will otherwise become "final and binding upon both parties[35]".

Another salient feature that characterizes the DAB is its role of informal assistance performed upon the joint request of the parties[36]. This function strengthens the Board's pre-emptive dispute avoidance capacity. Indeed, by providing its opinion on the matter in contention or on the disagreement the Dispute Adjudication Board <<*may throw a revealing light on the rights and obligations of the parties and thus preventing a matter from becoming a dispute*[37]>>.

c) The Combined Dispute Board (henceforth CDB)

As previously mentioned, the CDB has been introduced under the ICC rules as a third alternative type of DB. It can be defined as a hybrid between the DAB and the DRB that normally issues recommendations with respect to any dispute referred to it, but it may issue a binding decision if a party requires so and no other party objects. Should an objection be raised, the CDB will decide whether to issue a recommendation or a decision on the basis of the criteria set forth in the Rules after a proper assessment on the impact that the measure can either have on the project completion or on the fulfillment of the contractual obligations[38].

In addition, art 6(3) of the ICC DB Rules allows the CDB to issue binding decisions regardless of the parties' request in the following situations: (i) whether, due to the urgency of the situation or to other relevant considerations, it would facilitate the performance of the contract or prevent substantial loss or damage to the parties; (ii) whether it would prevent

[35] Sub-clause 21.4.4 FIDIC Red Book, 2017

[36] Sub-clause 21.3 FIDIC Red Book, 2017

[37] (Bunni, 2005, p. 606)

[38] (Draetta, 2010)

disruption of the contract; (iii) whether it is necessary to avoid loss of evidence. It goes without saying that this evaluation is entirely left to the wide discretion of the members of the Board and it gives priority to the necessities of the contract notwithstanding the consent of the parties[39].

The evaluation of this third type of DB is a hotly debated topic that divides legal scholars. According to some, it represents a compromise between the DAB and DRB that should be highly valued since it brings together all the positive features of the two mechanisms: it usually follows the consensual approach of a DRB but it can also be entrusted with the decision-making power of a DAB. Taking into account its dual face, it could be regarded as a valid tool in construction contracts with particular regard to the efficiency and preservation of the contractual relationship between the parties.

Definitely the added value brought by this type of Dispute Board lies in its flexibility, in fact its use can be adapted to different needs: it can be employed as a DRB when the dispute is still at an early stage and thus it is easily solvable through an agreement between the parties, whereas it can be used as a DAB when the dispute escalates and it is likely to have detrimental effects on the contract[40].

On the other hand, there are some legal scholars[41] who are of a different opinion and tend to condemn both the lack of predictability of the outcome of the Board, given the uncertainty of whether it will be an immediately binding decision or a recommendation, and the too wide discretion left to its members which may act regardless of the parties' consent.

[39] (Cairns, 2005)

[40] (Meilhac, Genton, Wolrich, Gelinas, & Bunni, 2007)

[41] In this regard, see (Dering, 2004)

Chapter 2 THE FUNCTIONING OF THE DISPUTE BOARD

2.1 The appointment and establishment of the Dispute Board

Once clarified the nature and scope of the Dispute Board, it is time to look at how it operates in practice.

The first step is the appointment of the members who will form the panel. Generally speaking, the most common size of a DB is three-members, yet this is not always the rule given that the construction contract can provide for a single-member board when small projects of lesser duration and costs are concerned. On the other hand, in highly complex projects the appointment of a three-member board is suggested, in particular with reference to those contracts exceeding a certain amount of money[42]. What is more, parties may rely on a board composed of several members in high level projects, such as the six-members panel in the Hong Kong Airport or the five-members board in the Channel Tunnel project[43]. Pursuing a cost-benefit logic, there might be also cases in which it can be suitable to have a two-members DRB to issue recommendations as quick as possible in addition to a larger DB for consultation[44].

It is crucial to outline that participants are chosen entirely by the parties as a way to let them gain full confidence in the board's expertise.

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[42] The amount is 25 million of dollar according to the FIDIC Contracts Guide, whereas 50 million of dollars according to the World Bank Rules.

[43] In the construction project for the Hong Kong airport a Dispute Review Group was established with a six members panel and a convenor in order to deal with the 20 main contracts. In the Channel Tunnel project instead, the panel was made of five members, yet only three of them were entrusted with decision making powers.

[44] In this regard, see (Panetta, 2016)

Indeed, to be fully effective, the board should be a permanent panel appointed at the negotiation stage, that is even before the construction of the project has begun. In fact, the more the members' selection is postponed, the more it will be difficult for them to promptly solve any dispute arising work in progress. Hence, when the board is appointed on an *ad hoc* basis after the dispute has arisen, members are not familiar with the circumstances of the case and they will need to undertake a burdensome study of all the files deploying much more time, effort and costs. On the contrary, during the negotiation phase parties are much more inclined to reach an agreement upon the members to be appointed because the atmosphere is still peaceful and open to dialogue.

A comparative analysis of the model rules drafted by the various organizations shows a slight difference in the way the board is appointed and established, especially in relation to the role that some third-party organizations – such as the ICC, the AAA and the CAM – play in the selection process of the most appropriate candidates.

According to sub-Clause 21(1) of the FIDIC Red Book entitled "*Constitution of the DAAB"*, the board has to be nominated in the contract or it has to be established within a date set out in the Contract data that, in absence of an express statement, is of 28 days after the Contractor receives the Letter of Acceptance.

As a result, it is likely that the DAAB will be a standing board appointed before the construction work has begun. Prior to the 2017 renewal of the main model contracts, instead, 1999 FIDIC Yellow and Silver Books used to provide for an *ad hoc* board to be appointed after the dispute had arisen. This has been replaced with a permanent board for all standard contracts having acknowledged the undoubted advantage of becoming conversant with the project from a very early stage.

Currently, the FIDIC rules provide for a default three-member board in absence of a different choice made by the parties. To be more specific, one member is appointed by the Owner, a second member is appointed by the Contractor and a chairman is appointed by the first two members but

still subject to the final approval by both parties.

The involvement of the FIDIC in providing assistance to the parties with the selection procedure is only limited to specific conditions of disagreement set forth in the sub-Clause 21(2). The reason lays in the fact that generally the FIDIC does not carry out services in relation to the DB procedure administration.

Under art 7 of the ICC Dispute Board Rules instead, the default DB is a three-members standing board, whose first two experts are appointed jointly by the parties within 30 days after signing the contract or after the commencement of any performance under the contract. In case of disagreement among them, the two members are appointed by the ICC Dispute Board Centre[45] upon the request of one party. Within a further 30 days' period after the appointment, the two members must suggest a third expert to be selected by the parties in the following 15 days. Should they fail, once more the last member is appointed by the Centre.

Moreover, article 7(3) contains a *catchall provision* [46] which entrusts the Centre with the power to appoint a member anytime it is satisfied that doing so will ensure the proper application of the Rules.

Lastly, pursuant to the Dispute Resolution Board Rules of the Milan Chamber of Arbitration, the DRB is a three-members default standing body appointed by the parties. However, in the event that they fail to constitute the DRB in the deadline stated in the contract or within 30 days from its entry into force, the Milan Chamber of Arbitration will act as the appointing authority at the request of the interested party.

[45] The Dispute Board Centre is a separate administrative body within the ICC that can provide administrative services to the Parties. These services include appointing Dispute Board members, deciding upon challenges against DB Members, determining the fees of DB Members, and reviewing Decisions.

[46] This expression is used by (Panetta, 2016, p. 245)

2.2 Qualification and competence of the members

2.2.1 The selection process

In relation to the professional qualifications required to be appointed as a member of a DB there is no fixed practice. Indeed, sub-Clause 21(1) of the Red Book only makes reference to a "suitable qualified person", whereas art 7(8) of the ICC DB Rules sets forth several attributes to be taken into account by the Centre when appointing a DB member, among which the nationality, residence, language skills, training, qualifications and experience, availability and ability to conduct the work to be carried out and to hear any observation, comment or request made by the parties.

In practice, the composition of the board can be of a mixed nature, comprising practitioners from engineering and the law. While some scholars claim that it is preferable to choose engineers with basic knowledge in the construction field and with a high degree of experience in relation to the project under construction[47], other scholars suggest that the ideal board should be composed by two engineers ad a lawyer acting as the chairman. The rationale is that, if on the one hand it is true that the underlying nature of the contract is likely to raise issues of a purely technical nature, on the other the role of the chairman is to supervise the hearing and to decide upon questions concerning the interpretation of contractual clauses and national legislations and, therefore, a solid legal knowledge is particularly appreciated. However, reluctance is showed in practice towards the selection of lawyers as DB members, who are rather relegated to a consultancy role on specific issues[48].

[47] Of this view (Meilhac, Genton, Wolrich, Gelinas, & Bunni, 2007)

[48] In this regard, see (Mahnken, 2018-2019). The Author outlines that << *Some DRB proponents are of the view that the involvement of lawyers in DRB proceedings makes these adversarial, that the focus turns to legal issues,*

All in all, members of a DB are to be regarded as *team players*[49] who need to get their head in the game to ensure a winning solution. Clearly, construction knowledge and experience are key elements, yet it is also essential to possess personal qualities such as good management and communication skills to make the team successfully work.

In particular, some main desirable attributes have been outlined in a qualitative study, as a result of data collected through a focus group interview [50] composed by 2O practitioners assembled from members of FIDIC-NET with direct experience in construction projects. Among them, the following have been outlined: awareness of the DB process; ability to communicate one's viewpoint to the other members with sufficient clarity and to persuade; awareness of the natural justice implication of actions taken by a member and of ethical issues; and possession of a suitable personality.

2.2.2 The independence and confidentiality obligations

The paramount[51] ethical requirements placed on Dispute Board's members are independence and impartiality[52].

and the use of common sense, which should be the basis of DB proceedings and DRB recommendations, but which lawyers are ostensibly not able to use, will be neglected>>. See also (Griffi, 1998, p. 834), the Author advices of the rarity of finding lawyers among the panel's experts due to the fact that their excessive intervention in the DAB proceeding would turn it into "*an esoteric legal laboratory".*

[49] (Shadbolt, 1999)

[50] The qualitative study has been reported by (Ndekugri, Chapman, Smith, & Hughes, 2014)

[51] This is the expression used by (Shadbolt, 1999, p. 108) to remark the importance of the indepence and impartiality requirements.

[52] The concepts of impartiality and independence are well established in most legal systems and jurisdictions. According to common definitions, impartiality means having no direct involvement or interest and not favoring one

As a matter of fact, each DB member is required not to act as an advocate for one party but, as a team player, is expected to pursue a cooperative spirit in the general interest of the team rather than in the particular interest of the appointing party. Compliance with the impartiality and independence obligation imposes both a subjective and objective test[53]. Indeed, to be impartial a board member must not subjectively favor, or appear to favor, one party over the other; to be fully independent, instead, the member must objectively show a lack of bias in favor of one of the parties. To this end, each DB member is under an *ongoing* obligation to disclose any interest or relationship that could cast a reasonable doubt on his or her independence from the contracting parties. In this regard, art 8(2) of the ICC DB Rules requires the parties to sign a statement of independence and to disclose in writing any fact or circumstance that would, in the eyes of a party, appear inconsistent with the independence obligation. As outlined above this is an ongoing obligation, meaning that the members have not only to be but also to remain impartial throughout the entire life of the DB by giving notice of any new events that are likely to compromise their status.

