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Valentina Capasso

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VALENTINA CAPASSO
PHD CANDIDATE AT THE UNIVERSITIES OF NAPLES FEDERICO II AND JEAN MOULIN LYON 3 (*)

DISPUTE BOARDS: WHAT IF THEY WERE MULTI-TIERED ARBITRATION?

SUMMARY: 1. Introduction. – 2. Dispute Boards: history and models. – 3. The British different choice: Statutory Adjudication. – 4. The enforcement issue. – 5. The *Glencot* case. – 6. A DB-arb? – 7. How, when and why.

1. "There is a lack of understanding concerning the whole process of a standing board… The key is to get people thinking about dispute avoidance. Not letting the issue get to the stage of potential trench warfare". (1)

In order to prevent the title from sounding misleading, it is necessary to clarify immediately: the Dispute Boards are not arbitral tribunals, nor their verdict is an award.

This is, at least, what is expressly provided by the parties (*rectius*: by the standard forms they use), (2) supported by the jurisprudence – which, having finally established that having recourse to the panel is a pre-condition to arbitration, (3) has at the same time marked the distinction between the two figures and excluded that the determination itself is able to be enforced like an arbitral award – and confirmed by the doctrine. (4)

(*) This article was subject to independent external peer review.

(1) BATTRICK P., BROWN D., A is for apple, adjudication, arbitration and now avoidance, Driver Trett Digest, September, 2017, 21.

(2) For instance, article 1.2 ICC Dispute Board Rules (hereinafter: ICC DBR) specifies that "Dispute Boards are not arbitral tribunals and their Conclusions are not enforceable like arbitral awards"; similarly, sub-clause 21.4.3 of 2017 FIDIC Red Book states that "the DAAB proceeding shall not be deemed to be arbitration and the DAAB shall not act as arbitrator(s)".

(3) *Swiss Supreme Court*, 7 july 2014, 4A_124/2014; Peterborough City Council vs Enterprise Managed Services Ltd, [2014] EWHC 3193 (TCC).

(4) Actually, an Italian lawyer may disagree, at least with reference to DAB, which may be compared with *arbitrato irrituale*, but this issue deserve deeper investigation and cannot be dealt with in a satisfactory manner in this paper.

Indeed, if the issuing of an award is the natural outcome of arbitral proceedings, the very fact that the Board reaches a formal decision can be considered a sort of "failure" in pursuing its primary purpose, which is not the *resolution of disputes*, but *dispute avoidance*.

That this has always been the real aim of DBs is beyond any doubt; yet, practitioners seem(ed?) to have forgotten it, to the point that someone ([5]) has recently felt the need to recall that the Underground Technology Research Council had already been titled "Avoiding and Resolving Disputes during Construction" ([6]), and that in the new FIDIC Suite of Contracts, released on December 2017, the previously designated "Dispute Adjudication Board" (DAB) is now called the "Dispute Avoidance / Adjudication Board" (DAAB).

That said, the question dealt with in this paper is whether arbitration may be grafted into DB proceedings or, at least, DB members may be asked to act as arbitrators after they have ceased their previous role.

2. Looking back over the history of dispute resolution mechanisms in the construction field, common developments may be found at international level: disputes, which were initially resolved through internal negotiation techniques ("round a table, without the assistance of lawyers or quantity surveyors"), ([7]) starting from the second post-war period began to take on connotations of frequency and complexity that pushed contracting parties to seek alternative solutions. ([8])

At first, a solution was largely found in arbitration, which at the time was quick, inexpensive and generally definitive: the role of arbitrator, in fact, was usually attributed to an engineer – presumably endowed with the high degree of expertise required from the technical nature of the dispute – which made swift decisions, often without providing reasons (and, thus, making the awards hard to challenge). ([9])

However, this ideal situation did not last long: "disputants found that the alternative was growing more and more similar to, if not sometimes

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([5]) Allione R., *Letter to the Editor*, *DRBF Forum*, 2017, 21(4), 7.

([6]) Technical Committee on Contracting Practices of the Underground Technology Research Council, *Avoiding and Resolving Disputes during Construction: Successful Practices and Guidelines*, New York, 1991.

([7]) Uff J., *How Final Should Dispute Resolution Be?*, August 2010, SCL, 1.

([8]) Baker W.B., Douglass P.M., Edgerton W.W., Sperry P.E., *DRBF Practice & Procedure Manual*, DRBF, 2007, 1.

([9]) Tackaberry J., *Adjudication and arbitration: the when and why in construction disputes*, *Arbitration*, 2009, 2, 236.

indistinguishable from, the adjudication for which it was meant to substitute. While its use had become pervasive in society, the alternative was dead as an alternative". (10)

This is where States-adopted solutions parted their ways.

In United Kingdom discussions were carried out which would have finally led to the introduction of Statutory Adjudication, (11) while in Ireland the panacea for all ills was found to be conciliation (12) (both kinds of ADR that, although very different from each other, presuppose an already crystallized dispute).

By contrast, in the United States, research started some 20 years earlier and focused on *dispute avoidance*, rather than on *dispute resolution*: as a consequence, the need was felt to anticipate as much as possible the involvement of the body in charge of the settlement of any contrast. In this context, the Dispute Boards made their appearance.

Although the first documented case of recourse to a form of Dispute Resolution Board – at the time known as the Joint Consulting Board – dates back to the 1960s, (13) it was during the mid-1970s – on the occasion of the works related to the Eisenhower-Johnson Tunnel in Colorado, between 1975 and 1979 (14) – that the mechanism began to be utilized with increasing frequency, enjoying a success that has facilitated its expansion, firstly in the United States and then, to varying degrees, abroad.

Indeed, although the use of similar mechanisms may be occasionally found even in a previous period, (15) DBs spreading outside the USA has been conveyed by the *Fédération Internationale des Ingénieurs Conseils*

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(10) YARN D., The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization, *Penn. St. L. Rev.*, 2004, 108, 929-930.

(11) *Infra*, para. 3.

(12) IRELand. Department of the Environment. Strategic Review Committee, *Building Our Future Together: Strategic Review of the Construction Industry*, Dublin, Stationery Office, 1997.

(13) On *Boundary Dam Hydroelectric Project* in Washington: see CHERN C., *Chern On Dispute Boards. Practice And Procedure*[3], New York, 2015, 11.

(14) Moreover, it does not seem to be a coincidence that, in the same period (1974), the Better Contracting for Underground Construction report was published. The document, released by the U.S. National Committee on Tunneling Technology, following a study (started in 1972) on international contractual practices, contained a series of recommendations aimed at avoiding the emergence of disputes during the execution of procurement contracts, of which it underlined the deleterious effects in terms of time and costs.

