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ICC ADR & DRBs – A DIY SOLUTION TO ICDs*

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SYNOPSIS

There is no specific provision for DRBs in the July 1st 2001 ICC ADR Rules. However the Rules do provide for ICC ADR as a pre-cursor to ICC Arbitration and ICC Arbitration remains one of the World's foremost methods of finally resolving international construction disputes. Parties wishing to avail themselves of the convenient administrative mechanisms established for ICC ADR and provide a DRB for their international construction project will have to "fill in the blanks" by providing themselves with the detailed rules necessary for the establishment of a DRB. Fortunately the 1999 FIDIC Suite of Contracts has a DRB ("DAB") mechanism fully established and it is found in discrete sections of the relevant documents. Consequently the ICC Rules and FIDIC forms together can provide a relatively convenient "cut and paste" DRB for international construction projects. Please note that this version of this talk will probably be amended for presentation at the IBA in Cancun.

KEYWORDS – ICC, ADR, DRB, International Construction Disputes, FIDIC, Knutson, IBA, ICC ADR

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* International Construction Disputes

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Section 1 - Introduction – The ICC and International Construction Disputes

- 1.1 The ICC is perhaps the World's foremost forum for the conduct of international construction disputes. It is dwarfed in total number of cases by CEITAC and the AAA but outside the United States and China it is the premier non-state venue that parties turn to for resolution of this type of dispute. Whilst the statistics are not entirely easy to decipher the number of construction related disputes in front of the ICC at any one time may well be about 100 or so with a nett value in the many million of dollars. I know from my own experience on the ICC Court that international construction disputes feature at almost every one of the monthly sessions of the Court and at many of the weekly Committee meetings.
- 1.2 FIDIC* have since about 1959 included references to the ICC in their standard form of international construction contract which, perhaps even including US Government Contracts Overseas is, in its many variations, the most widely used suite of international construction forms. Again, in the ICC Court, FIDIC forms of dispute resolution clauses, whether or not the contracts are recognisably full FIDIC contracts, feature very frequently in the deliberations of that Court. There are at least two published articles in the ICC Bulletin containing extracts from selected decisions of the Court in relation to the FIDIC Contract.
- 1.3 The market use of FIDIC is likely to mean that if you practice in the field of international construction contracts, you are likely to come across FIDIC. If you are an acolyte of ADR, you may wish to use it in relation to their forms – forms which often arrive with ICC arbitration stipulated as the final stage of dispute resolution.

THE ICC and ADR

- 1.4 The ICC is not “a new kid on the block” when it comes to ADR – it has venerable experience in the area. The ICC Conciliation Rules stem, from memory, from the mid 1970's and although they were not widely used in practice, and attest to the willingness of the ICC to assist parties with this method of dispute resolution before it became an new American and then international vogue.
- 1.5 In 1992/3 I attended a meeting at the ICC to consider ADR. The CPR Institute from the United States was very heavily represented and Jim Henry, the recently retired President of CPR was very successful in spreading the ADR gospel amongst the delegates attending that conference. Even then, as I recall, prominent promoters of the DRB concept were amongst the members of the audience.
- 1.6 It is of course a historical matter that FIDIC themselves adopted “Dispute Adjudication Boards” with a 1996 revision to their 1992 Fourth Edition of the Civil Engineering Contract. With the publication of the Orange Book “Conditions of Contract for Design – Build and Turnkey” the DAB was formally installed in the FIDIC contract forms. The FIDIC type of “DRB” was different from many American models – decisions of the DAB were and still are immediately binding and, unless the parties gave the appropriate notices, became final within a certain number of days. There was no question of contractually compliant non-compliance with the decisions of the DAB.