FIDIC rules on their part are more detailed in laying down the punctual conditions that must be fulfilled in order to comply with the warranties of independence and impartiality[54].

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person or side more than another, whereas independence means being free from the influence, control or determination of another or others.

[53] (Valdès & R.Schubert, 2017)

[54] See art 4.1 (letters a; b; c; d; f; g) of the General Conditions of Dispute Avoidance/Adjudication contained in the Appendix attached to the Red Book, according to which the DAAB member shall:

(a) have no financial interest in the Contract, or in the project of which the Works are part, except for payment under the DAA Agreement;

(b) have no interest whatsoever (financial or otherwise) in the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel;

(c) in the ten years before signing the DAA Agreement, not have been employed as a consultant or otherwise by the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel;

(d) not previously have acted, and shall not act, in any judicial or arbitral capacity in relation to the Contract;

(f) not, while a DAAB Member and for the Term of the DAAB:

What is more, organisations such as the Dispute Resolution Board Foundation and the Dispute Board Federation came up with codes of ethics to ensure that DB members adhere to the highest requirements of impartiality and independence throughout the duration of the project and replace them in case they don't[55].

What happens when the two requirements are not respected? According to the ICC DB Rules if any party wishes to challenge a DB member on the basis of an alleged lack of impartiality, independence or otherwise, the same may submit to the Centre a request within a stated time and, should it be approved, then the member has to be removed. The same intervention in the procedure administration is ascribed to the AAA under art. 1.02.F AAA DRB Guide Specifications. On the contrary, Sub-clause 21(1) of the Red Book only specifies that the appointment of any member may not be terminated unilaterally but as a result of a mutual agreement between the parties.

In addition to the obligation of independence, confidentiality is also a decisive requirement imposed upon all members. Both art. 9(2) of the ICC DB Rules and 7(1) of the Appendix attached to the Red Book claim that any information and document obtained by a DB member pursuing a DB's activity must be treated as confidential and private, meaning that it can be disclosed only with the consent of the parties and it can be used only for the

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(i) be employed as a consultant or otherwise by, and/or

(ii) enter into discussions or make any agreement regarding future employment with the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel, except as may be agreed by the Employer, the Contractor and the Other Members (if any); and/or

(g) not solicit, accept or receive (directly or indirectly) any gift, gratuity, commission or other thing of value from the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel, except for

payment under the DAA Agreement.

[55] In particular, see the DRBF Code of Ethical Conduct, Chapter 6 at http://www.drb.org/concept/manual/. The Code lists 5 main canons to be respected by DRB members: Canon 1 deals with conflict of interest and disclosure; canon 2 deals with the confidentiality obligation, canon 3 deals with the board conduct and communications; and canon 4 deals with fairness in the board procedures.

purpose of the Board's activities. Moreover, in order to ensure that arbitration or other similar proceedings on the dispute determined by the DB remain fully independent, art. 9(3) of the ICC DB Rules prohibits members to hold the office of judges, arbitrators, experts or advisers of a party.

Once having been selected, the DB members formally take up their function with the signature of a tripartite agreement, better known as "the DB Member Agreement". This is a professional services arrangement that establishes the role, authority and obligations of both the DB members and the contracting parties. Pursuant to the ICC DB Rules, it has to be signed separately by each member of the board with both the Employer and the Contractor. The outcome is therefore a fully detailed document defining the specific competences ascribed to the single member. On the other hand, the Appendix to the Red Book claims that the DAAB Agreement is to be signed by the three members of the DAAB as a whole with all the other parties to the contract. However, the fact that it is signed jointly by the board does not relieve each member from the respective responsibilities as well as the functions and obligations assumed.

2.3 The Dispute Board's activities

2.3.1 Informal assistance and site visits

Once the Dispute Board Member Agreement has been signed, the board can commence its activities. As a matter of fact, it can act both as a dispute avoidance and as a dispute resolution mechanism. In the first scenario, the board is entrusted with a preventive role that consists in dealing with disagreements before they escalate into formal disputes between the parties. In the second scenario instead, the contractual balance has already been compromised, negotiations turn out to be inefficient and the board is

hence asked to solve a dispute.

To be more specific, the DB's tasks are accomplished through regular site visits as the project comes to life. In fact, the chance to follow closely the development of the project and to become aware of technical difficulties and contractual ramifications that are likely to become disputable, makes the DB a real milestone among the ADR mechanisms[56]. Indeed, pursuant to the FIDIC procedural rules, the Board members are under the obligation to regularly visit the worksite at intervals of no more than 140 days at the request of either party, with a minimum of three visits per year according to art. 12 of the ICC Rules. During such visits, the Board is entitled to review the performance of the contract, ascertain the project's progress and assist the parties either in avoiding potential disagreements or resolving those that have arisen. In particular, this task of informal assistance with disagreement is set forth in art. 17 of the ICC Rules and it may take several forms: it can be either a conversation between the DB and the parties; or a set of separate meetings held with any party; or a written note addressed to the parties containing the salient features of the responses suggested by the board.

All the informal opinions given by the DB when exercising this informal task are non-binding upon the parties and they will be further developed should the disagreement escalate into a formal dispute.

Besides, the same duty of informal assistance is recalled under Sub-clause 21(3) of the FIDIC Red Book upon the joint request of both parties. The idea is that << *by providing an opinion on the controversial matter, the board may throw a revealing light on the rights and obligations of the parties and thus prevent a matter from becoming a dispute*[57]>>.

[56] (Shadbolt, 1999)

[57] (Bunni, 2005, p. 625), as cited in (Zoppis, 2018)

2.3.2 The dispute resolution procedure: a comparative analysis between the regulations of the International Chamber of Commerce and the FIDIC Suite of Contracts

When a purely factual disagreement between the parties escalates to the point of a formal dispute, the DB will be invested with the task of reaching a determination as a result of the dispute resolution procedure. There is no such a definition of the term "dispute" and, hence, it can only be found at law with different solutions adopted under each jurisdiction[58].

The 2017 Second Edition of the Rainbow Suite has divided the previous FIDIC 1999 Sub-clause 20 into two separate clauses: the new clause 20 - which now deals with the procedure for claims- and the clause 21 - which deals with disputes and arbitration.

It therefore distinguishes between the making of a claim, that is putting forward a request for an entitlement or relief in accordance with the contract by giving a Notice to the Engineer, and the concept of dispute. Accordingly, a dispute arises when a claim has been rejected by the Engineer, and the party is dissatisfied with its determination.

Indeed, in order to activate Sub-clause 21(4)(1), either party who is totally or partially dissatisfied with the Engineer's determination must transmit a Notice of Dissatisfaction and refer, within 42 days, the dispute to the DAAB for its decision.

When considering the FIDIC's multi-tiered approach for dispute resolution in international construction contracts, it is important to outline

[58] (Zoppis, 2018). In acknowledging the fact, the Author claims that the definition of dispute under s108 of the 1996 Housing Grants Construction and Regeneration Act given in (Fastrack Contractors Limited v Morrison Construction Ltd, 2000) can provide a useful guidance. In this law case, Judge Thornton stated that <<*A 'dispute' can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion*>>. In short, the Judge conceived the notion of "dispute" in its normal every-day meaning and this is also the approach followed by the FIDIC.

that there is a well-defined sequence linked by a continuing set of deadlines, from the Notice of claim to the referral to the DB, which fulfills the need to prevent the parties from delaying the procedure. Indeed, if any party does not respect the deadline, the NOD will expire making the Engineer's determination finally binding. In turn, the DAAB is obliged to complete its decision within 84 days unless the parties agree on another date. The DAAB decision is immediately binding, despite not final, and the parties shall promptly comply with it irrespective of any NODs.

Moving on to the formal referral of disputes pursuant to the ICC Dispute Board Rules, art. 18 claims that any party may at any time refers a dispute to the DB by submitting a concise written statement of its case with a specific content and relevant documentation. Accordingly, formal referral to the DB is not a legal question but rather a matter of opportunity[59]. In practice, it is found that project managers prefer to rely on direct negotiations and wait too long before resorting to a third party such as the DB, fearing that they will be judged unable to personally find a proper solution to the matter. The written statement is followed by a written response from the other party within 30 days and additional documentation to support its case. A hearing is then conducted in presence of all members within 15 days after the chairman has received the response, unless otherwise agreed by both the parties and the DB.

On the contrary, under rule 7 of the Annex to the 2017 DAAB Procedural Rules, holding a hearing is a discretional choice of the board that is free to decide on the date and place in consultation with the parties. In addition, the board is charged with investigative inquisitorial powers in ascertaining the facts and matters at stake. Among them, there is the power to request the prior submission of written documentation and arguments from the parties, and the power to refuse admission to persons other than representatives of the parties in charge of the performance of the contract – that is to say that lawyers willing to intervene in a supportive role can be excluded by the board and they can only advice "behind the scenes".

[59] (Panetta, 2016)

Moreover, in order to avoid repeated obstruction from one party and to enable the board to issue its determination, the ICC Rules claim that in case of refusal or failure from one party to be present at the DB procedure or any stage thereof, the DB is entitled to adopt its decision *in absentia*. This allows the board to reach a fast solution while the construction work can proceed undisturbed and it seems to run counter the intrinsic nature of the DB mechanism itself, which is in fact based upon the full cooperation between the parties.

The hearing is to be conducted informally, meaning that the board is largely in charge of its management and it is not bound by any judicial rule on evidence or burden of proof. By way of example, there is no witness cross-examination and no pre-trial discovery. The idea is to create a climate of total confidence and openness towards the parties by << *eliminating all the vestiges of legal hearing process*[60]>>. This is confirmed under article 9 of the DRB Rules of the Milan Chamber of Arbitration, according to which the DRB enjoys full discretion provided that the procedure is fair, transparent, suitable for the case and it avoids delays and additional costs. Hence, under these conditions, the DB is free to hold hearings, examine documents and records produced by the parties, hear witnesses, and ask for more information.

In particular, art. 21 of the ICC Rules defines a punctual organization of the hearing, which requires a detailed presentation of the case, a request by the board of further clarification on certain matters, and answers to the request provided by the parties.

Lastly, it should be underlined that the hearing must be private and confidential, meaning that it is to be held closed doors and all the activities related to the proceeding cannot be disclosed without the prior consent of the parties. Secrecy is a real added value in the DB procedure because it creates a liberal environment in which parties are pushed to adopt a more open and confident approach in sharing mutual information and concerns with the board. This is the reason why some scholars suggest to fostering

[60] (Stpanowich, 1996, p. 362) as cited in (Calabresi, 2009, p. 146)

deeper the confidentiality requirement by introducing contractual clauses aimed at prohibiting the admissibility of DB reports in evidence in later proceedings. However, this could be counterproductive for the parties given the evidential weight and the deterring effect carried by such reports, which are in fact the outcome of knowledgeable experts who have witnessed first-hand the construction of the project[61].

2.4 The final determination of the Dispute Board and the notice of dissatisfaction

For the dispute resolution procedure to be completed, the DB is required to issue a determination in the form of a recommendation or a binding decision, after a stated time[62]. It goes without saying that the amount of time necessary to reach a concise determination is highly flexible and it varies according to the complexity and the high costs involved in international construction projects.