See also BAKER W.B., DOUGLASS P.M., EDGERTON W.W., SPERRY P.E., *DRBF Practice & Procedure Manual*, 2.

(15) This is the case for the Dispute Resolution Adviser (DRA), reported by BUNNI N.G., *What Has History Taught Us in ADR? Avoidance of Dispute!*, *Arbitration*, 2015, 2, 177. The DRA will be cited again *infra*, para. 6.

(FIDIC) only since 1996, when the Supplement to the Fourth Edition of the Red Book [16] was issued.

In fact, sub-clauses 67.1, 67.2 e 67.3 of the Fourth Edition outlined a multi-tiered dispute resolution mechanism, which comprised three obligatory phases, each one envisaged as a condition for access to the next one (the engineer's decision, an attempt of agreed settlement – for the experiment of which the choice of the most suitable instrument was remitted to the parties – and finally the arbitration).

The 1996 Supplement maintained the 3-tier mechanism, but substituted the first step (the engineer's decision) with the newborn Dispute Adjudication Boards, [17] a sort of hybrid system that, albeit moulded on the American Dispute Resolution Boards, was clearly influenced by the simultaneous introduction of British Statutory Adjudication.

Disputes Boards are bodies, usually made up by one [18] or three [19] expert members, ideally (in the so-called standing or full-term model) appointed since the beginning of the works, if not even before, with the obligation to follow their development and to carry out periodic visits on the site. It is also possible to provide for an ad-hoc dispute board (that is, appointed after the dispute has already arisen) or for "a sort of 'permanent ad-hoc' meaning an ad-hoc DAB... appointed... for resolving all disputes arising out of a certain Works Contract"; but this would inevitably result in losing "the most important benefit of the standing Board, that of dispute avoidance". [20]

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[16] The FIDIC conditions of contract for works of Civil engineering construction (Red Book) First Edition was published in 1952; the Second Edition in 1963; the Third in 1977; the Forth in 1987.

[17] Probably driven by the World Bank, which had already adopted the DB mechanism in its procurement guidelines the year before; indeed, it was the World Bank itself to subsequently promote the drafting by FIDIC of the MDB Harmonized Construction Contracts.

[18] In which case, one should talk about Dispute Review Expert (DRE).

[19] During the Channel Tunnel project, for instance, a Dispute Review Board was set up: it was composed of 5 members, all directly involved during the meetings, although decisions were taken by colleges of 3, chosen from time to time in relation to the individual dispute. Moreover, the Disputes Review Group (DRG) operating at the Hong Kong Airport consisted of 6 people plus a convenor (whose main task was to call meetings), from which a panel of one or three members was drawn for the resolution of each dispute. See CHERN C., *Chern on Dispute Boards. Practice and Procedure* cit., p. 11.

[20] ALLIONE R., NICULESCU F., *Adventures in Dispute Board Member Selection: A Look at Recommended Best Practice and Variations that Arise in Eastern Europe, DRBF Forum,* 2017, 21(1), 17. In fact, although the former FIDIC Yellow Book and Silver Book provided, instead, a model of *ad-hoc* DB, "the DAB system established by FIDIC was conceived above all with a view to constituting a permanent DAB and not an *ad hoc* DAB, the idea being to

In any case, a great attention is paid to the guarantee of members' neutrality: they have to disclose all previous and/or supervening circumstances which could make them non-impartial or even make them appear as such.

Each member must normally be approved by all parties even when their choice is shared between them. (21) Parties' trust in Board members is enhanced and strengthened during their periodic visits, which, in addition to allowing them to be constantly and directly informed of the progress of the works, are aimed at encouraging dialogue with the parties. This allows Board members to identify any difficulties as soon as they rise and propose solutions promptly, initially by means of informal suggestions.

Actually, Board members should make indirect solicitations, which respond to the logic of Socratic maieutics, (22) rather than real suggestions: indeed, they "are not engaged as consultants and they should never attempt to redesign the project or advise the contractor how it should be constructed". (23) Nor they are mediators: by contrast to what is allowed in mediation, "there shall be no ex parte communication, advice or other consultation between any Board member and any Party to the contract including subcontractors and suppliers on any matter or issue that is pending or may become before the Board". (24)

If such "suggestions" are not enough, at parties' request, the Board may render a formal written opinion. In the event that even this latter proves to be not sufficient, the Board will be called to make a conclusion, whose content and effects will be different according to the specific model the parties have chosen *ab origine*.

In fact, although the best known models remain the Dispute Adjudication Board ("DAB", which give rise to an immediately binding opinion) and the Dispute Review Board ("DRB", in which, instead, the ruling becomes binding only if the unsuccessful party does not notify the other a Notice Of Dissatisfaction – "NOD" – within a default term), the International Chamber of Commerce, which since 2004 has adopted its own regulations, adds a third alternative: the Combined Dispute Board

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facilitate speedy disposition of the performance during the performance of the project without jeopardizing its continuation with the beginning of the end". See Swiss Supreme Court, 7 July 2014, 4A_124 / 2014.

(21) But a joint appointment trend has been identified by DETTMAN K.L., *DRB Joint Selection: The Wave of the Future?*, *DRBF Forum*, 2016, 20(1), 20 ff.

(22) ALLIONE R., Interview accorded to the Author, 12 April 2017.

(23) CHERN C., *Chern on Dispute Boards. Practice and Procedure* cit., 13.

(24) AAA Dispute Resolution Board Operating Procedures, sect. 2.0(3), available at *https://www.adr.org*.

("CDB"), in which, in case of disagreement about the type of verdict to be issued, the Board itself will opt for the alternative that appears more suitable according to the circumstances. (25)

Anyway, even if a formal decision is reached and is binding (*ab initio* or following the losing party's failure to notify a NOD), it cannot be directly enforced.

Therefore, in any case of non-compliance, it would still be necessary to resort to arbitration. (26)

3. If in the United States more attention has been paid on the prevention of disputes, the English Legislator made a partially different choice.

In 1993, Sir Michael Latham was officially asked to conduct a Joint Review of Procurement and Contractual Arrangements, jointly promoted by the public (Department of the Environment) and private (four industrial organizations and two representative groups of the main clients) sectors.

Such a common mandate can be easily understood, not only in the light of the obvious existence of a governmental interest, given the importance of the sector for the economy, but also because, in Common law Countries, construction sector regulation is the same, irrespective to the public or private nature of the contracting parties. (27) In fact, this is a natural consequence of the therein recognized centrality of the contract, which, in turn, results in the great freedom Public Administration enjoys in the field of Public procurement. (28)

Latham's results were condensed into his Final Report, "Constructing the Team" (usually referred to as the "Latham Report"), published in July 1994.