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- 1.7 The World Bank funds over 20 billion dollars of projects every year and of course its standard forms of contract found in the Standard Bidding Documents is of immense interest. The World Bank also adopted DRB's, thanks in part to the lobbying of a former Chairman emeritorous of this Committee, Gordon Jaynes. DRB's in the World Bank version followed the American model with the DAB decision being non-binding. Voluntary non-compliance remained contractually compliant.
- 1.8 Meanwhile at the ICC and particularly in its Commission on International Arbitration which is generally seen as functioning as a policy formulating arm of the ICC, the Chairmanship changed to a Canadian, Paul Gelinias who reorganised and reinvigorated the Commission with the formation of a number of Working Groups including one on ADR. The forum on ADR and its Working Group on the ADR Rules caucused extensively and consequently the ADR Rules, having been approved by the various requisite organisations within the ICC, came into force as from July 1st 2001.
- 1.9 Thus it can be seen that the ICC, whose business consists to a fair extent of largely FIDIC inspired international construction contracts has formally adopted ADR. FIDIC themselves have, somewhat earlier than the ICC adopted DABs which any American would recognise immediately as a DRB in the US sense.* Looking from a world-wide perspective, as a sub-category of the whole ADR movement, DRB's have been a beneficial product of the search, primarily in America, for useful mechanisms other than litigation or arbitration for resolving disputes. FIDIC have adopted DRB's for their particular field whilst the ICC have adopted the more all embracing concept of ADR albeit without specific reference to DRB's.

* For an interesting analysis of the history of DRB's see the article by A A Matthews in the Dispute Review Board Foundation Newsletter

Section 2 - The ICC ADR Rules – Their scope and some limitations

The ICC ADR Rules came into force as from July 1st 2001. They are published in a small green fringed booklet which includes both the Rules themselves and the “Guide to ICC ADR” (“the Guide”). The Guide has no obvious contractual effect although it was no doubt unfortunate that the authors of the Guide failed to state this expressly. The Rules themselves do say at the end of the Preamble that the Guide “*does not form part of the Rules*”, [but] *provides an explanation of the Rules and of various settlement techniques which can be used pursuant to the Rules*”. (underlining added) This of course leaves an area of vagueness as the Rules refer to the Guide and state themselves that [only??] the settlement techniques described in the Guide can be used pursuant to the Rules. Does that mean that other settlement techniques cannot be used? The answer probably is that a safe lawyer would only derogate from the Rules by agreement recorded in writing.

The Guide was quite a controversial document during the activities of the Working Group on ICC ADR. In a nutshell, and warning that I did not attend all of the meetings, my recollection of the process were as follows:

1. The core drafting party within the Working Group produced draft Rules.
2. The draft Rules were quite extensively criticised for a number of reasons. Some of those reasons are picked up below, where I recite the brief history of my own contemporaneous comments. In particular, concepts such as describing ADR as “*amicable dispute resolution*” rather than Alternative Dispute Resolution were widely although not universally criticised.
3. Some of the criticisms were accepted by the core drafting group and, for example, the emphasis on “*amicable dispute resolution*” in the draft Rules was dropped.
4. The Guide was published in draft form and revived amicable dispute resolution and some of the other objectionable elements of the Rules themselves which had been evicted from the Rules.
5. In the Spring of 2001 the ICC Commission on International Arbitration met and the Guide was criticised for many of the same reasons the Rules themselves had initially been criticised. In particular, they did not reflect the European practice, reflected in the FIDIC DABs, of having binding mediation and did not admit the possibility of mixed mediation/arbitration/conciliation proceedings.
6. The Guide was published with few, if any, concessions to the criticisms made at the meeting.

Conclusion on the Guide

Unless you don't know anything about ADR it would be best to ignore the Guide. Its most likely function for those who are conversant with ADR principles and practice is that it will cause disagreements between the parties as to how the ADR should proceed.

What the Rules Actually Say

The Rules themselves consist of a Preamble and seven reasonably short Articles plus a Costs Appendix – in total only 9 pages of text.

They are worthy of certain summary comments. It is unfortunate that there is a “Preamble”, because the effect internationally of the Preamble will be unclear. No doubt many systems would be hesitant to give binding effect to the two paragraphs making up the Preamble

The Rules themselves are purely administrative. As with the Conciliation Rules which they replaced, the intervention of the ICC is purely at an administrative level. The ICC will ensure for your money that there is at least the appointment of a neutral and a preliminary meeting to discuss the potential types of ADR which might be used. They will also record the termination of the ADR proceedings which itself can be a useful intervention given that many multi-tiered systems of dispute resolution provide for amicable settlement proceedings as a pre-condition for raising the ante in arbitration or the courts.