Furthermore, in order to gain more consistency and build confidence in the DB process itself, the determination should most likely be the result of a unanimous decision. Indeed, such an endeavor to reach unanimity is demanded both under art. 25 of the ICC Dispute Board Rules and rule 8 of the Annex Red Book. Anyway, in case unanimity cannot be achieved, the conclusion is rendered by a majority of the DB members and any dissenting

[61] In this regard, see (Capasso, 2018). The Author makes reference to the Sect. 2.8.3 of the DRBF Practice and Procedures Manual by outlining that <<*The admissibility of DRB reports in evidence in later proceedings has been a major factor in the effectiveness of DRBs since it allows the litigation forum access to a reasoned written report prepared by knowledgeable industry experts who have witnessed, first hand, the construction of the project*>>.

[62] That is within 84 days according to Sub-clause 21.4.2 of the Red Book, whereas within 90 days under art. 22 of the ICC Rules and it can be extended for a maximum of 20 days with the consent of both parties.

opinion is communicated to the parties by means of a separate written document, which cannot constitute part of the final conclusion. It should be noted that the choice of standing out dissenting opinions, following the practice of *common law* systems, may be counterproductive given that it is likely to incentive the party to challenge the determination before an arbitral tribunal or a competent court by relying on the arguments raised by the dissenting member.

As far as the structure of the determination is concerned, there is no such a strict requirement to rely on, yet it is reasonably expected to be exhaustive in addressing all the matters submitted by the parties and consistent enough in view of its possible reform before an arbitration panel or a court.

In particular, art. 22 of the ICC Dispute Board Rules sets out the main contents of a conclusion, which must include the date on which it was issued; the findings of the DB; and the reasons leading to them. In addition, it may also deal with a chronology of the relevant events; a list of the submissions and documents produced by the parties; and a summary of the dispute assessing the respective positions of the parties, of the Contract provisions, and of the procedure followed by the board.

Clearly, it is necessary for the determination to be written and reasoned. Indeed, by specifying the reasons that led to the conclusion, the DB members prove to have carried out such a meticulous study on the matters at issue that an arbitration panel would have reached the same outcome if the case had been submitted before it. The persuasive nature of a board conclusion is undeniable if one considers that it is likely to be the most accurate and proper appreciation of the contentious issues, given that the board is familiar with the project having followed its development since the very beginning. Accordingly, challenging the basis of the determination can be a very difficult undertaking since it is unlikely for the arbitration panel to overturn such a well-reasoned decision[63].

[63] (Marston, 2001, p. 23)

What is more, under art. 23 of the ICC Rules draft forms of the DB decisions can be - on express agreement between the parties - reviewed by the ICC DB Centre before they are signed. It can be useful to recall that a specular power is exercised by the ICC in relation to arbitral awards and it requires the payment of an additional registration fee. However, although it may seem very profitable, the review is only limited to binding decisions and it cannot be extended to recommendations.

As already mentioned in Chapter 1[64], in accordance with the terms of the contract, a DB conclusion can be issued either in the form of a recommendation or as a decision. The essential difference between the two lies in the legal nature rather than in the procedure followed for their adoption. As a matter of fact, parties are contractually compelled to comply with a decision issued by a DAB in the exact moment they receive it, whereas a recommendation issued by a DRB can be voluntary observed by the parties and it must be complied with only if none of them expresses dissatisfaction. Hence, some scholars have pointed out that binding decisions commit the parties to a "pay now, argue later" approach during the project with a view of favoring its prompt execution, whereas recommendations encourage cooperation between the parties and they better reflect the paramount role ascribed to the original DB model, that is the one of dispute avoiding[65].

To be more specific, the decision issued by a DAB is said to have an *interim binding effect* since it must be promptly observed by the parties, notwithstanding of any NODs pursuant to it and until shall it be revised in an amicable settlement or an arbitral award. Indeed, under Sub-clause 21(4)(4) in the event that, within 28 days, none of the parties gives a notice of dissatisfaction with a DAAB decision or the DAAB fails to reach a conclusion, the decision will become *final and binding*.

Should they issue a NOD instead, parties have 28 days more at

[64] See above, Chapter 1.7 Different types of Dispute Board: salient features and a comparison between them.

[65] (Chern C. , 2019)

disposal to actively engage with each other with a view of settling their dispute amicably, thus avoiding to having recourse to arbitration. This timeframe far from being intended as a passive cooling-off period requires an active effort of the parties, which calls for the undertaking of amicable settlement procedures such as direct negotiation, mediation, expert determination or other forms of ADRs[66]. The allowance of this time lapse has been strongly criticized by some scholars as an unnecessary waste of time having the ultimate effect of delaying the enforcement of the DAAB decision before resorting to arbitration[67].

As far as DRB recommendations are concerned, under art 4(3) of the ICC Rules, a recommendation becomes *final and binding* on all parties unless one of them gives a written notice to the DBR and to the other party expressing its dissatisfaction within 30 days of receiving it. Accordingly, in the event that no dissatisfaction is showed the recommendation will acquire the same legally binding nature of a decision and it will have to be complied with immediately, whereas should any party give timely notice of dissatisfaction the dispute will be finally settled by arbitration or by any court of competent jurisdiction as set forth in the contract.

Pursuant to the AAA rules instead, the recommendation issued by a DRB can never acquire binding nature and it needs to be accepted or rejected within 14 days.

It should be noted that under the ICC Rules, just like in the FIDIC framework, resorting to arbitration is made subject to the previous attempt of a DB procedure. Indeed, the arbitration is conceived as a means of last resort, which comes into play when all other methods of dispute resolutions set forth in the contract have failed[68].

However, the proceeding before the arbitral tribunal does not, as a

[66] (FIDIC, The FIDIC Contracts Guide, 2000)

[67] In this regard, see (Brackin, 2006)

[68] (Dąbrowska, 2019)

rule, constitute an appeal instance in relation to the decision of the DAB[69]. Indeed, it should be regarded as a new and autonomous trial of the case rather than a *revisio prioris istantiae*[70]. This interpretation is confirmed through the wording of Sub-clause 21(6) of the FIDIC Red Book, which states that the arbitrator or arbitrators will have full authority to open, examine and amend any certificates, findings as well as the decisions of the DAAB regarding a given dispute, provided that they have not become final and binding. What is more, none of the parties will be limited to the evidence and arguments previously put before the DAAB, nor to the reasons for rejection stated in the protest, and any decision issued by the board will become admissible evidence in arbitration.

In the largest part of international construction contracts, the arbitration clause refers to the institutional arbitration administered by the ICC but parties are not prevented from resorting to another form of arbitration.

2.5 Issues related to the legal nature and the enforcement of the final determination

As a starting point, it is important to stress that DBs are not arbitral tribunals and therefore their decisions cannot be enforced as arbitral awards[71]. Indeed, it is unanimously agreed that – despite few similarities –

[69] (Bunni, 2005, p. 279)

[70] The expression defines the function of the appeal, which does not give rise to a new and autonomous judgement but only to a review of the issues examined in the trial at first instance. According to this interpretation, it is not possible to submit new questions and raise new arguments in the judgment of appeal.

[71] See Art. 1.2 of the ICC Rules.

they differ considerably especially as far as the institutional rules governing their procedure and functioning are concerned. On that account, a DB determination cannot be deemed equivalent to an arbitral award and its legal nature has to be examined according to the governing law of the contract, meaning that the assessment may vary from one jurisdiction to another.

A comparative analysis of several *civil law* and *common law* systems shows that the decision of a board can be better compared to an *expert determination*, that is a consensual procedure in which a dispute between the parties is submitted to an expert who will render a determination on the matter at stake that will acquire a legally binding nature on explicit consent of the parties[72]. The DB decision is therefore merely binding as a matter of contract between the parties, not having the attitude of a *res judicata*.

Once clarified the ultimate nature and the evidentiary value of a DB decision, another hot issue is related to its enforcement. It goes without saying that, not being equivalent to an arbitration award, a DB determination cannot be enforced under the 1958 New York Convention but only by way of an ordinary action in court for breach of contract which triggers legal consequences in the form of compensation for its improper execution[73]. This greatly reduces the chances of its enforcement and is therefore viewed as a gap in the functioning of the DB as an effective ADR mechanism in international construction disputes.

As already mentioned before, according to FIDIC model rules, all DAB decisions are immediately binding and are to be given prompt effect

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[72] (Calabresi, 2009). In particular, the Author outlines that the legal nature of a DB decision is comparable to: a *neutral interim expert determination* or to an *adjudication* under the 1996 HGCRA in the UK; to the *expertise-irrevocable* in Belgium; to the *expertise-arbitrage* or *Schiedsgutachen* under Swiss law; and to the *perizia contrattuale* in Italy. Yet, the issue is fiercely debated in Italy given that, despite being widely used in practice, the *perizia contrattuale* is not expressly regulated under the law, thus some believe that the DB decision should be encompassed within the contractual arbitration (i.e *arbitrato irrituale)* under art. 808-*ter* of the Italian Civil Procedure Code. For more details on the Italian case, see Chapter 3 below.

[73] (Knutson, 2005)

to, yet they become both final and binding only whether no notice of dissatisfaction is given under Sub-clause 21(4).

However, what happens when a party who is dissatisfied with a DB decision voluntary decides not to comply with it and fails to defer the dispute to the arbitral tribunal or to the competent court as set forth in the contract?

In the event that a decision has become both final and binding but a party has failed to comply with it, the previous mechanism in force laid down in Sub-clause 20.7 of the 1999 FIDIC suite of contracts entitled the other party to refer that failure to arbitration, without needing to obtain another DAB decision or waiting for the amicable settlement period to expire. In other words, the party could adhere either the arbitral tribunal or the competent court only with the view of ascertaining a lack of compliance with the DB decision that ultimately ended up in a breach of the contract. However, both arbitral tribunals and courts had struggled to interpret such clause in a way that allowed for prompt enforcement of the duty to immediately comply with the DB decision without also revisiting the merits of the underlying dispute[74]. What is more, serious practical difficulties arose because Sub-clause 20(7) only referred to final and binding decisions leaving non-final decisions aside[75]. To this end, the final resolution reached by the Singapore Court of Appeal in Persero II provided *a roadmap* for achieving prompt enforcement of binding but non-final decisions[76]. Indeed,

[74] (Dering, 2004). The Author admits that the issue is controversial and he has been unable to identify a predominant view in this regard.

[75] (Bunni, 2005). The Author talks about a "gap" that could arise when Sub-clause 20 is applied in practice.