Sir Latham too advocated the need to prevent disputes by adopting partnering techniques, which can be defined as a "structured management approach to facilitate teamwork across contractual boundaries"; (29) ne-

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(25) Worldwide, there is a greater variety of models and terminologies: see TOZER B., *Dispute Boards: Is the Current Australian Model Appropriate?*, *DRBF Forum*, 2017, 21(2), 1 and 10 ff.

(26) Indeed, referring the dispute to the DB is now a pre-condition to arbitration or litigation: see *supra*, fn 3.

(27) BRABANT A., *Les marchés publics et privés dans l'U.E. et outre-mer. Tome II, Le droit et les faits*, Bruxelles, 1996, 53 ff.

(28) OICE, *Procedure e tempi di esecuzione delle grandi opere nei paesi industrializzati. Studio OICE. Analisi comparata delle procedure più efficaci per la realizzazione delle opere pubbliche in Francia, Germania, Gran Bretagna e Spagna*, Roma, 2007, available at http://www.igitalia.it, 31.

(29) CONSTRUCTION INDUSTRY BOARD, *Partnering in the Team: A Report by Working Group 12 of the Construction Industry Board (CIB Reports),* London, 1997, 1.

vertheless, he was also aware that "disputes may arise, despite everyone's best efforts to avoid them".

Thus, having reviewed several ADR mechanisms, he identified adjudication as "the key to settling disputes in the construction industry". (30) Latham suggested that this procedure – already envisaged, in narrower terms, in the NEC standard forms of contract – should have been adopted by Statute, in order to make it applicable to all construction contracts.

And so it was: article 108 (1) Housing Grants, Construction and Regeneration Act 1996, which came into force on 1st May 1998, gives each party to a construction contract "the right to refer to disputes arising under the contract for adjudication". (31)

Consequently, each party of the construction chain (client, contractor and subcontractor) is *entitled* – and not burdened (32) – to refer the resolution of any dispute arising from the contract to an impartial third party, the adjudicator, who has the legal obligation to reach a decision within 28 days of receiving the referral notice.

The adjudicator's decision, immediately binding on the parties (albeit not final), is likely to be enforced (33) by the Technology and Construction Court ("TCC"), a specialized section in construction matters of the Queen's Bench Division. Indeed, the Court has always shown an almost unconditional support, since it has interpreted the enforcement of the adjudicator's decisions as a sort of "mission" conferred on it by the legi-

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(30) LATHAM M., *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry: Final Report*, London, 1994, 87.

(31) It is not possible to extensively review adjudication in this paper; for further information, see COULSON P., *Coulson on Construction Adjudication*[4], New York, 2018; PICKAVANCE J., *A practical Guide to Construction Adjudication*, Oxford, 2016; REDMOND J., *Adjudication in Construction Contracts*, London, 2001; RICHES J. L., DANCASTER C., *Construction Adjudication*[2], Oxford, 2004; CHERN C., *Chern On Dispute Boards. Practice And Procedur*[3] cit., 56 ff.

(32) Since adjudication is not intended to be a pre-condition to arbitration or litigation, and given that it can be started both before or pending other processes.

(33) This model inspired the Italian Commissione di studio per l'elaborazione di ipotesi di organica disciplina e riforma degli strumenti di degiurisdizionalizzazione, con particolare riguardo alla mediazione, alla negoziazione assistita e all'arbitrato, whose works are now published in *Un progetto di riforma delle ADR*, Napoli, 2017.

With particular regard to ADR in the construction field, in order to improve the effectiveness of the *accordo bonario* (and expressly moving from the Statutory Adjudication experience), it has been proposed to provide a peremptory deadline within which the Contracting Authority could start litigation, expiring which the third party's proposal would become binding and enforceable. See AULETTA F., *La Commissione Alpa e le Adr nei contratti pubblici*, *Giur. arb.*, 2017, 1, 159 ff.

slator: suffice here to remind that it stated that "judicial enforcement" is a "a mandatory and compulsory exercise imposed by the State" (34) and that "the objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances (35) that the courts will interfere with the decision of an adjudicator". (36)

4. Statutory Adjudication, thus, benefits by both the Legislator's and the TCC's underpinning.

As already put forward, the same cannot be said of DBs, (37) because of their whole contractual nature and because of the express statement that DB members do not act as arbitrators, that brings the consequence that DAB decisions cannot be considered as arbitral award for the purposes of domestic enforcement, (38) nor for those of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Hence, "a court could not then be expected, under the NYC, to enforce the decision of a DAB as if that decision were an arbitral award". It is true that "a local court might come to the summary conclusion as a matter of fact that all issues between the parties have been decided by the DB decision and that it should be directly enforced; for example, under an interim relief or summary judgment procedure. Many decisions of adjudicators have been enforced in the English courts by this method"; but, "if there is an arbitration clause then an English court would most likely stay the matter under section 9 of the Arbitration Act 1996". (39)

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(34) *Joinery Plus Limited (In Administration) v Laing Limited*, [2003] EWHC 3513 (TCC) at [40].

(35) I.e., when the Court recognizes the existence of lack of jurisdiction or breach of the rules of natural justice.

(36) *Carillion Construction Ltd v Royal Devonport Dockyard Ltd*, [2005] EWCA Civ. 1358 at [85].

(37) On the subject, see CHERN C., *Chern On Dispute Boards. Practice And Procedure* cit., 407 ff.

(38) The winning party has therefore to bring an action "for breach of contract for failure to comply with the DAB's decision" or "for the value of the decision as a debt due and payable to it": see JONES D., *Dealing with Multi-Tiered Dispute Resolution Process*, *Arbitration* 2009, 75(2), 194.

(39) GOULD N., *Enforcing A Dispute Board's Decision: Issues And Considerations*, *ICLR*, 2012, 470.

Actually, every FIDIC contract provides for arbitration, which can be started after a cooling-off period (40) during which parties should try to reach an amicable settlement of the dispute.

The main problem was thought to be the fact that sub-clause 20.7 of the Red Book (as well as the corresponding provisions in the other standard forms) expressly allowed a party to initiate arbitration to enforce the DB's *final* decisions (in other words, when the losing party had failed to issue a NOD), while nothing was said for the opposite case. Nevertheless, a review of FIDIC models history demonstrates that "the reason why disputes relating to 'final and binding' decisions were excluded from arbitration stems from old English law", according to which "where a debt was indisputably due from a debtor in England, relatively speedy summary judgment was available from the English courts" and "even in the presence of an arbitration clause, English courts still had jurisdiction to hear matters relating to debts which were indisputably due". (41)

The inappropriateness of extending such solution to international contracts, where "the Contractor would almost certainly not want to go to a local court (typically in a developing country), as the local court often could not, or would not, grant the desired relief" (42) then lead to the amendment of Clause 67.4, whose new wording set forth that "where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become *final and binding*, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration". (43)

It is thus apparent that the new formulation did not deal with non-final decisions because *they had always been deemed to be enforceable by means of an arbitral award*. (44)

This has been confirmed by ICC Case No 10619, (45) where the arbitral tribunal "unanimously decided that an Engineer's non_final decision

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(40) Formerly lasting 56 day, now reduced to 28.