In addition, the Rules provide for a strong degree of confidentiality, breach of which may presumably give rise to an action in damages. They also provide that *“Each party shall cooperate in good faith with the Neutral”*. Here again, bad faith activities should, if proven, give rise in many systems to an action in damages.

It is also no doubt useful that mediation is the default technique and that the Neutral *“shall be guided by the principles of fairness and impartiality and by the wishes of the parties”*. ICC Neutrals therefore may well, despite the failure to refer to bad faith activities in the “exclusion of liability article, Article 7(5) probably be liable under many (particularly civil law) systems, for bad faith activities - which must be deemed in these circumstances to include failing to be impartial by acting on the wishes of one party only.

Article 1 – Scope of the ICC ADR Rules

For some reason this paragraph states in the second sentence that *“The provisions of these Rules may be modified by agreement of all the parties, subject to the approval of the ICC.”*

I do not personally know the history of this sentence although I can understand that the ICC might wish at least to be informed of suggested amendments to the Rules if it is going to administer the appointment of Neutrals under the amended Rules. It does seem to me however to be a little too much to make the amendments subject to the approval of the ICC.

Parties wishing to utilise amended versions of the Rules will now no doubt copy the relevant elements of the agreement to the use of amended ICC ADR Rules in a DRB to the ICC for approval because, extremely unfortunately, there is as a result of this wording no doubt an excellent argument that if the approval of the ICC has not been actually obtained, modifications to the Rules and, the reference to ICC ADR itself may be unenforceable. Indeed, it may even be that clever lawyers will wait for the attempt to enforce decisions or awards purportedly made under the ICC ADR Rules, or even awards or settlement agreements purportedly made under the ICC Rules to point out a such a fatal defect in court and in fact prolong the dispute expensively for many more years. I know I would.

As mentioned, I was a member of the ADR Rules Working Group within the ICC and can tell you that there was some rather extensive debate about the Rules, what they should do and what they should try to do. I personally found the debate to be quite frustrating because I believe the ICC has with, these Rules, missed a golden opportunity to appeal to the whole world with its Rules and to bring in the more or less the whole of the vast variety of ADR mechanisms under the ICC umbrella. I would guess that it was the view of the majority of the Committee that mediation by a sole mediator is on the ascendant internationally, a view I would not disagree with so far as general international transactions are concerned, and that their mental model for ICC ADR was based on individual transactions in international sales disputes. Of course, ADR as practised world-wide it is much broader than that model suggests. DRBs are simply one example that does not fit this model.

Nonetheless, this one model, namely the individual mediator acting as mediator in a dispute over a single transaction became the model to which the ADR Rules are aimed.

This necessarily meant that the ADR rules were not directed towards construction disputes, the possibility of temporarily binding decisions, straightforward evaluations, “deal mediation” and so on.

I will now give a brief summary of what the Rules themselves set out, without editorial comment.

The essential characteristics of ICC ADR

It is a bit difficult to summarise the Rules with fewer words than used by the Rules themselves²

As is the case with all of the ICC model forms of all of the ICC Rules relating to dispute resolution, these rules are administrative. This means that by signing up to the Rules, you or your client will be assured that the ICC will take the matter in their grasp and for a fee, ensure that a (hopefully suitably qualified) mediator will be appointed and he or she will attempt to resolve the dispute/s.

The essential characteristics of ICC ADR include the following:

1. The parties involved in ICC ADR have the ability to choose the settlement technique best suited to help them resolve their dispute with the help of an experienced Neutral. Mediation is the “default” settlement technique in that where the parties cannot agree upon a settlement technique, mediation will be used.
2. The Neutral has a very different role compared to traditional dispute resolution procedures. The Neutral facilitates communication between the parties in ADR but, unless otherwise agreed, does not render an opinion or award which is binding in itself upon the parties. However, ADR can lead to a settlement agreement between the parties which ends their dispute and is binding upon them in accordance with the law that applies to the agreement.
3. ADR proceedings under the Rules are intended to be efficient, rapid, and therefore relatively inexpensive. The procedure has been developed to provide parties with a framework to reach an amicable solution to their disputes using a minimum of time and resource.
4. ADR proceedings are primarily party-controlled. The role of Neutral is usually confined to advising and guiding the parties to facilitate communication in order to reach an amicable settlement.
5. ADR places an emphasis on confidentiality and the Rules have been drafted so as to provide maximum safeguards protecting confidentiality.
6. The Rules apply exclusively to business disputes, both international and domestic.
7. The Rules also apply to multiparty disputes.