[76] (Valdès & Schubert, 2017). Indeed, in the paper the Authors outlined that several other authorities supported the legal reasoning advanced by the Singapore Court of Appeal, among them the South Africa court with its decision in Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd allowing the claimant to go directly to court to compel compliance with a binding non-final DB decision; and the ICC decision in case No.15751/JHN in which the sole arbitrator recognized the failure to promptly comply with a binding DB decision as a breach of contract for which damages could be rewarded, being it independent from other disputes arising between the parties.

in this law case the Singapore Court of Appeal overruled the legal reasoning of Persero I[77], according to which the same arbitral tribunal exercising jurisdiction over a failure to promptly comply with a DAB decision must also have reviewed the merits of that decision before it could issue a final award. In rejecting this approach in Persero II, the Court claimed that <<*The dispute over the paying party's failure to promptly comply with its obligation to pay the sum that the DAB finds it is liable to pay is a dispute in its own right which is capable of being finally settled by international arbitration*[78]>>. In short, the Court recognized that a binding but non-final decision of a DAB under the FIDIC Red Book could be directly enforced through arbitration and the arbitral tribunal could exercise jurisdiction over

[77] (CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK, 2011)**.** This is part of the so called "Persero Saga", which is a truly remarkable series of law cases concerning the enforcement of immediately binding non-final decisions issued by a DAB. The dispute began when a DAB decided that the Employer (TPGN) under a Red Book based contract for the design and installation of a natural gas pipeline in Indonesia had to pay the Contractor (CRW) approximately US$17 million of dollars in respect of variations. Due to a lack of compliance by PGN, CRW in 2009 began an arbitration in Singapore relying on the Sub-clause 20.4 to claim prompt payment of the amount. The arbitrators recognized the breach of contract and issued a final award to that effect. However, the Singapore High Court set aside the arbitral award on the grounds that the arbitral tribunal lacked jurisdiction to issue a final award without having also reviewed the merits of the original decision. The Singapore Court of Appeal in turn confirmed the decision but it come up with a different legal reasoning. First of all, it clarified that the arbitral tribunal had jurisdiction to hear the case, but it was supposed to hear also the merits of the underlying dispute. What is more, and this is the added value of the ruling, it acknowledged that pending the arbitral proceeding on the merits, it was still possible to issue an interim or partial final award on the alleged failure to promptly comply with the DAB. Following this decision, the Contractor adhered the arbitral tribunal asking for both an interim arbitral award requiring the Employer to pay the sum, and a final award on the merits. The Contractor received an interim award on the compliance issue and the Employer challenged the second award on the merits. In 2015, the Singapore Court of Appeal by majority ruled in favor of CRW and upheld the interim award. The Court found that binding but non-final DAB decisions could be enforceable by way of final interim awards without referring the secondary dispute back to the DAB and without the need to submit also the underlying dispute to arbitration.

[78] (PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation, 2015)

the issue of prompt compliance independently by issuing a final award without ever exercising jurisdiction over the merits of the same decision.

Following the dicta of the Persero Saga, a new expanded Sub-clause 21(7) was introduced under the 2017 FIDIC Red Book, which now allows any failure to comply with a DAB decision – whether final or non-final – to be referred directly to arbitration. However, in relation to non-final DAB decisions, the right to enforcement by an interim relief or award is subject to the fact that the merits of the dispute are reserved until they are resolved by a final arbitral award. This is also set forth in art 5(4) of the ICC Rules, which claims that if any party fails to comply with a binding or final and binding decision, the other party may refer the failure itself either to arbitration or to the competent court without having to submit it before the DAB first.

Despite these revised provisions under both FIDIC model contracts and the ICC rules, a careful contract drafting is crucial to enable parties to enforce prompt compliance with non-final DB decisions. Indeed, some legal scholars support a form of *justice privée* in this regard by suggesting parties to add liquidated damages or penalty clauses that would apply in case of non-compliance with a determination, such as the suspension of the performance by the party in whose favor the determination was rendered[79].

[79] In this regard, see (Panetta, 2016).The Author makes reference to the views of (Dering, 2004) and (Harbst & Mahnken, 2006). In addition, see also (Valdès & R.Schubert, 2017)

Chapter 3 EVALUATION AND FAMILIARITY WITH THE MECHANISM OF THE DISPUTE BOARD

3.1 Use and implementation of the mechanism worldwide: an evidence-based approach

Since its first official use at the international level in the El Cajon Dam and Hydropower project in Honduras in the '80s, the Dispute Board has come a long way. By most accounts, it has gained recognition worldwide being included as an effective dispute resolution mechanism on numerous types of construction projects of varying size. In particular, its increased success can be registered in Europe, China, South Africa, India and the USA[80].

In acknowledging the development of the DB, it can be useful to adopt an evidence-based approach, that is to rely on factual data showing the positive results achieved by this type of ADR in international construction dispute avoidance and resolution.

To this end, the Dispute Resolution Board Foundation has gathered information about the use of Dispute Boards since 1982 and it has then published a database available online[81]. According to the statistics, DBs have been used on at least 2,700 construction and engineering projects

[80] In this regard, see (Chern C. , 2019). The Author by way of example and without limitation, among the most important infrastructure projects contemplating a DB as mechanism for dispute resolution and avoidance, mentions the followings: the Tagus River Bridge in Portugal; the Xiaolangdi Hydroelectric Power Plant and the Hong Kong Airport in China; the Channel Tunnel Project; the Highland Water Project in Lesotho; and the Boston Central Artery Tunnel Project also known as "the Big Dig".

[81] The database can be found at http://www.drb.org/publications-data/drb-database/.

around the globe with an aggregate value of approximately US$270 billion. Moreover, their effectiveness can be detected in over 98% of the projects, given that DBs' determinations have not gone on to further arbitration or litigation with substantial time and cost savings to all the affected parties.

Considerable interest has developed over the years for this profitable ADR mechanism and many Multilateral Development Banks now support its use. Indeed, in addition to the World Bank, several financial institutions make use of the MDB Harmonised General Conditions in their bidding documentation for construction projects funded by them[82]. What is more, the Japan International Cooperation Agency (JICA) and the Asian Development Bank (ADB) have provided DB training for their borrowers and staff for many years and now accept to include the cost of financing DBs in their loan agreements. On the contrary, the European Banks – despite having included DBs in their standard bidding documents – have not actively embraced their use compared to other IFIs. In particular, neither the European Investment Bank (EIB) nor the European Bank for Reconstruction and Development (EBRD) consider the cost of DBs as legal costs and, as a matter of policy, refuse to include them within their part of the project financing albeit accepting to finance the cost of the FIDIC Engineer instead.

Finally, the business community is currently experiencing the impact that the newest development banks, such as the National Development Bank of Sri Lanka (NDB) and the Asian Infrastructure

[82] See (FIDIC, FIDIC MDB Harmonised Construction Contract). The Harmonised Contract General Conditions have been licensed by several Participating Banks for use on their projects. From 1 March 2007, the Participating Banks have agreed that also some bilateral and international agencies can take out a license from FIDIC to use the Harmonised General Conditions on projects funded by the same agencies. Participating Banks are currently: The World Bank; African Development Bank (AfDB); Asian Development Bank (AsDB); Black Sea Trade and Development Bank (BSDB); Caribbean Development Bank (CDB); Council of Europe Development Bank (CEB); European Bank for Reconstruction and Development (EBRD); and Inter-American Development Bank (IADB). Participating Agencies are currently: AusAID, Australia; AFB, France; JICA, Japan; and EXIM, Korea.

Investment Bank (AIIB) are bringing to the development of DBs[83].

What is more, it should be noted that a different use for Dispute Boards in the context of development banks has to do with the prevention and the detection of corruption and fraudulent practices in large infrastructure projects. It has been found that these contractual machines may be helpful to overseeing the proper use of funds on projects as well as to verifying accounts and final payments.

3.2 The Italian case and the distrust towards the development of "private justice systems"

Despite the undisputed success of the Dispute Board registered around the world, it is necessary to outline that some countries, Italy among all, still show reluctance towards the use and implementation of this extra-judicial mechanism for dispute resolution in construction contracts. What is the main reason for that?

It seems clear that Italy, as well as any other *civil law* system, ascribes a paramount role to the judiciary. Accordingly, the cultural and historical background of the country is hardly accustomed to extra-judicial means for dispute settlement.

One can say that the main fear which in fact paralyses any attempt to develop and implement the DB, and all the other ADR mechanisms in general, lies in the need to avoid the "*dangerous justice privatization*[84]*"*. In other words, there is an instinctive hostility to the expansion of the parties' private sphere of action as far as the administration of justice is concerned.

The heart of the issue is the lack of confidence and sometimes

[83] In this regard, see (Filip De Ly, 2017)

[84] (Bondy, Mulcahy, Doyle, & Reid, 2009, p. 3)

awareness of the existence of alternative methods to settle civil and commercial disputes. One example for all is given by the use of mediation, which is by now one of the most widespread ADRs under the Italian legal system. As a matter of fact, despite the inclusion of a fully voluntary mediation for all civil and commercial disputes concerning disposable rights, most litigants attempt this amicable settlement procedure only because it is imposed by law as a condition precedent to bringing a suit in court[85]. Accordingly, far from being the outcome of a free choice made by the parties to amicably settle their dispute, mediation is conceived as a mandatory precondition to be fulfilled in order to have access to judicial protection[86].

However, even in relation to *civil law* systems it is possible to withstand a paradigm shift in the way the notion of justice is to be intended, thus leading the way to the development of extra-judicial mechanisms for dispute resolution. To this end, the Italian Constitutional Court with the ruling n. 223 of the 19 July 2013 came up with a remarkable interpretation of justice pursuant to art. 111 of the Italian Constitution, claiming that it can no longer be deemed as "*an exclusive and superior prerogative that the State has the duty to provide through the judiciary, but rather as a service that can be effectively rendered by third subjects to whom the parties - within the limits fixed by the Law - agree to refer to in order to achieve*

[85] A preliminary and mandatory mediation attempt in civil and commercial disputes in Italy is imposed by the LD No. 69/2013, converted into law No. 69/2013. The law integrated and updated the provisions of the LD No. 28/2010, which had been declared unconstitutional by the Italian Constitutional Court in 2012. It now establishes four different types of civil and commercial mediation: a voluntary mediation that can be freely chosen by the litigants in every civil and commercial dispute concerning disposable rights; a judicial mediation, that is a court-ordered attempt to mediate; an *ex contractu* mediation, where the mediation attempt is written in a clause of a commercial contract among parties or in a company statute; and a mandatory mediation, which is imposed by law as a condition precedent to bringing a suit in court.

[86] (Majorano, 2012)

justice[87]*".*

Following the dicta of the Italian Constitutional Court, the use of Dispute Boards could be a valid non-jurisdictional form of justice in terms of adequacy, flexibility and time saving of the judicial response. From this point of view, the idea of ADR could be better understood through the simile of the "superhighway[88]", namely it is intended as a part of a large motorway containing several different lanes whose final destination is justice.

As already pointed out in Chapter 1, flagging concerns surrounding the use of Dispute Boards in Italy have been already overcome by the Milan Chamber of Arbitration (CAM) that came up with a Dispute Resolution Board Regulation in force since January 2016, thus boosting the use of the instrument at the international level.

3.2.1 Instruments at the crossroads between Arbitration and the Dispute Board according to the Italian legal system

In spite of what it may seem, it is possible to list several extra-judicial means for dispute resolution encompassing significant similarities with the DB also at the national level.

First of all, the arbitration reform which took place in 2006

[87] (Giudizio di legittimità costituzionale in via incidentale art. 819 ter, c. 2°, c.p.c., 2013). With its decision, the Italian Constitutional Court has declared art. 819-ter, paragraph 2, of the Civil Procedural Code unconstitutional with respect to the *translatio iudicii* between judges and arbitrators in order to safeguard the right to have access to justice as a fundamental constitutional principle. In particular, in acknowledging the analogous and alternative function of arbitration with respect to public jurisdiction, the Court outlines that <<*Anche se l'arbitrato rituale resta un fenomeno che comporta una rinuncia alla giurisdizione pubblica, esso mutua da quest'ultima alcuni meccanismi al fine di pervenire ad un risultato di efficacia sostanzialmente analoga a quella del dictum del giudice statale*>>.