(41) SEPPÄLÄ C.R., *Ways of Improving DAB Decision Enforcement. Relevant History of FIDIC's Dispute Resolution Provisions*, Seminar for *DRBF 13th Annual International Conference*, Paris, May 4, 2013, 8.

(42) *Ivi*, 9.

(43) Emphasis added.

(44) This is consistent with the idea that "[DB's] decision becomes, in effect, a contractual obligation on both parties such that non-compliance with it by either of them is a breach of contract and the party in breach would be liable in damages": see BUNNI N.G., *The Gap in Sub-clause 20.7 of the 1999 FIDIC Contracts for Major Works*, *ICLR*, 2005, 276.

(45) Published in *ICC International Court of Arbitration Bull.*, 2008, 19(2), 85 ff.

on a dispute under Clause 67... should be enforced by an arbitral award". And, since DBs took the place of the Engineer under the 1999 FIDIC standard forms of contract, Seppälä expressed the opinion that there were "no reason why the same principle should not apply to a non-final decision of a DAB under the current editions". (46)

In 2009, the Author reiterated his view, (47) that was furthered by the wording of sub-clause 20.9 of 2008 FIDIC's Design, Build And Operate Form of Contract, according to which "in the event that a Party fails to comply with any decision of the DAB, *whether binding or final and binding*, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.8 [Arbitration] for summary or other expedited relief, as may be appropriate". (48)

Such idea has finally been endorsed by FIDIC, that, in 2013, issued a Guidance Memorandum (49) expressly recalling the above-mentioned sub-clause 20.9, (50) in order to clarify that "the failure itself" to comply with "DAB decisions that are binding and not yet final... should be capable of being referred to arbitration".

In truth, "the trend continues towards a more effective way of enforcing DAB decisions", (51) as it is shown by the well-known Persero saga (52), which ended with the Singaporean Court of Appeal recognizing the possibility, for the winning party, to have DAB's decision directly enforced by means of an interim award, that "is truly 'final and binding' as between the parties". (53)

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(46) SEPPÄLÄ C.R., *Engineer's non-final decision enforced by unanimous ICC arbitral award*, *Construction Law Int.*, 2009, 4(3), 26. Indeed, as the above-mentioned Author noted (in SEPPÄLÄ C.R., *An Engineer's / Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award*, in *White&Case*, December 2009, 9, note 43) that Clause 67.1 of the ICC Model Turnkey Contract for Major Works (2007) – issued between the rendering of the award (in 2001) and its publication (in 2008) – already provided that "an arbitral tribunal may, if considered appropriate by the arbitral tribunal and permitted under applicable law... make interim awards for the purpose of enforcement of the CDB decision".

(47) SEPPÄLÄ C.R., *DAB Decisions: Bound to pay? How enforceable are DAB decisions? How enforceable should they be? How should they be enforced?*, Seminar for *9th Annual DRBF International Conference*, London, May 17, 2009, available at www.drb.org.

(48) Emphasis added.

(49) FIDIC CONTRACTS COMMITTEE, FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1st April 2013, available at www.fidic.org.

(50) Now reproduced in sub-clause 21.7.

(51) CHERN C., *Chern On Dispute Boards. Practice And Procedure* cit., 422.

(52) BUTERA G., *The Persero Saga*, *DRBF Forum*, 2015, 19(2), 1 and 8 ff.

(53) CHERN C., *Chern On Dispute Boards. Practice And Procedure* cit., 430. As a consequence, if the arbitral tribunal – that has also been asked to determine the underling dispute on the merits – "later award less to the party seeking payment under the DAB decision, then that can easily be dealt with in the final award by the tribunal making a

Such a solution, however, is only available provided that the applicable Arbitration Act allows the tribunal to issue interim awards and guarantees Courts' assistance in respect to their enforcement.

In other words, DB's decision compliance is not ensured *per se*, and this would reduce the attractiveness of the whole mechanism. (54)

The question thus arises as to whether parties may circumvent the enforcement issue by according to the same neutrals already appointed as DB members the power to adjudge the dispute as arbitrators. (55)

5. Against this idea, operators in construction field may be naturally led to think of the famous *Glencot* case, (56) which seemed to exclude a concrete possibility of mediation-adjudication proceedings.

Glencot (sub-sub-contractor) started adjudication against Barrett, claiming the outstanding payment of the works carried out for the latter. After the appointment of the adjudicator, parties agreed to settle the dispute and requested the professional to assist them in drafting the settlement agreement.

However, since new problems arose and the attempt to settle the dispute in a consensual manner failed, the parties, (once again) unanimously, decided to resume adjudication – that had been interrupted in the meantime – before the same adjudicator. This latter, before accepting the new (old?) role, and despite the already expressed will of the parties, asked them further confirmation, fearing that they could consider his impartiality as having been compromised by his past acting as mediator.

None of the parties objected.

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finding to that effect and issuing a final award requiring a return of any excess. In a similar fashion, if the amount due later is found to be greater than originally awarded in the interim partial award, the tribunal can order the payment of a greater sum".

(54) As BORYSEWICZ E., *Why are Dispute Boards Not More Widely Used in France?*, *ICC Bull.*, 2013, 24(2), 48, notes, one of the main reasons why "dispute boards are not more frequently used in France (and maybe also in other civil law countries) is... the reluctance of some parties (be they owners or contractors) to agree to be bound by dispute board decisions"; and it is self-evident that such an objection would lose its strength if DB's decisions could be enforced as arbitral awards.

(55) Dealing with all possible "Structures for the Combination of Mediation and Arbitration" is thus outside the scope of this paper; references concerning these models may be found in DEASON E.E., *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, in *Yearb. Arb. & Mediation*, 2013, 5, 221 ff.

(56) *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*, [2001] EWHC Technology 15, commented by OGHIGIAN H., *On Arbitrators Acting as Mediators, Arbitration*, 2001, 68(1), 42 ff; BERESFORD HARTWELL G.M., *Mediation And Adjudication: Glencot*, *ivi*, 67(4), 341 ff; TALBOT P., *Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?*, in ivi, 67(3), 221 ff.: the latter author was the adjudicator in the case.