Commencing ICC ADR Proceedings

In order to commence ICC ADR proceedings, the parties must agree to submit their dispute to the Rules. This agreement can come about in a number of ways:

² I am grateful to Brendan Reilly of Masons Solicitors London for the production of most of this redaction which consists of a mixture of elements from both the Rules and the Guide.

- Prior agreement of the parties, either in the original contract or by way of later agreement; or
- One party submitting a Request for ADR to the ICC and this being accepted by the other party.

In all cases the first step in ICC ADR proceedings must be the submission of a Request for ADR to the ICC.

Selection of the Neutral

As with many dispute resolution procedures, success is largely dependant on the abilities of the person overseeing the procedure, whether they be a judge; an arbitrator or a facilitator. The same rule of thumb applies to ICC ADR.

The Neutral can be selected either by agreement of all parties or by appointment of the ICC. Where the Neutral is selected by the ICC the parties can advise of any specialised skills, experience or qualifications that they desire the Neutral to have. The ICC will then make every reasonable effort to appoint a Neutral having those characteristics.

Confidentiality

In order to ensure that parties enter into ICC ADR with as much confidence and trust in the process as possible, the Rules provide important confidentiality provisions. Article 7.1 provides that ICC ADR proceedings are private and confidential starting from the filing of the Request for ADR. Only two exceptions to this rule are provided:

1. The parties may agree that all or part of the proceedings will not be confidential; and
2. A party may disclose any given element of the ADR proceedings if so required by the applicable law.

Any settlement agreement reached by the parties must also remain confidential, subject to the above exceptions. In addition, a party may disclose the settlement agreement if such disclosure is required for its implementation or enforcement.

ICC ADR Procedure as summarised in the Guide

The following is a very brief outline of the ICC ADR procedure as foreseen by the authors of the text.

1. The cost of the ADR proceedings is comprised of:
 - (a) ICC administrative expenses and;
 - (b) the remuneration of the Neutral.

The system of payment has been designed by the ICC so that it controls the cost of the ADR proceedings and to ensure compliance with established deadlines. The parties share the costs equally, unless an agreement is reached that indicates otherwise. The Rules do not expressly state that in the absence of agreement to the contrary the parties each bear their own and their advisers' costs of taking part in the ADR process, so this may be a matter for the decision of the Neutral or agreement to the contrary.

2. The parties must seek agreement on the settlement technique to be used. The following options are referred to in the Guide:
- (a) **Mediation**, described as being where the Neutral seeks to facilitate the amicable resolution by the parties of their dispute but does not provide any opinion as to the merits of the dispute;
 - (b) **Neutral evaluation**, described as being where the parties agree to allow the Neutral to provide a non-binding opinion concerning one or more matters including:
 - (i) an issue of fact;
 - (ii) a technical issue of any kind;
 - (iii) an issue of law;
 - (iv) an issue concerning the application of the law to the facts;
 - (v) an issue concerning the interpretation of a contractual provision;
 - (vi) an issue concerning the modification of a contract.

The parties then make use of that non-binding evaluation to negotiate an amicable settlement, based upon their greater knowledge of the likely outcome from a traditional tribunal if they do not reach a settlement.