[88] This particular straightforward simile was introduced by Julio César Betancourt in his lecture given at the University of West London, on 8 March 2016. See (Betancourt, 2016)

introduced the contractual arbitration (*i.e. arbitrato irrituale* or *arbitrato libero*) under art. 808-*ter* of the Italian Civil Procedural Code. It owes its origins to a remote decision of the Turin Court of Cassation[89] and it has been expressly regulated later in time. In addition to the ritual arbitration (*i.e. arbitrato rituale*), expressly regulated under the Italian Civil Procedural Code, in which the main function of the arbitrators is to issue a final award having the same effects of a judicial decision, the idea of a purely contractual form of arbitration eventually took place. Under the actual art. 808-*ter,* the parties may establish – by means of an explicit and written contractual clause – that present or future disputes are to be decided by a third and impartial arbitrator without the need to comply with formal rules enshrined in the Civil Procedural Code and with a view to obtaining a final arbitral award having the same effect of a contractual determination among the parties. The jurisdictional nature of the ritual arbitration is therefore superseded by the contractual nature ad effects of this different form of arbitration[90].

As already mentioned in Chapter 1.4.1, one of the major benefits of arbitral awards refers to their enforceability abroad, given that the arbitration agreement is recognized at least in all the Contracting States of the 1958 New York Convention. Despite the evident differences between the ritual and the contractual arbitration, there is a still unsolved issue related to the recognition of the contractual awards pursuant to the New York Convention. In this respect, it should be borne in mind that the Convention in defining its scope of application under Article 1 refers to <<*the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*>>, thereby encompassing all types of arbitral awards

[89] Cass. Torino, 27.12.1904, in Riv. dir. comm., 1905, II, 45.

[90] In this regard, see (Ruffini, 2002). Taking everything into account, the Court of Cassation with the sentence of 19-10-1963, no. 2784, in Giust. civ., 1964, I, 87 has explicitly encompassed contractual arbitration among the legal devices of substantive law rather than among the procedural law institutions.

having binding and final effect between the parties without distinguishing between ritual and contractual arbitration.

By relying on this literal interpretation, the Italian Civil Court of Cassation is inclined to extend the application of the NY Convention also to contractual arbitration[91].

However, the issue is still controversial and there is a fierce disagreement among scholars. Some of them point out that it would be rather paradoxical to have a contractual arbitration award that cannot be enforced under the national law of the State in which it was issued but is enforceable in a foreign legal system, thus being entitled to achieve a more favorable treatment than the one allowed under the domestic law[92].

On the other hand, some criticize this approach by stressing that relevance should be attributed to the will of the parties, which could well be aimed at excluding the enforcement of the arbitral award in their State of nationality while admitting it abroad for reasons of confidentiality, for example[93].

In addition to the contractual arbitration, there are two further instruments which are worth mentioning: the arbitrage clause (*i.e. clausula di arbitraggio*), regulated by art 1349 c.c., and the expert determination (i.e. *perizia contrattuale*) which is instead widespread in practice. These two

[91] In this regard, see: Cassazione civile sez. un., 18/09/1978, n.4167, according to which the NY Convention on the Recognition and Enforcement of Arbitral Awards applies regardless of the ritual or contractual nature of foreign arbitration, given that the determining factor is the written arbitration agreement which states the willingness of the parties to submit the dispute resolution to a third party; Cassazione civile sez. I, 15/12/1982, n.6915 according to which the NY Convention can also be applied to arbitral awards that would be qualified as contractual under the Italian law, given that the necessary condition for a foreign award to be recognised by another member State pursuant to Article V. 1 (e) of the New York Convention is that the award has become binding upon the parties; and Cass., 15.6.2002, n. 9281 which in fact equals the contractual arbitration to the ritual arbitration under the 1958 NY Convention.

[92] Of this view are (Briguglio, 2005); (Bove, 1999); and (Marinelli, 2002)

[93] (Ravidà, 2008)

extra-judicial devices bear several structural similarities and are rather discernable from a functional perspective[94]. In both cases, the parties agree to refer to one or more experts, accurately chosen for competence and professional qualification, the task of delivering a technical appreciation on a specific issue and then to recognize it as binding upon them.

The essential difference lays in their ultimate role, given that in the arbitrage the expert performs a constitutive activity aimed at completing or integrating the content of a legal agreement that has already been concluded among the parties albeit not being fully perfected in one of its constitutive elements, such as the price determination. This creates a peculiar form of cooperation between the parties and the third subject, according to which the former agree to rely either on the expert's "*arbitrium boni viri*" or on his/her "*arbitrium merum*[95] *"*.

On the other hand, with the expert determination the parties agree to entrust a third expert with the task of solving a dispute which has arisen between them in relation to a contract already completed in all of its constitutive elements. It is clear that in this last scenario the expert does not perform any kind of constitutive activity, but is called to deliver a technical appreciation on an essential element of a pre-existing legal relationship, fully completed, whose outcome will be binding upon their agreement. The expert is chosen by the parties by reason of trust and competence and is expected to act in compliance with the rules of art without having any relevance his or her own personal discretion.

The expert determination falls within the "private justice" system and it is comparable to the contractual arbitration since both instruments are aimed at achieving the same substantial effect, which is to settle a dispute

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[94] (Tizi, 2016)

[95] In this regard, see (Torrente & Schlesinger, 2019) . In the first situation the expert acts according to an equitable appreciation of the facts and the parties may challenge the determination whether it appears to be manifestly wrong or unfair, whereas in the second scenario the expert acts according to his or her own full discretion and the resulting determination won't be questionable except after having proved the expert's bad faith.

by means of a resolution that is voluntarily accepted as contractually binding by the parties. According to the Court of Cassation[96], what actually differentiates the expert determination from the contractual arbitration is the peculiarity of its subject, which concerns a specific technical matter rather than the whole legal relationship as such. Despite that, the close connection between the two instruments enables most scholars and case law to encompass the expert determination under the rule of art 808 *ter* c.p.c.[97].

In the end, all the aforementioned instruments share common features that allow to distinguish them from adversarial systems: they all represent extra-judicial remedies for dispute avoidance and resolution and they all find their source in a contract, thus the resulting determination has only a contractual value and it cannot be directly enforced like an arbitral award.

Moving on to the issue of the legal nature of a DAB decision in Italy, it should be noted that, among the few respected specialist academic publications on the matter, the contribution of U.P Griffi really stands out. By relying on a decision of the Court of Appeal of Rome [98] that ascribed to the Engineer's determination the same legal value of a contractual arbitration award, the author reaches an *a fortiori argument* by pointing out that the same nature should be recognized to the final and binding decision of a DAB, which – compared to the Engineer's determination – also presents the characteristics of independence and impartiality in relation to all the

[96] Corte di Cassazione, civile, sez III, 28/06/2016, sentenza no. 13291-2016

[97] See in particular (Bossi, 2012). The Author claims that there is pacific agreement among legal scholars and jurisprudence in recognising the expert determination as a special kind of contractual arbitration due to its contractual nature. In acknowledging the fact, the Author makes reference to the following rulings: Cass. 15 May 2003, n 7516.

[98] Corte d'appello di Roma, 21 luglio 1997, ricorrente Consorzio interprovinciale fra le Imprese Pugliesi di costruzione I.P.C.

interests at stake[99].

However, by fitting this interpretation with the leading case-law[100] that – as we said before – recognizes the enforcement of contractual awards just like ritual awards, one can get to the wrong assumption that it should be possible to directly obtaining the recognition and enforcement of a DAB decision under the rules of the NY Convention.

This assumption contravenes with the international practice in this matter, which ascribes a purely contractual value to a DB determination and allows it to circulate abroad only as a simple contract. Hence, in order to avoid any misunderstanding, it seems more appropriate to state that the expert determination is the extra-judicial means that most closely resembles the nature of a DAB determination according to the Italian legal framework[101].

3.2.2 Prospects for future development: the inclusion of a Technical Advisory Board pursuant to art. 1, paragraphs 11-14, DL no. 32/2019 (better known as "*Decreto Sblocca Cantieri"*)

Apart from the debate surrounding the three extra-judicial means for dispute resolution examined above, which are deeply rooted into the Italian

[99] (Griffi, 1998). The Author refers to the DB as an "arbitration of fourth generation". According to his view, the qualification of a DB decision as a contractual arbitration award should not be excluded by the fact that the members of the board are not arbitrators, nor by the fact that in case of dissatisfaction with the DB determination the parties are entitled to challenge it before an arbitration tribunal.

[100] See the jurisprudential guideline described *supra* in footnote no. 89.

[101] This conclusion is reached by (Calabresi, 2009, p. 162). The Author claims that the decision of the DB can only be compared to an expert determination *strictu sensu* and, being it encompassed under the discipline of the contractual arbitration ex art 808 *ter* c.p.c., she disagrees with the view of those scholars who recognize the possible enforcement of contractual arbitration awards just like ritual awards.

legal framework or in any case widespread in practice, it is worth mentioning the introduction of a new legal device in the field of public construction contracts which is inspired, as parameter of reference, by the Dispute Review Board.

Indeed, the recently adopted DL no. 32/2019[102] (better known as "*Decreto Sblocca Cantieri*") converted into Law no. 55/2019 included – albeit on a temporary basis – a Technical Advisory Board (i.e. *Collegio Consultivo Tecnico*, shortened to "CCT") under art.1, paragraphs 11-14[103]. The law decree has brought a radical reform of the Code of Public Contracts, providing for the amendment of almost half of its articles with the aim of promoting the economic recovery of the Italian productive system.

To be more specific, a similar Technical Advisory Board had been previously introduced under art. 207 of the Law no. 50/2016 as a way of reducing the number of pending proceedings in civil matters. In particular, art. 207 brought a significant innovation in the field of litigation especially in the context of alternative remedies to judicial protection by providing a valid tool to settle disputes between the parties, which is built upon the international counterpart of the Dispute Review Board.

The Technical Advisory Board was conceived as an optional form of preventive assistance provided by a panel of three members for a rapid resolution of possible disputes arising during the execution of the

[102] The DL no. 32/ 2019, "*Disposizioni urgenti per il rilancio del settore dei contratti pubblici, per l'accelerazione degli interventi infrastrutturali, di rigenerazione urbana e di ricostruzione a seguito di eventi sismici*", deals with urgent provisions for the revival of the public contracts sector, for the acceleration of infrastructural interventions, urban regeneration and reconstruction following earthquakes.

[103] According to paragraph 11, the CCT has a temporary validity until the entry into force of the Regulation referred to in article 216, paragraph 27-octies of the d.lgs. 50/2006. To date, the potential for an effective use of the CCT is still weak since the final approval of the Regulation has been postponed only a draft single regulation has been produced on 13 May 2020 containing provisions for the execution, implementation and integration of the Public Contracts Code, which has not made any reference to the CCT.

contract[104]. The CCT had to be appointed at the signing of the contract or within the first period of performance as a way to ensure that the relationship between the parties was not compromised. However, since its very introduction, the CCT has been harshly criticized by the Council of State and the Italian Anticorruption Authority (ANAC[105]). Accordingly, in its Opinion No 855/16 the Council of State called for its repeal because it was not clear both whether the recourse to the CCT constituted an alternative to the amicable agreement (i.e. *accordo bonario*[106]) and how the two legal devices actually related to each other. Furthermore, no definition of the concept of "dispute" was provided under the law, thus widening without limits its scope of application[107]. In addition, during a parliamentary hearing concerning the implementation of the EC directives on public contracts, the ANAC President raised several flagging concerns surrounding the

[104] (Giuffrè & Tranquilli, 2019)

[105] The Italian Anticorruption Authority (ANAC) is an independent administrative authority charged with the prevention of corruption in public administrations, subsidiaries and state-controlled enterprises.