Again according to parties'agreement, separate meetings took place with the parties, and it was only during the second meeting that Barrett (who would have been later resulted the losing party and – one can imagine – knew that), asked the adjudicator to resign because of his lack of impartiality. The professional, however, upon the advice of his lawyer, held that he was no longer obliged to do so at such an advanced stage of the proceedings.

Barrett, eventually found responsible to pay the claimed sums, did not comply to the adjudicator's decision and challenged it during the enforcement hearing before the TCC on the grounds of breach of the rules of natural justice (sub specie of bias).

Lloyd J, though considering that "in the adjudication [the adjudicator] was asked to decide certain points about which there was no documentary evidence, in other words to form a view about the credibility of the applicant's case", and even "taking account of [the adjudicator's] commendable openness and explanations", eventually "reached the conclusion any fair-minded and informed observer would conclude that... there was a real possibility of [the adjudicator] being biased". (57)

I respectfully disagree.

It is true that "bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect" (58) and that "a decision affected by apparent bias [...] would not [be] a decision authorised by the terms of the contract and therefore [would be] unenforceable as any other decision made without jurisdiction". (59)

On the other hand, however, it could not be neglected that – in the case at stake – Barrett failed to immediately advise the adjudicator of his concerns about the impartiality of the latter and, furthermore, he agreed for the continuation of the adjudication; and TCC has long stated that any objection to the adjudicator's jurisdiction is to be either raised or reserved since its rising, or otherwise it should be deemed as waived. (60)

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(57) *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* cit., at [24-25].

(58) As Lord Woolf, cited in *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* cit., at [68], once said.

(59) *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* cit., at [25].

(60) In *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd*, [2010] BLR 377 at [37], TCC dealt with the question as to "whether, taking account of the particular reservation, a party by participating in the adjudication has waived its right to object on grounds of jurisdiction", and held that "if the party does not raise any objection and participates in the adjudication then, even if there is a defect in the jurisdiction of the

6. If the solution retained in the *Glencot* case is questionable, one should argue that, more generally, med-arb and alike forms of dispute resolution may well be entirely carried out before the same professional or body, provided that parties so agree.

Indeed, with regard to Italian arbitration-related provisions, it has already been stressed that, albeit the "case of designation of the professional who had followed the out-of-court procedure of the dispute... will immediately give rise" to the parties power to file a recusal action pursuant to art. 815 c.p.c., this would only happen "if there is no specific agreement between the parties so that their two consultants can take on the role of arbitrators". (61) And, after all, even the IBA Guidelines on Conflicts of Interest include the existence of "Relationship of the arbitrator to the dispute" – namely, the fact that the arbitrator "has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties" (sect. 2.1.1) or, in any case, "had a prior involvement in the dispute" (62) – in the *Waivable* Red List.

Sometimes this is recognized even by law: article 412 cod. proc. civ., for instance, in allowing the parties in employment disputes "at any stage (63) of the conciliation attempt, or at its end in case of failure... to agree for the settlement of the dispute, by mandating the conciliation board to determine the dispute by arbitration", demonstrates the compatibility "between conciliation and arbitration steps albeit administered by the 'same commissioners'". (64)

In truth, the main problem in the *Glencot* case seems to have been the fact that "when he went into mediator mode, the adjudicator shuffled between and saw the parties separately". (65)

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adjudicator, that party will create an ad-hoc jurisdiction for the adjudicator and lose the right to object to any decision on jurisdictional grounds".

(61) CONSOLO C., *Imparzialità degli arbitri. Ricusazione*, in FAZZALARI E. (a cura di), *La riforma della disciplina dell'arbitrato*, Milano, 2006, 74.

(62) IBA COUNCIL, *IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 October 2014, available at www.ibanet.org, 20.

(63) The wording suggests that the conversion of the conciliation board's role may occur at any time, provided that the panel has at least been *asked* to start the conciliation attempt. Seemingly in this sense, AULETTA F., *Le impugnazioni del lodo nel "Collegato lavoro" (Legge 4 novembre 2010, n. 183)*, *Riv. arb.*, 2010, 4, 568.

(64) As stressed by AULETTA F., *Le impugnazioni del lodo nel "Collegato lavoro"* cit., 564, who reminds that such a model is not an *unicum*: a similar two-tier mechanism before the same body is provided in Vatican City; see PICARDI N., *Il Collegio di conciliazione ed arbitrato dell'Ufficio del lavoro della Sede apostolica*, in AULETTA F., CALIFANO G., DELLA PIETRA G., RASCIO N. (a cura di), *Sull'arbitrato. Studi offerti a G. Verde*, Napoli, 2010, 626.

(65) GRIFFITHS D., *Do Dispute Review Boards Trump Dispute Adjudication Boards in Creating More Successful Construction Projects?*, *Arbitration*, 2010, 76(4), available at

It should be noted, however, that the prohibition of *ex parte* communications in multi-tiered ADR is not universally prescribed: Sect. 17 of Singaporean International Arbitration Act (Chapter 143a), for instance, states that "(1) If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator.

(2) An arbitrator or umpire acting as conciliator —

(a) *may communicate with the parties to the arbitral proceedings collectively or separately*; [...]

(4) *No objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this section*" (66).

Actually, the Italian lawyer does not need to go so far: with regard to legal separation proceedings, Article 708 para. 1 c.p.c., allows the President of the Tribunal to hear the spouses, "*first separately* and then jointly", in order to attempt conciliation; and, in case of failure, it will be the President him/herself to issue orders providing for temporary and urgent relief (para. 3).

It follows from the above that, in principle, there is no inherent need to forbid the mediator (and perspective decision maker) to carry out *ex parte* meetings or conversations; but it is to be recognized that such a

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www.ciarb.org, 692. Whether or not one agrees with the assertion that, when the arbitrator's partial behaviour occurs during the proceedings, "it will always affect the adversarial principle" (cfr. SPACCAPELO C., *L'imparzialità dell'arbitro*, Milano, 2009, 391), it seems clear that *ex parte* communication would most likely give rise to a successful challenge of the award for breach of the rules of natural bias (*sub specie* of the *audiatur et altera pars* principle).

(66) Emphasis added.

Similarly, the Italian c.p.c. – at Article 185-*bis* – expressly provides that the conciliation proposal that the judge may deem to submit to parties on his/her own initiative "cannot constitute grounds for his/her rejection or abstention".