- (c) **Mini-trial**, a settlement technique constituting a panel made up of the Neutral, as facilitator, and a manager of each of the parties to the dispute. Ideally, each manager should have the authority to bind the party that selected him or her and must not have been directly involved in the dispute. Each party then presents its position to the panel in a concise manner. The panel then seeks a solution acceptable to all of the parties or, alternatively, expresses an opinion on the position of each side. That panel opinion is then used to prompt an amicable settlement between senior executives of the parties.
- (d) **Any other settlement technique.** The parties, in consultation with the Neutral and within the framework of Article 5.1 of the Rules, may agree upon any appropriate ADR settlement technique that would assist them to resolve their dispute amicably.
- (e) **Combination of settlement techniques.** It may be appropriate, given the nature of the dispute or the wishes of the parties, to use a combination of settlement techniques. The options for such a combination are relatively unlimited, but may, for example, allow a Neutral to give his or opinion on a specific issue to “unlock” the dispute or break an impasse during the course of a mediation.

Termination of ICC ADR Proceedings

Article 6 of the Rules provides for 6 events that will terminate ADR proceedings commenced in accordance with the Rules. These are self-explanatory and need little comment:

1. The signing by the parties of a settlement agreement which puts an end to their dispute;

2. Written notification to the Neutral by one or more of the parties that it does not wish to pursue ADR proceedings;
3. Written notification by the Neutral to the parties that the procedure agreed upon during the first discussion or thereafter has been completed;
4. Written notification by the Neutral to the parties that, in his or her opinion, the ADR proceedings will not result in an amicable resolution of the disputes between the parties;
5. The expiration of any time period set for ADR proceedings;
6. Written notification by the ICC that payments due by one or more parties pursuant to the Rules have not been made;
7. Written notification by the ICC, that, in its opinion:
 - (i) the designation of the Neutral was not possible, or
 - (ii) it was not reasonably possible to appoint a Neutral.

Analysis

It can be seen that, regardless of what may or may not be considered to be blemishes in the text, the ICC ADR Rules have an immediate utility in relation to international construction contracts. Many contracts (not simply construction contracts) provide vaguely for an attempted amicable settlement before arbitration or indeed litigation can be commenced. It would be a very simple matter indeed to include a specific reference to ICC ADR in the Appendix or Special Conditions to a contract or other contract documents to fulfil this requirement. The FIDIC / ICC contracts have for many years included a requirement for attempts at amicable resolution prior to arbitration and have been criticised for the lack of specific guidance to how this may be achieved. Along with the Rules of many other institutions, the ICC ADR Rules can now be added as a suitable method for attempting amicable resolution to fill this gap in the FIDIC contract.

The Rules as established reflect a certain amount of conceptual or indeed, ideological, purity so far as ADR goes. It has to be said and no doubt the people most involved with the process would acknowledge that few, if any, concessions were made by the core group drafting the Rules to European ADR practices or sensibility. ICC ADR thus reflects what may very well be a mainstream consensus within the United States (and perhaps Canada) as to what ADR should be. For example because of the emphasis on consent of the parties to the whole process they, in other words either one of them, are able to terminate it at any time.

When I spoke on the ICC Rules in October 2000 at a CPR Institute meeting I highlighted the following elements of the Rules:-

- the draft Rules call for Mediation by default
- there is ad hoc or pre-arranged appointment
- they apply to all business, not only international business
- the fees are paid jointly to ICC, which pays Neutral
- there is termination of the procedure by notice from 1 party only

- there are strong privacy provisions
- the Neutral cannot have been or be an arbitrator

In this critique of the Rules I said that there were five points which were worthy of further critical discussion. These were as follows:-

- “dispute” or “difference”
- National practices re: arbitrator/mediators
- Art 3.3 – “Independence” only?
- “Amicable” Dispute Resolution
- Why have such an easy bail out?

Briefly, there is no obvious need to confine the ambit of the mechanism to disputes only, but on a careful reading, this is what has been done. In some cultures, it would be easier to get past the threshold of appointment by reference only to a “difference”. Further, many countries, including parts of Switzerland, Germany and the World’s largest country, China, do not see the need to prohibit mediators from flipping back and both between something that looks like mediation and arbitration/conciliation. These practices have been disenfranchised for no good reason. Article 3.3 (now 3.2 in the final text) refers only to “independence”. My point was quite simple – surely the Neutral should be required to be neutral?