[106] The amicable agreement is an extra-judicial means for dispute resolution in public construction contracts set forth under art. 205-206 of the d.lgs. 50/2006. It provides that the RUP (*i.e.* the responsible for the procedure) may request the Arbitration Chamber to come up with a shortlist of five experts with specific competence in relation to the subject of the contract. Later the Rup, in agreement with the Contractor, chooses one expert among them. The expert, within 90 days from the appointment, formulates a reasoned proposal for an amicable agreement that, should it be accepted by the parties within 45 days of its receipt, marks the conclusion of the amicable agreement and holds the same legal value of a compromise (i.e. *accordo transattivo*).

[107] In particular, the Council of State stressed that *<<I casi di controversie che possono eventualmente sorgere non sono facilmente definibili. La norma, in particolare, non chiarisce se il ricorso al comitato consultivo costituisca un sistema alternativo all'accordo amichevole e come le due istituzioni si relazionino effettivamente l'una con l'altra. Infine, questa disposizione potrebbe incidere sui compiti della Camera Arbitrale e sollevare problemi di compatibilità con il criterio della delega di cui alla lettera aaa), art. 1 n. Legge 11/2016. Alla luce di tali criticità, si propone di sopprimere la disposizione>>*.

functioning of the CCT[108]. First of all, art. 207 was deemed to be too vague in its content and since it relied on the contractual arbitration as reference model, it affected the tasks and functions of the Arbitration Chamber[109] by circumventing the law which prescribes that arbitration in public contracts can only be institutional or administered. What is more, the President raised the issue of impartiality and independence of the CCT members. Parties – just like in the amicable agreement – are entitled to appoint the three members of the board without having to comply with any further requirement.

It is due to these fierce criticisms that art. 207 was repealed by the d.lgs. 56/2017. However, in line with the proposal [110] raised by the Commission for the Reform of Arbitration and ADR in Italy in 2017, the CCT was reintroduced under art.1, paragraphs 11-14 of the DL no. 32/2019, converted into Law no. 55/2019.

According to the new regulation, parties may agree that – before the commencement of the project or within 90 days from that date – a Technical

[108] The parliamentary hearing was held on 17 March 2016 and the President of the ANAC claimed that*: << il CCT consente, infatti, l'introduzione di un sistema alternativo (meno garantito sia nei presupposti che nelle modalità di funzionamento) all'accordo amichevole e che, inoltre, non sembra nemmeno trovare un collegamento sicuro nella legge delega. Le parti, infatti, possono designare le tre componenti del CCT - senza alcun intervento da parte di terzi, come nel caso dell'accordo bonario- come assistenza per tutta la durata del contratto, compresa la possibilità di proporre possibili soluzioni alle controversie che possono poi essere incorporate in operazioni concrete. D'altra parte, inoltre, il CCT, per esplicito accordo delle parti, potrebbe anche avere la funzione di assistere nella risoluzione delle controversie sorte durante l'esecuzione del contratto; in tal modo, trasformandosi in una sorta di arbitrato irrituale, incide sui compiti e sulle funzioni della Camera Arbitrale ed elude, nella sostanza, il criterio della delega di cui alla lettera aaa), secondo cui l'arbitrato negli appalti pubblici può essere amministrato soltanto>>*.

[109] This is the Arbitration Chamber established at the ANAC pursuant to art. 210 of the d.lgs. 50/2006.

[110] (Alpa, 2017). The Commission for the Reform of Arbitration and ADR was created by the Minister of Justice Andrea Orlando and chaired by Guido Alpa. In 2017, the Commission came up with a proposal in the matter of public contracts with a view of reducing the number and the length of judicial proceedings as well as of assuring foreign investors on credit recovery.

Advisory Board is set up in order to assist them with the rapid resolution of possible disputes that may arise during the implementation of the contract. The CCT consists of three members with appropriate experience and professional qualification in relation to the nature of the contract who are approved by the parties. In this sense, there is a remarkable difference with the international counterpart, given that for the CCT a fixed three-members size board is imposed.

What is more, in the event of a dispute arising between the parties, the CCT may informally hear them in order to facilitate its rapid resolution. If the parties agree to endorse the final determination reached by the CCT, the following agreement will not have the same legal value of a compromise, unless the parties decide otherwise.

Taken everything into consideration, the CCT has some crucial differences compared to the DRB developed at the international level. Among them, one can list the non-binding nature of the CCT determinations that may be accepted by means of an agreement between the parties; the lack of specific obligations of impartiality and independence imposed upon its members; and the fixed three-members size composition. Despite these shortcomings, the introduction of a DRB counterpart into the Italian legal system can be viewed as a positive attempt to familiarize with the existence of such a useful alternative mechanism for solving the technical issues that may affect the executive phase of the construction contract. With a view to future improvement, it would be particularly useful to enact specific guidelines to govern the procedure before the CCT. Thanks to this support, it is likely to grow in popularity and use.

3.3 Going beyond the mechanism of Dispute Boards for dispute avoidance and prevention: the partnering experience

3.3.1 Nature and features of the instrument

Moving to the *common law* experience with ADRs, one can take the U.S. as point of reference. Not surprisingly**,** the birthplace of modern Dispute Boards is traced back to Colorado with the 1975' Eisenhower Tunnel Project. Since then, despite the increased use of the mechanism in the U.S. construction industry, there has been a relatively recent attempt to go even further with the implementation of a more efficient and less expensive means for dispute prevention and resolution.

It has been observed that, in order to reduce considerably the potential for disputes in the business industry, it is of paramount importance to provide a cooperative environment in which all the key project participants and their employees share the same goals and engage in a constructive dialogue aimed at reaching appropriate and satisfactory compromise solutions.

According to the American experience, the most suitable means to achieve this goal is called "partnering" (also known as "structured collaboration" or "alliancing"). This is a voluntary system established early in the project lifecycle that engages all the parties and the multiple stakeholders in a proactive dialogue with a view to achieving mutually beneficial goals in a win-win logic. It is characterised by a positive and cooperative spirit that enables multiple subjects to reach an agreement on the objectives to be pursued by improving communication and collaborative attitude.

Partnering was first established in the US in 1991 under the impetus of two pioneering construction projects in which the tangible benefits of the

instrument were perceived concretely[111].

As a matter of fact, having witnessed the substantial savings in costs and time, the Corps of Engineers came up with the first formal partnering program in the construction industry after a meeting was held between the most influential managers and leaders in Atlanta, Georgia. It comes with no surprise that the pamphlet which followed the meeting was fully endorsed by the business industry and it boosted the development of many partnering programs both at the State and the private level.

In addition to this new trend in the US building industry, one can also list the approach followed by the UK North Sea oil and gas industries in the early 1990s. This form of partnering, better known as *alliancing,* differed typically from the US Corps of Engineers' initiative being the former characterised by a set of individual contracts between the Employer and each alliance member, plus an additional umbrella agreement binding all parties to the alliance. In 1994 Sir Michael Latham, commissioned jointly by the government and the construction industry, came up with a "Constructing the Team report" recommending the use of project partnering as a way to improve the Employer's satisfaction in the UK industry and indicating the New Engineering Contract (NEC) from the Institute of Civil Engineers (ICE) as the most accurate tool for its implementation [112].

Generally speaking, partnering can be distinguished from other widespread forms of collaborative working, such as joint ventures between contractors, in the way it requires the cooperation and alignment between

[111] See (Edelman, Carr, & Lancaster, 1991). The first project – Oliver Lock and Dam Replacement – was in 1988 and involved a $110 million replacement lock and dam on the Black Warrior-Tombigbee Waterway at Tuscaloosa, Alabama, to substitute an old undersized lock. The second project – Bonneville Dam Navigation Lock – followed shortly thereafter in 1989 and was a $330 million navigation lock replacement. The use of partnering on these two projects was highly acclaimed by the participants, especially the Chiefs of the Construction Divisions, Dan Burns in the Mobile District and Howard Jones in the Portland District.

[112] (Skeggs, 2003)

all the participating companies to achieve common goals[113].

In particular, two main categories of partnering can be listed: long-term partnering (also known as strategic alliancing), which covers the provision of services over a specified period of years; and project-specific partnering, which is an agreement tailored to a single specific project[114].

Moving on to the functioning of the partnering process, it should be noted that in absence of an adequate and precise definition of partnering, there is a division between those who conceive it as an informal and organic project management and those who regard it as a more formal and instrumental strategy that involves the deployment of a widespread set of systems, practices and procedures. According to the latter view, three main phases can be identified[115].

The first step is the partnering preparation starting early with senior management commitment. Stakeholders contractually agree to use partnering at the start of a project, select a third-party neutral facilitator, and set up time and agenda for the initial partnering meeting. Indeed, an effective partnering program is based on a bottom-up cooperation, securing support and personal engagement of the top management from both the Owner and the Contractor.

The second step is the initial partnering workshop, which is held before the beginning of the project construction between the parties and the key stakeholders, who are interested in the best completion of the work, and it is facilitated by a neutral adviser. Participants are required to adopt predefined templates for the analysis of the critical issues that may arise as a way to avoid asymmetry of information, which could in turn jeopardise

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[113] In this regard, the definition given in (Bennett & Jayes, 1998, p. 4) can be of help: *<< Partnering is a set of strategic actions which embody the mutual objectives of a number of firms achieved by cooperative decision making aimed at using feedback to continuously improve their joint performance>>.*

[114] (Scott, 2001)

[115] (Fasel, 2000)

the outcome of the workshop. All in all, the workshop is designed to enhance team spirit and problem solving, and it may also include a voting system for the adoption of joint solutions. The discussion group is entrusted with the task of drafting a project Charter, that is the visual plot of broad project goals to be achieved signed by all the participants.

It should be noted that the Charter is not intended to replace the main construction contract, indeed << *Partnering is not a contractual agreement, nor does it create any legally enforceable rights and duties*[116]>>. Hence, it mainly focuses on human working relationships rather than on the underlying contractual relation between the parties, which is most commonly prone to generate an adversarial attitude. In other words, time and energy is mainly invested in the project completion with a view to preserving the underlying business relationship between the parties instead of maintaining an adversarial position.

The first chapter of the project Charter contains the mission statement, that is a short proclamation of the project's key objective. What is more, participants to the workshop are expected to reach an agreement to a problem-escalation ladder, which points out the various steps to be undertaken to resolve issues before they escalate into formal disputes by identifying the individuals across organizational boundaries to address them within a fixed time before moving up to the next rung on the ladder.

The last step is the evaluation system, which is implemented through regular follow-up meetings where an assessment of the partnering success is carried out and participants may share any new circumstance that has emerged work in progress. Evaluation via periodical joint sessions is crucial to keep the structured collaboration always active and updated. When the project is complete, the stakeholders can use final evaluation forms to measure whether the project goals were achieved as well as the results of the partnering process, thereby suggesting eventual changes.

Overall, it has been noted that the key ingredients for a successful partnering are cooperation, trust, mutual benefit, fairness, good faith, team

[116] (Edelman, Carr, & Lancaster, 1991 , p. 1)

work, open communication and problem solving.