The *rationale* behind that statement is easy to understand in the light of the Constitutional Court jurisprudence, which excludes that a judge, once issued his decision, cannot be asked to adjudicate again over the same cause of action, whether on appeal or opposition (see, for instance, Corte Cost., 15 September 1995 No 432, *Foro it.*, 1995, I, 3068 ff, annotated by GAETA P., TEI G., *I pregiudizi sul pregiudizio ovvero il falso mito della verginità del "giudice del merito"*; Corte Cost., 24 April 1996 No 131, *ibidem*, 1999, I, 1489 ff; 31 May 1996 No 177, *ibidem*, 1996, I, 3616 ff, annotated by SCARSELLI G., *Terzietà del giudice e processo civile*; 18 July 1998 No 290, *ibidem*, 1999, I, 430 ff). For further refereces, see TIZI F., *L'imparzialità dell'arbitro e del tribunale arbitrale*, Santarcangelo di Romagna, 2015, 89 fn 86, and 110 fn 44.

This principle, however, will not apply if the opposition is just a phase of the same legal action: see also *infra*, para. 7, text and fn 80.

behaviour increases the risk of future challenges and should better be avoided.

Anyway, since DB members, unlike mediators, are not allowed to "express personal opinions on the merits of party positions in encouraging settlement" or "engage in *ex parte* conversation with each side", (67) the same "ethical issues that arise when [mediation and arbitration] are combined, challenging the integrity of each process in different ways, and creating several risks to both parties and neutrals" (68) cannot be plainly extended to DB-arb.

Once again, it is possible to support the statement with a practical example, this time selected from the construction field: the Dispute Resolution Adviser – set up in Hong Kong in 1991 in the context of a hospital renovation project – was intended to facilitate dialogue between the parties and to make non-binding recommendations and assessments. Should any attempts to reach an agreement had failed, however, the same neutral could be asked to assume the role of arbitrator.

In addition, it should be underlined that the majority of the existent DB Rules does not prevent parties to set up a sort of same-neutral DB-arb: the ones arranged by the Chartered Institute of Arbitrators (CIArb) only envisage the parties' possibility to produce the DB's recommendation or decision (69) – depending on the chosen model – in "any subsequent arbitral or judicial proceedings" (as well as article 27 ICC DRB and sub-clause 21.6 FIDIC Red Book do), while remaining silent about the opportunity for DB members to be later asked to seat as arbitrators; and nothing is said on this point in the American Arbitration Association's Rules, (70) nor in the Milan Arbitration Chamber ones. (71)

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(67) FULLERTON R., *Med-Arb And Its Variants: Ethical Issues For Parties And Neutrals*, *Dispute Res. Journ.,* 2010, 55-56.

(68) *Ivi*., 61. Such mistrust would not be shared in East-side countries: as KAUFMANN-KOHLER G., KUN F., *Integrating Mediation into Arbitration: Why It Works in China*, *Journ. Int. Arb.*, 2008, 25(4), 485, report, "the China International Economic and Trade Arbitration Commission (CIETAC)... empowered its arbitral tribunals to mediate arbitration cases from the beginning of its establishment". And this is not astonishing, since the Civil Procedure Law adopted in 1991 actively promoted conciliation in courts proceedings (*ivi*, 484).

(69) Respectively, at Articles 3(6) and 4(6).

(70) Namely, the *AAA Dispute Resolution Board Hearing Rules and Procedures* and the *AAA Dispute Resolution Board Operating Procedures*.

(71) As to the ANAC Arbitration Chamber – notwithstanding the fact that Article 209 *Codice degli appalti* is silent on the point – Article 1 para. 7 of the Ministry of Infrastructures and Transports Decree of 31th January 2018, by setting the maximum fees owed to the arbitral tribunal in case of conciliation, impliedly admit a conciliation attempt during the proceedings.

On the contrary, ICC Rules provide a default prohibition, but they expressly left to the parties' will the chance to have recourse to the same experts for the final determination of the dispute: as article 9.3 ICC DBR sets forth, indeed, "*unless otherwise agreed* in writing by all of the Parties, a DB Member shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the Contract, whether as a judge, an arbitrator, an expert or a representative or adviser of a Party". (72)

Actually, it is to be acknowledged that the 2017 FIDIC contracts seem to go towards the opposite direction: sub-clause 8.1(a) of the APPENDIX General Conditions of Dispute Avoidance/Adjudication Agreement to the New Red Book states that "the Employer and the Contractor undertake to each other and to the DAAB Member that the DAAB Member shall not... be appointed as an arbitrator in any arbitration under the Contract", without the clause "unless parties otherwise agree"; but parties' sovereignty to amend standard terms, both at the time of signing the contract or during the works, does not need an express provision. And "those who believe that the same person should never serve as both a mediator (73) and arbitrator in the same case even when the parties give their informed consent are guilty of taking a mechanical, rule-centered approach to dispute resolution, which Dean Pound warned against". (74)

So, it is worth sharing the view that it is possible to "give DRBs power to decide any disputes (not resolved by their earlier efforts) as arbitrators so that they are a form of mediation/arbitration. Some in the United Kingdom, with *Glencot...* in mind, will see jurisprudential difficulties with this approach, but the prize that it might reap (in cost savings and the availability of a system for the enforcement of foreign arbitral awards) makes the idea worthy of trying". (75)

This statement, after all, has been confirmed in the *Mi-Space v Lend Lease* case, where the Court, albeit considering that "it is somewhat unusual for Dispute Review Boards also to be arbitrators", held that "there is no reason in principle or... in policy, why they could not be arbitrators in relation to the same project. In one practical sense at least there is an advantage, which is that the members of the DRB might well have acqui-

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(72) Emphasis added.

(73) And, *a fortiori*, as a DB member.

(74) PHILLIPS G.F., *Same Neutral Med-Arb: What Does the Future Hold*, in AMERICAN ARBITRATION ASSOCIATION, *AAA Handbook on Mediation*^{2nd}, New York, 2010, 78, referring to POUND R., *Mechanical Jurisprudence*, *Columbia Law Rev.*, 1980, 8, 605.

(75) GRIFFITHS D., *Do Dispute Review Boards Trump Dispute Adjudication Boards in Creating More Successful Construction Projects?*, 692.

red a good working and practical knowledge of the project and all the disputed problems which have arisen as the project has proceeded". (76)

And, even though the above-cited statements are limited to DRB, it seems that there are no reasons impeding to extend them to DAB: the two forms of DB only differ from each other in respect of the value of the final verdict of the Board, but the proceedings are carried out in the same manner, and the Board members shall act under identical duties.

7. Having dealt with the question as to *whether* a DB-arb before the same panel is conceivable and concluded in favour of parties sovereignty, there is still the need to explain *how*, *when* and, above all, *why* they would reasonably make such choice.

These three issues are strictly linked to each other.