Further, the continued references to “amicable” DR in the Guide smack of nothing more than gimmickry, and do not shed light on ADR. And finally, although some progress was made on this in 5.1, the bail out is just too easy. In Europe, World-wide and certainly in America, where “Court-annexed” ADR has mushroomed, and it simply cannot be said that to be ADR, it has to either be totally voluntary or, indeed, amicable – we are, after all, talking about money, often very serious money, and business reputations or even survival.

Section 3 - Considerations in using the ICC ADR Rules for DRB formation

The extent to which you might wish to use the ICC ADR Rules for DRB formation will depend to some extent on your view of what DRB's can or should do. The ICC ADR Rules include a helpful section on pages 5 and 6 of suggested ICC ADR clauses covering optional ADR, an obligation to consider ADR, an obligation to submit to ADR with an automatic expiration mechanism, and an obligation to submit a dispute to ADR followed by ICC arbitration as required. A slightly modified version of the "obligation to consider ADR" may for example be used where attempts at amicable settlement are necessary under the applicable version of the FIDIC contract.

As mentioned above, ICC ADR does contemplate in Article 3 (4) the designation of more than one neutral either by agreement or by request by the ICC. If therefore you want an *ad hoc* DRB or Dispute Resolution Person resolving disputes as they arise you can again, use the ICC ADR Rules with relatively few amendments.

If however your vision of DRB includes any of the following:

1. The Board should always be more than one person;
2. The Board should be appointed at the outset of the project and continue until all disputes under the project have been considered by it;
3. Board decisions should have a binding effect, at least in the interim;
4. The workings of the Board should not be capable of being interfered with unilaterally by one or other of the parties;
5. The Board should not be able to be terminated by one party only;
6. The Board should undertake some site visits and receive and/or receive regular reports from the site and selected documents;
7. Individual Board members appointed by the parties can be "partial";
8. Any other matter I have not listed above, which you consider to be important for operation of DRB;

then the ICC ADR Rules are going to have to be amended.

Section 4 - Establishing a DRB under hybrid FIDIC/ ICC ADR Rules

During a meeting (now as long ago as Spring 2001) of the ICC Commission on International Arbitration to consider the ICC ADR Rules and the draft Guide I pointed out to the Commission members that I am drafting an ICC Model Turnkey Contract for the ICC and that we very much wished to consider incorporating the ICC ADR Rules as the preliminary step before arbitration. The response from the authors of the Rules was that the Rules were not intended to accommodate DRBs. Unanimous sentiment from the floor was to the effect that neither the Rules nor the Guide should be seen as blocking the use of the Rules for DRBs. Fortunately they do not, and the Commission established a DRB group. However it has to be pointed out that conceptually the Rules are not currently consistent with DRBs for, amongst others, the following reasons:-

1. The Rules do not specifically envisage the formation of permanent boards;
2. The termination rules for ICC ADR are not consistent with the notion of a DRB.

Consequently any adoption of the ICC ADR Rules will have to, by consent of the parties, negate the elements of ICC ADR which do not facilitate DRB establishment and continuity.

If a party to one of the new suite of FIDIC contracts wishes to use ICC ADR, the simplest way to do it would be to delete the sixth paragraph of article 20.2 and agree that the DRB shall continue until the date upon which the final certificate has been issued or the date after the DAB has decided the final dispute referred to it, whichever is later.

The agreement would have to record that it was sent to the ICC for its agreement and that article 6 of the ICC ADR Rules relating to termination of the ADR proceedings is amended by the deletion of 6(1) B and F.

With very few additional amendments, most of the FIDIC provisions relating to the functioning of the Board, such as the General Conditions of Dispute Adjudication Agreement and Procedural Rules could simply be incorporated, *mutatis mutandis* (copyright permitting).

Section 5 – Summary and Conclusion

While they may not be everything to everyone, the ICC ADR Rules are quite flexible, and can be used off the shelf for many ADR situations. For DRBs in construction contracts, thought will have to be given to the amendments needed, both to the ADR Rules, and if the FIDIC contracts are used, the provisions of FIDIC, to allow the parties to make good use of the beneficial aspects of FIDIC DABs, and the well tested administrative skill and judgement of the ICC.

Robert Knutson 21.9.2001