When the partnering program takes account of these multiple elements, it creates the most suitable environment for preserving working relationships in which all the various concerns are put into the pot for accurate evaluation. What is more, maintaining the integrity of commercial relationships means establishing a long-term alliance between the parties, thereby creating a valuable incentive for future business.

However, some have pointed out that the real added value of partnering lies in its being an embodiment of the obligation of good faith in the contract implementation[117]. According to this view, compliance with the partnering program implies, in broader terms, compliance with the general canon of good faith. Therefore, good faith is "crystallized" by means of a structured collaboration and translated into practical terms, thereby avoiding all the issues connected to the vagueness of its notion such as the need to resort to the Court in order to define its scope and limits[118].

It goes without saying that the benefits of the mechanism in terms of costs and time savings are particularly tangible when compared to litigation's delays and expenses. Although they may vary, partnering costs generally range from $500 to $10,000 over the life of the contract and are limited only to a facilitator and a meeting room, thereby avoiding all the massive arbitration and lawyer fees.

In addition, parties may benefit from a long-term profit, which has

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[117] In particular, see (Kleckner M. E., 1995). The Author argues that a claim in international construction contracts <<*può anche essere la materializzazione dell'obbligo di buona fede nell'esecuzione del contratto*>>. In other words, it can embody the duty of good faith.

[118] Many jurisdictions – especially French, Italian, German and UAE Civil Codes – expressly include references to the concept of good faith in commercial dealings. In contract law, the clause of good faith imposes upon each party an obligation of fair dealing in the making, performance and interpretation of the contract so as not to jeopardise the right of the other contracting party. This is a general clause, meaning that it is difficult to find a precise, positive and unequivocal meaning of good faith. Accordingly, parties generally are forced to resort to the Court in order to define its scope and practical implication.

to do with the building up of a lasting commercial relationship.

However, there is still considerable debate surrounding the nature and the merits of a partnering approach[119]. It has been noted that partnering alone cannot account as an adequate ADR, given that the good will of the parties is not always powerful enough to deal with all the critical issues resulting from a partnering workshop.

What is more, divergences are likely to arise between the partnering collaborative conduct and the logic underpinning the main construction contract, which is built upon a commercial relationship. In other words, a real tension develops between the need for trust between clients and contractors on the one hand, and the very rational economic reasons that predispose contractual partners to act in more adversarial ways.

Despite that, one of the major challenge is about overcoming the cultural barriers of the different participants, given that international construction contracts involve multinational subjects from a different political, legal, economic, and cultural background. Therefore, cultural alignment among different organizations turns out to be the *conditio sine qua non* of a successful partnering and it implies that several organizations share some common fundamental basic values, attitudes and beliefs. Consequently, unless there is some intrinsic compatibility between the different organizations involved from the very beginning, they will need to change their ways of working to support collaborative approaches and this change is truly unlikely to take place in practice[120].

All things considered, the comprehensive cooperation to achieve mutual benefits and common development as well as the active communication between multiple stakeholders underpinning the partnering

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[119] (Schultzel & Unruh, 1996)

[120] (Bresnen & Marshall, 2000). In acknowledging the fact, the Authors claim that <<*another complicating factor is that the existence of "subcultures" within manufacturing organizations may be associated with horizontal and vertical differentiation, specifically, departmental specialization and hierarchical stratification that make in practice very hard to achieve cultural alignment*>>.

program can turn out to be an effective preventive medicine to avoid the resort to litigation in construction disputes.

On that account, it is desirable for the future to disseminate the positive American partnering experience in the major construction contracts tendered internationally. As a starting point, raising awareness of the existence of this type of ADR is likely to favour its growth in leaps and bounds.

To date, partnering still hides in the shadows and its benefits are unknown in most jurisdictions. There is still a growing need for a more systematic and in-depth research into the nature and the feasibility of a partnering approach. In particular, the first step towards partnering implementation is expected to be taken by the most influential international financing institutions that still lack specific policy on the topic.

As a matter of fact, an increase in awareness is likely to provide the business community with a viable alternative management practice to effectively avoid disputes in international construction contracts without adversely affecting project performance.

Once having assessed the high success rate of the Dispute Board as an alternative means for dispute resolution and dispute avoidance in international construction contracts, a more accurate evaluation of the mechanism should be provided. To begin with, among the positive features to outline, there is the fact that the board turns out to be much more credible and authoritative than the Engineer since it is fully independent from the parties and neutral in relation to the construction project. As a result, the DB is exempted from all those criticisms raised on a conflict of interest ground with respect to the Engineer and the Owner.

Moreover, the added value brought by the DB lies in its role of informal assistance performed through a "project-based approach".

The DB follows the project step by step, taking action in the exact moment a controversy arises. Especially when it comes to standing DBs, which are appointed before the construction work has begun, the regular presence in the "battle field" ensures direct knowledge of the facts as well as time and costs savings compared to an *ex post* submission of the dispute to an outsider such as an arbitrator or a judge.

On that account, << *The key is to get people thinking about dispute avoidance, not letting the issue get to the stage of potential trench warfare*[121]>>. In other words, the business community has chosen to rely on a "*legal equivalent of preventive medicine*[122]*"* acting by means of regular checkups in the context of repeated job-site visits rather than intervening when the dispute has already become "an end stage disease". Indeed, the DB acts as a dispute minimizer by providing a real-time conflict control being promptly available and capable of intervening immediately. If the

[121] (Battrick & Brown, 2017, p. 21)

[122] This expression is used by (Panetta, 2016, p. 162)

parties accept the experts' suggestions, the DB operates as a circuit breaker that avoids the crystallization of formal disputes.

In addition, the flexibility of this contractual machinery should be highlighted when compared to traditional litigation. The DB procedure is informal and it is based on the full cooperation between the parties pursuing a friendly and business-oriented approach. Indeed, the DB may be viewed as a *"quick and dirty"* mode of justice[123], which is more pragmatic and favours the dejudicialization of the procedure with the intervention of lawyers reduced below the limit and the commercial relationship between the parties strengthened as much as possible.

Another advantage lies in the composition of the board, which consists of experts in specific technical matters related to the contract with a deeply heterogeneous background. This high level of expertise has an impact on the quality of the final determination, whose authority will be very difficult to challenge in a subsequent legal forum.

Furthermore, what cannot be overlooked is also the psychological element of the DB procedure that, by creating a less hostile and confidential environment, encourages a *win-win philosophy*[124] satisfying all the affected parties. Indeed, they tend to avoid supporting frivolous or aggressive positions, which may compromise their credibility in front of the panel fearing its judgment in view of further and subsequent disputes. In other words, the idea is that there are neither winners nor losers, but each party comes out half-defeated because the need to reach a compromise setting of the facts is preferred over ascertaining the truth in view of a greater good, namely the completion of the project in the fastest and cheapest way possible.

On the other hand, a thorny issue laying at the middle state between merits and demerits of a DB refers to its cost. It is clear that one of the main incentives for the parties to rely on ADRs is the profit gained from saving

[123] (Neuberger, 2013)

[124] (Owen, 2003, p. 21)

the massive expenses of litigation. However, when it comes to the Dispute Board there is little empirical evidence to support its effectiveness in saving costs. The issue is that a full appreciation of its costs is linked to several parameters, such as the overall duration of the procedure. It is not possible to estimate *ex ante* how busy a board will be and, in the worst case scenario where no dispute arises between the parties, it may never be summoned.

According to statistics provided by the Dispute Resolution Board Foundation, the estimated cost of a standing DB may range from 0.05% to 0.25% of the contract value for more difficult projects[125]. It goes without saying that these are highly positive percentages when compared to international arbitration, where costs are normally in excess of 10% of the contract value.

Generally speaking, DBs involve both direct and indirect costs that are fixed sums to be shared equally between the parties irrespective of the result achieved[126].

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[126] In particular, according to the Appendix to the Red Book, the DB members shall be paid as follows in the currency named in Dispute Adjudication Agreement:

(a) a retainer fee per calendar month, which shall be considered as payment in full for:

(i) being available on 28 days' notice for all site visits and hearings;

(ii) becoming and remaining conversant with all project developments and maintaining relevant files;

(iii) all office and overhead expenses including secretarial services, photocopying and

office supplies incurred in connection with his duties; and

(iv)all services performed hereunder except those referred to in sub-paragraphs (b) and (c) of this Clause

(b) a daily fee which shall be considered as payment in full for:

(i) each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and the site, or another location

of a meeting with the Other Members (if any);

(ii) each working day on site visits, hearings or preparing decisions; and

(iii) each day spent reading submissions in preparation for a hearing.

The direct costs of DBs comprise a retainer for each member of the panel, a daily fee per site member for site meetings and dispute determinations, and travel time and expenses. In addition, there are also indirect costs connected to the contracting parties' employees' time in preparing for and participating in DBs' meetings.

It is suggested that the perceived costs – as we said usually lower than 0.25% of the final contract price – that make DBs relatively expensive compared to other ADRs, should be viewed as an "insurance cost" paid as a way to protect the contracting parties from the risk of a costly legal dispute eventuating[127].

It goes without saying that the major saving related to the use of Dispute Boards involves the lack of arbitration and lawyer fees. What is more, there are also reduced costs of delays because disputes are dealt with step by step, thereby avoiding an accumulation of claims and favoring the business relationship between the parties. Indeed, according to the statistics of the DRBF, over 98% of disputes referred to DBs conclude the matter at issue, either directly or as a result of the parties placing their trust on the DAB's decision or DRB's recommendation as a basis for settlement. Hence, the well-known remark ''justice delayed is justice denied'' turns into an inspirational quote for DBs, as a way to avoid festering disagreements, which ultimately cause uncertainty and massive damage to the contracting

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(c) all reasonable expenses incurred in connection with the Member's duties, including the cost of telephone calls, courier charges, faxes and telexes, travel expenses, hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (b) of this Clause;

(d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

[127] The idea of fixed DBs costs paid as an "insurance cost" is conveyed by (Charrett, 2009, p. 14). The Author claims that just like a common insurance *<<We understand that paying the known amount of an insurance policy will protect us from the indeterminate and potentially financially crippling costs that could occur if the risk event occurred>>*.

parties[128].

As already mentioned, the Dispute Board has been valued as the rising star of ADR in international construction contracts[129], yet not all stars shine so bright.

Indeed, a proper evaluation of the instrument calls also for the detection of its main drawbacks. The first disadvantage connected to the use of DBs concerns the effectiveness of the final determination and its enforceability. It has been previously stated that DB proceedings end up with decisions which are binding only as a matter of contract between the parties, thereby not being enforceable as arbitral awards. Hence, when a party who is dissatisfied with a DB decision voluntary decides not to comply with it, the other party has to resort to arbitration in order to obtain an interim award recognizing its provisional enforcement, thus further delaying the resolution of the underlying dispute[130].

Besides, another weak point concerns the composition of the panel, which is made of experts selected at the commencement of the project when the parties are still unaware of the specific technical issues that will give rise to future conflicts. This makes difficult to detect *ex ante* the branch of engineering with the proper expertise that will be needed. To make matter worse, a current recent issue has been raised in relation to the need to expand the pool of qualified DBs' members, given that on the one hand reluctance is showed towards the inclusion of construction lawyers among the experts constituting the panel due to the technical nature of the matter at issue and, on the other hand, engineers usually lack adequate experience in the legal

[128] (Harmon, 2003)

[129] See footnote 21, Chapter 1.4.2.