Actually, the favourable opinions mentioned in the previous paragraph focused on DRB because they start from the assumption that the Board should first make its recommendation and then, upon parties'request, assume the role of arbitral tribunal. This may be a sensible solution, since the first verdict (being aimed at smoothing contrasts and moving forward and, therefore, being not binding and possibly based on equitable valuations rather than on strictly law criteria) is likely to differ from the arbitral award. Should the chosen Board model be a DRB one, thus, it is thinkable that its members could be appointed as arbitrators *after* the rendering of their recommendation.

When it comes to DAB, instead, it would be redundant to ask the panel to issue two consecutive binding decisions, which are likely to have the same content. In these cases, then, it would sound more reasonable for parties to directly invite the Board to render an award, that, as such, would be immediately enforceable before national Courts or, if needed, under the New York convention.

Whatever the chosen model is, the appointment of the members of the panel as arbitrators would allow parties to benefit from their familiarity with the project and the matters at stake, so that the dispute – being already known by the decision maker – could be settled in a timely and cost-effective manner. (77)

Theoretically, this result may be reached both

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(76) *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd*, [2013] EWHC 2001 (TCC), at [26]; the judgment has been commented by COPE J., *Is it Appropriate for Dispute Board Members to act as Arbitrators on the Same Project?, DRBF Forum*, 2013, 17(3), 4 ff.

(77) For further discussions on the balance of pros and cons see PHILLIPS G.F., *Same*

i) by modifying the relevant DB rules since the beginning or, these latter remaining the same,

ii) by switching to arbitration during the proceedings (more specifically, at the moment of requiring the decision).

The first option shows a greater appeal in terms of certainty and cost savings, but could end up denaturalizing DB mechanism that, as already pointed out, is firstly and mainly aimed at avoiding disputes. Indeed, it seems likely that, if parties were aware since the beginning that all their statements and behaviours could be recorded by Board members and, then, taken into account in the rendering of the award, they would be probably brought to hide relevant information during the meetings and site visits (78) and, more generally, to not act in a plain faithful way. In addition, one could argue that the agreement by which the parties undertake not to object to the (previously) DB members acting as arbitrators would result in a prearranged waive of their right of recusation. It would therefore be deemed as null and void, since one can only give up a right that s/he already holds. (79) However, it is suggested that this undisputable principle is ineffective in this case, since the parties' arrangement would set out a unitary procedure, even though potentially two-tiered; and, in alike cases, even a judge would be disqualified. (80)

By contrast, the second alternative is more respectful of both the real nature of the DB's proceedings and of the parties' actual will: (81) they could commit to look for an amicable settlement of the dispute before the Board, bearing in mind that all relevant information will not leak out in any subsequent proceedings without their consent. This solution, however,

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Neutral Med-Arb: What Does the Future Hold, 75 ss., who strongly advocates in favour of "Same-Neutral Med-Arb" models.

(78) The same concerns are expressed by BREWER T.J. & MILLS L.R., *Med Arb: Combining Mediation and Arbitration*, *Dispute Res. Journ.*, 1999, 53, 35, in respect of med-arb; TIZI F., *L'imparzialità dell'arbitro e del tribunale arbitrale* cit., 109, in respect of Article 815 para. 1 n. 6 c.p.c.

(79) TIZI F., *L'imparzialità dell'arbitro e del tribunale arbitrale* cit., 180-181.

(80) As recently held by Corte Cost., 13 May 2015 No 78 (*Foro it.*, annotated by MINAFRA N., "*Rito Fornero" e giudizio di opposizione: obbligo di astensione del giudice?*; *Riv. it. dir. lav.*, 2015, 3, 717 ss., annotated by DALFINO D., *La Corte costituzionale e il rito Fornero: il giudice dell'opposizione non deve astenersi*) in respect of Fornero proceedings in the employment field.

Anyway, this does not prevent parties to challenge each single member of the DB/arbitral tribunal for other reasons than their "double role".

(81) Who, in this case, are well aware of the previous involvement in the dispute of their future arbitration tribunal; and, in this case, it is worth referring again to the already quoted Consolo's words (see *supra*, para. 6, text and fn 62).

may prove hard to occur. It is true that, if relationships turn out to be too deteriorated to reasonable expect that the (perspective) losing party will comply with the DB's decision, it may be convenient to agree to skip this step and directly obtain an (enforceable) award. Nevertheless, the same concerns expressed in respect of the first option apply: why should a party waive his/her possibility to have his/her case reheard afresh by a new tribunal, before which s/he could adjust his/her defences?

Admittedly, the actual DB rules leave room for tactical advantage, since they make it conceivable a gap (upwards or downwards) between parties' defences before the Board and those submitted to the arbitral tribunal: on the one hand, the confidentiality obligation imposed upon the DB and the counterparty (82) impedes the transmigration of documents and arguments from the first to the second step, if the concerned party does not wish so. On the other hand, none of the parties is "limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD". (83)

In the light of the above, DB-arb benefits seem to fade.

Things would be different if DB process was to arbitration as pre-trial is to trial: after all, the first step already resembles to the pre-trial conference, where it is usually carried out an attempt to settle, failing which the second step (respectively, arbitration or trial) has to be started.

In addition, it is suggested to further the parallel by burdening the parties to a full discovery since the first tier, in the sense that *all that, and only that,* they put forward before the Board could then be relied on during the (possible) arbitral process: such an adjustment may, at the same time, strengthen both the dispute avoidance and the dispute resolution potential of the whole mechanism.

Concerning the first point, it has to be acknowledged that there has long been (and still is) "considerable dispute whether pre-trial", among others objectives, was capable "to increase the number of settlements", "to promote earlier settlements", "to shorten trials" and "to narrow and define the issues of law and fact". (84) Notwithstanding this, it seems signi-

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(82) See sub-clauses 7.1 and 7.2 of the APPENDIX General Conditions of Dispute Avoidance/Adjudication Agreement to the New Red Book.

(83) 2017 FIDIC Red Book, sub-clause 21.6.

(84) SEELY J.G. JR., *California Pretrial in Action*, *California Law Rev.*, 1961, 49, 915-916: indeed, while "[t]he advocates of pre-trial contend that pre-trial results not only in swifter justice, but also in better justice. Pre-trial is said to diminish the chance of a case being won or lost by surprise at trial. Since the essential issues of the case are exposed at the

ficant that a trend has been detected towards many Countries (belonging both to Civil law and Common law families) to "incorporate[e]... alternative dispute resolution... into case management"; (85) and that, specifically in the construction field, it was the TCC – already a precursor in case management – that firstly introduced a mediation service. (86)

It is true that, according to Sect. 13 of the Court Settlement Order, "the Settlement Judge shall from the date of [his/her] Order not take any further part in the Proceedings nor in any subsequent proceedings arising out of the Court Settlement Process and no party shall be entitled to call the Settlement Judge as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of or connected with the Court Settlement Process". Anyway, the ineffectiveness of such provision in respect to DBs is clear once one bears in mind that Board members are not mediators; in addition (and whatever their real role in dispute avoidance is deemed to be), it cannot be denied that, at least in the DAB model, when they issue a decision, they dismiss their previous function and become adjudicators. And "there is nothing so calculated to encourage settlement as for the judge to get hold of the case and express a provisional view. One of the advantages of the pre-American Cyanamid requirement that an applicant for an interlocutory injunction had to show a strong *prima facie* case was that judges were encouraged to express a provisional view on the strength of the plaintiffs case. Thereafter in many cases the action was settled". (87)

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conference and defined in the order, court and counsel may direct their efforts more efficiently and thus will be better prepared for a trial on the merits", "[t]he opponents reply that the experienced, well-prepared attorney accomplishes the same objectives without pre-trial".

(85) SORABJI J., *Managing Claims – General Report*, International Association of Procedural Law Conference, Tianjin, November 2017, 41, who gives the examples of England and Wales, France, Germany and Chile (the report is still unpublished: I thank the Author for having given me the chance to read it and his permission to quote it).

The phenomenon, however, is not new: Lord Woolf and his reform, indeed, were inspired by the commercial judges, that has already started to actively encourage the use of ADR: see JOLOWICZ J.A., *The Woolf reforms*, in ID., *On civil procedure*, Cambridge, 2000, 392.

(86) AKENHEAD R., *The Benefits Of Using The Technology & Construction Court*, at PLA Annual Conference at Keble College, Oxford, 23rd March 2012, da *www.pla.org.uk, 5, who reports that the pilot scheme, introduced in 2006 and "enable[ing] TCC judges in London to act in effect as mediators in TCC cases... proved successful".*

(87) HOFFMANN L., *Changing Perspectives on Civil Litigation*, *The Modern Law Rev.*, 1993, 305. This is consistent with the fact that "studies from the Dispute Board Federation have shown that where a dispute adjudication board is in place and where its decision is immediately final and binding, there is a substantially increased chance that the number of

As to the idea to make DB proceedings a disclosure step, the statement that "the parties, having found out in the course of discovery the strengths and weaknesses of their cases, will be more inclined to settle without going to trial at all" ([88]) is substantiated by US' experience, where empirical research carried out by the Federal Judicial Center since the 2000 discovery amendments to the Federal Rules of Civil Procedure ([89]) showed that initial disclosure not only "decreased litigation expense, time from filing to disposition, the amount of discovery" and decreased "the number of discovery disputes", but – what is more interesting for our purposes – "increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement". ([90])

In addition, as Sect. 2.8.3 of the DRBF Practices and Procedures Manual underlines, "[e]xperience has shown 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". ([91]) As a result, in the "few occasions (under 40 cases reported to [2015]) where

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actual full-fledged disputes that arise are much lower, and in many cases nil on construction projects, with the parties preferring to ask for an opinion from the DAB and then act on that rather than seek a full-blown hearing on the dispute": see CHERN C., *Chern On Dispute Boards. Practice And Procedure* cit., 8.

([88]) HOFFMANN L., *Changing Perspectives on Civil Litigation*, 305; almost identically, JACOB J. I. H., *The Fabric of English Civil Justice*, London, 1987, 267, suggested that "there should be introduced on as wide a range as possible the open system of pre-trial procedure, so that the parties become fully informed of each other's cases at as early a stage as possible to enable them to make a realistic appraisal of the respective strengths and weaknesses of their cases which should lead to earlier and fairer settlements", immediately after expressing his wish for the introduction of "a power, even a duty, on the court to promote a settlement or compromise between the parties either of its own motion or an application made by way of a settlement summons".

([89]) In US, the federal discovery rules have been amended several times, switching from an almost fully adversarial model to a more judge-managed one, as it was designed with the 2000 amendments.

([90]) CHASE O.G., *Reflections on Civil Procedure Reform in the United States: What Has Been Learned? What Has Been Accomplished?*, in TROCKER N., VARANO V. (eds.), *The Reforms of Civil Procedure in Comparative Perspective. An International Conference dedicated to Mauro Cappelletti, Florence, 12-13 December 2003*, Torino, 2005, 182.

([91]) *Contra*, DETTMAN K.L., *To Admit or Not to Admit, Revisited?*, *DRBF Forum*, 2016, 20(2), 7, who express the view that "making DRB reports admissible carries the risk of unintended consequences— the informality of the DRB process may be changed or undermined by parties adding to the DRB process protective measures relating to later legal proceedings". But see the immediate answers provided by FULLERTON R., *An Argument for Contract Admissibility*, *ibidem*, 2017, 21(1), 1 and 12-13; and BAKER W.P., *Admissibility: A Contrary View*, *ivi*, 14-15.

a dispute board's decision or recommendation on a substantive dispute has been referred on to arbitration or the courts ..., very few decisions of a dispute board have been overturned". (92) In fact, it seems clear that "an arbitrator or judge will be greatly influenced by a decision (on the facts) given by a panel of experienced, impartial construction experts who were familiar with the project during its construction and saw the evidence as it was being created rather that looking back at evidence of events from the past". (93)

So, why do not turn DB members into arbitrators?

The only real "risk" incurred by parties is that the (final) decision would result closer to the "truth", rather than to the "formal setting of facts". (94) It should not be so frightening. Or should it?

ABSTRACT: *This article investigates the possibility, for the parties to a construction contract providing for a Dispute Board, to give Board's members the power to decide as arbitrators any disputes not already settled during the pre-arbitral proceedings. Indeed, DB proceedings – when failing their primary purpose of dispute avoidance – end up with decisions which are not in themselves enforceable. Therefore, the winning party has to start arbitral proceedings in order to have the dispute adjudicate again, while trying – in the meanwhile – to have the DB's decision provisionally enforced by means of an interim award.*

The suggested DB-arb model, by contrast, would allow the parties to benefit from the panel's familiarity with the project and the matters at stake, so that the dispute – being already known by the decision maker – could be settled in a timely and cost-effective manner, with a plainly enforceable decision.

(92) CHERN C., *Chern On Dispute Boards. Practice And Procedure* cit., 13. These data are to be compared with the total number of referrals: "although issues of confidentiality prevent an absolute determination, it is understood that" up to 2015 "almost 7,500+ disputes have been the subject of dispute board decisions".

(93) *Ivi*, 7.

(94) CARNELUTTI F., *La prova civile*, Milano, 1992, 29. Free translation.