[130] (Capasso, 2018). On that account, the Author investigates the possibility to introduce a *DB-arb model*, namely turning DB experts into arbitrators in relation to the same project by entrusting them with the power to decide disputes by means of plainly enforceable decisions.

field making dispute settlement hard to achieve.

A further pitfall lies in the fast and summary character of the DB procedure, which defects the rigor and accuracy typical of adversarial proceedings. This may imply that some principles of natural justice – among all, the principle of *audi alteram partem* – are likely to be neglected in absence of an express provision, given that the DB members do not act in a judicial capacity[131]. In addition, DBs also lack a robust body of case law because of the confidentiality requirement, which entails that determinations cannot be published. On that account, there might be cases in which parties seek to obtain a public ruling or a binding judicial precedent, hence recourse to ordinary jurisdiction can turn to be more suitable for them.

A last practical concern deals with the pragmatic nature of construction contracts, which are commonly part of a wider suite of interlinking contracts, involving multiple and often overlapping parties[132]. This generally implies that when a dispute arises, it arises under multiple project contracts that may in turn include different dispute resolution clauses. This disparity can lead to a series of concurrent proceedings in relation to the same, or similar, issues linked to the main project, potentially resulting in conflicting decisions.

It is clear that, being DBs designed for two-party disputes only, it is cumbersome to adjust them to multiple parties' settings. Indeed, when projects involve multiple contractors or layers of sub-contractors an option may be to rely either on a common DAB or on an "Interlocking" DAB member who sits on a number of boards within the same project[133]. However, procedural and administrative issues are likely to arise in such scenario especially with regard to confidentiality and admissibility.

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[131] See, (Jenkins & Stebbings, 2006, p. 219)

[132] (Draetta, 2010)

[133] This solution has been reached by (Owen, 2003, p. 26)

All things considered, what can be discerned from our final evaluation is that, whether litigation or DB is chosen as dispute resolution procedure, there are both positive and negative aspects. However, the advantages connected to the implementation of preventive methodologies outweigh the disadvantages in terms of time and costs involved in traditional litigation. In the end, it seems appropriate to share Abraham Lincoln's advice: << *Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, expenses, and waste of time*[134]>>.

[134] (Burger, 1982, p. 274)

CLOSING REMARKS

As a way of conclusion, the following quote from Sandra Day O'Connor – Associate Justice of the Supreme Court of the United States from 1981 to 2006 – seems particularly straightforward: << *The courts should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried*[135] >>.

The idea that has been conveyed in these three chapters is that, in order to achieve the best result from an international construction project, disputes must be reduced to the minimal. How to achieve this aim? The answer can be stated in a single word: prevention.

Members of the business community have come to the final conclusion that an ounce of prevention is worth a pound of cure, thereby taking some precautions from the early beginning of a project implementation can avoid the escalation of disagreements into formal disputes. From this perspective, we have seen that the introduction of standing Dispute Boards among the ADR mechanisms in international construction contracts has partially managed to fulfil this need. In particular, DBs play the role of peacemakers by assisting the parties to slip through the net of potential disputes if possible or, if not, to assist them to a speedy, cost-effective and acceptable resolution of disputes, thus avoiding the resort to arbitration or litigation.

The highly qualified panel of independent experts constituting the DB meets on regular site visits together with representatives of the Employer and the Contractor, where it becomes conversant with the project, acquires an up-to-date first-hand knowledge of all the relevant issues which are likely to give rise to formal disputes, and delivers informal advisory opinions with the acquiescence of both parties.

It has been noted that this "job-site level approach" is mainly

[135] (National Institute of Justice, 1986, p. 2)

intended to facilitate open communications with the contracting parties, to build up trust and cooperation, and to preserve long lasting business relationships. When the dispute avoidance mode is on, the DB can turn out to be a valuable ally for the best success of the project. Indeed, << *The contractual parties, just like partners in a marriage, must recognize that differences are bound to occur, and when they do, it is better to address them contemporaneously rather than sweep them under the rug*[136]>>. An effective dispute prevention mechanism, such as the DB, can assist the parties to face their differences through, just like a "marriage counsellor".

In line with the frantic search for the most effective legal equivalent to preventive medicine for disputes arising in the execution of international construction projects, a continued effort to promote dialogue and a collaborative work environment is crucial. Traditionally, cooperation between multiple subjects in the construction industry has been the driving force which led to a timely and prompt completion of large complex infrastructures. Accordingly, we have talked about the American initiative to spread the use and the implementation of project partnering as an effective way to move away from litigation. The commitment required to the contracting parties and all the project stakeholders is to align common objectives in view of the project well- being with a trustful and cooperative spirit.

One of the main ambition of this thesis was to provide a root cause analysis of the undeterred distrust towards extra-judicial means for dispute resolution in civil matters, which has an ultimate impact on the implementation of the examined ADR mechanisms in most civil law systems. On that account, we have seen how historical backgrounds and lack of awareness are practical obstacles that hamper any fundamental improvement in the construction field. Having outlined all the issues connected to the *modus operandi* of traditional litigation, the intention is to broaden the appeal for the acknowledgment of the benefits connected to the use of DBs and project partnering.

[136] (Harmon, 2003, p. 197)

All in all, the appeal is mainly addressed to legal practitioners. Indeed, it has been pointed out that << *The new generation of lawyers should be in a position to know and sufficiently understand the various forms of decision making, and litigation, to be sure, is only one of them […] Accordingly, it can be further argued that "the best lawyer" is not necessarily the one who wins most cases that go to trial, but rather the one who is able to provide the best legal advice, that is, the one that better satisfies the clients' interests*[137] >>.

Construction lawyers can therefore play a key role in healing conflicts by recommending dispute avoidance methodologies to their clients, and including appropriate clauses in the underlying construction contract. On that account, it seems particularly useful to recall the question raised by Harvard professor Frank E.A. Sander – one of ADR'S pioneers: << *How would you feel about a doctor who suggested surgery without exploring other choices*[138]*?* >>.

In particular, the doctor's obligation to make sure that patients are informed about all the possible courses of treatment equals to the lawyer's duty to advise clients to consider all the possible options to settle the dispute before litigate the matter.

The professor's challenging question dates back to the '90s, yet the message he was intended to convey is today more relevant than ever, given that the concept of jurisdictional justice is still deeply rooted in the collective consciousness as the only effective method for maintaining or restoring social order.

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[137] (Betancourt, 2016, p. 1). The contribution has been adapted from an evening lecture given at the University of West London, on 8 March 2016.

[138] (Sander, 1990, p. 50). In particular, the professor argues about the imposition upon lawyers of an ethical duty to discuss ADR options with clients. What is more, Professor Sander is known for the concept of the "multi-door courthouse", which is rooted in the idea of an innovative institution, namely a courtyard with many doors in which disputes are forwarded to mechanisms other than traditional litigation.

What is more, at the time of this writing the theme is even more significant given the highly adverse effects of the COVID-19 epidemic[139] on the business industry worldwide. On that account, it seems interesting to provide a brief analysis on how this virus is both affecting the international construction industry and reshaping alternative dispute resolution in the field.

It goes without saying that the Coronavirus pandemic is having a massive impact on construction projects, causing delay and supply chains disruption, shortage of subcontractors and materials, and the termination of contracts to control expenses. To make matter worse, governments have ordered the suspension of all non-essential businesses, which basically entail most construction projects, and even the closure of some construction sites until the end of the state of emergency period.

Taking everything into consideration, during the pandemic an increase in disputes is very likely to occur and, on the contractual side, much focus is now being given to the wording of standard models. To this end, FIDIC published a Guidance Memorandum[140] containing useful tools to be adopted in several scenarios that are likely to arise as a consequence of COVID-19. In particular, in public health emergencies of international interest like the one at stake, two broad categories of contractual provisions are concerned. The former pertains to 'force majeure', which refers to events unforeseeable at the time the contract was entered into and which the contracting parties – reasonably unable to avoid or overcome– may invoke to be exempted from liability for damages due to non-performance or delay[141].

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[139] The Coronavirus is an infectious disease that was firstly detected in the city of Wuhan, China. Since then, it has spread worldwide. It appears mainly as a respiratory illness, which can be even deadly in some cases.

[140] The Guidance Memorandum is available online on the official website - https://fidic.org/sites

[141] This situation could qualify as Force Majeure as defined under SC 19.1 (RB1999, YB1999, SB1999, or PB) or SC 1.1.14 (GB1999), or as an Exceptional Event as defined under SC 18.1 (RB2017, YB2017, SB2017, or EB)

The second category refers to emergency laws or decrees imposing health and safety measures on construction activities such as social distancing, supply of face masks and sanitizers, and limited working hours for staff and labour, which are likely to be treated as a change in laws[142].

The resulting legal consequences are different: while a force majeure event would typically excuse performance of the prevented obligations and entitle a contractor to an extension of time for any resulting delay, financial entitlements are likely to occur only in relation to the unavoidable costs incurred due to the change in law.

A point of major interest in the FIDIC Guideline refers to the dispute avoidance features provided in the FIDIC contracts. In particular, FIDIC stressed the importance of Dispute Boards also in this dramatic scenario. Indeed, DBs can turn to be helpful contractual machines entrusted with the task of delivering useful opinions and advices as to how handling this COVID-19 situation under the specific terms and facts of each individual construction contract. What is more, given that many court hearings have been postponed for the time being, the use of alternative forms of dispute resolution is particularly welcomed in order to reduce delay and accumulation of claims caused by the stalemate of court operations. Thanks both to their inherent flexibility and the lack of strict procedural rules governing their functioning, DBs are particularly inclined to remote working and online project monitoring. What is more, every cloud has a

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or under SC 1.1.37 of the GOB. These Sub-Clauses provide that a "Force Majeure" or an "Exceptional Event" (as the case may be) means an event or circumstance which: (i) is beyond a Party's control; (ii) the Party could not reasonably have provided against before entering into the Contract; (iii) having arisen, such Party could not reasonably have avoided or overcome; and (iv) is not substantially attributable to the other Party. The Contractor shall be entitled subject to Sub-clause 20.2 to claims for payment and/or EOT.

[142] If it is established that actions taken by the local authorities or government are to be considered as changes in Laws of the Country, then the Contractor may seek remedy under SC 13.7 of the RB1999, YB1999, SB1999 or PB, or under SC 13.6 of the RB2017, YB2017, SB2017, EB and GOB. This is because of the Contractor's obligation to comply with applicable Laws as set out under SC 1.13 of the RB, YB, SB1999, EB or PB, under SC 1.14 of the GOB, or under SC 1.12 of the SB2017.

silver lining and the COVID-19 emergency may turn out to be a blessing in disguise for the construction sector not only as it will prove the usefulness of DBs, but also as it will help to build resilience by strengthening project governance and by providing a new digital enabled environment.

All things considered, preventive methodologies (such as partnering or DBs) can become effective tools for the transformation and the evolution of civil justice towards the management of litigation reduction procedures, thus allowing the Courts to focus on particularly complex issues which require innovative solutions and cannot be successfully dealt with in other alternative ways.

At its heart, openness towards these innovative extra-judicial means is about meeting the needs of a dynamic and evolving business community; it is about grasping the economic and social transformations which affect the construction industry with a view of providing the best legal protection to the multiple interests involved.

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