



Forum

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Spotlight on the DRBF's Representative in Mexico: Dr. Lic. Herfried Wöss

Dispute Boards are a fairly recent institution in Mexico. In light of the need for modern infrastructure, their breakthrough will hopefully occur during the present presidency. The first Mexican Dispute Board rules were drafted by the author for Société Générale de Surveillance (SGS) in 1999¹, in order to solve a series of conflicts related to oil platforms of which the first one amounted to US\$200 million². In 2002, based upon an initiative of the undersigned, the Mexican Arbitration Centre together with the World Bank organised the first Mexican seminar on Dispute Boards. Last year, the Dispute Board committee of ICC Mexico, which was responsible for the Spanish version of the ICC Dispute Board rules, held an international seminar on the ICC dispute board rules in Mexico City with Mr. Gwyn Owen as its keynote speaker. Dispute Boards will play an important role at the ICC Mexico/Mexican Arbitration Centre conference on “*Arbitration and Dispute Resolution in the Construction Industry*” which will take place in Mexico City on June 28, 2007. The fruits of such efforts are starting to be conceivable.

A typical dispute resolution clause in a Mexican public works contract would include a reference to a so-called “independent expert” or a “resident at site” with ample authority to resolve technical disputes. However, in some cases the independent expert or the resident at site would also resolve legal issues. Whereas the independent expert is normally a nominating authority which may delay the appointment of the actual expert, the resident at site is in fact an employee of the owner of the works and not independent. The decision made by an independent expert is binding and may only be annulled in case of irregularities in the appointment of the expert, manifest error, fraud or bad faith and excess of jurisdiction of the expert. Excess of jurisdiction may already occur if the expert exceeds the term for the rendering of its decision or if it resolves legal questions without being expressly authorised to do so. Manifest error is a legal concept not actually known under Mexican law but serves to annul an expert opinion in case of incongruence or errors in the valuation of facts.

The borderline between technical dispute resolution and subsequent arbitration or court litigation is often not clearly defined and the result creates multiple uncertainties which may even affect the validity of an award. Apart from that, public works contracts contemplate a conciliation procedure administered by the Control Ministry (Ministry for Public Functioning) and not by an independent conciliator. All in all, the present system does not seem to meet the expectations of a cost efficient and modern dispute resolution system.

This seems to have been recognised by the federal government in the quite successful “*Hospital del Bajío - Public-Private Partnership (2005)*”³ which established a Dispute Review Board managed by an Expert Committee.

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The project consists of the construction and operation (without including medical services) of a public speciality hospital during 25 years. The Expert Committee has five members of which the investor and the Health Ministry select two members each. Of those two members, one has to be a construction expert and the other a hospital management expert. The four party appointed members select the president of the Expert Committee. The construction experts are “active members” during the construction phase of the project. Thereafter, the hospital management experts become such “active members.” In case of difficulties to appoint the experts, the ICC International Centre for Expertise acts as appointing authority.

The Expert Committee issues a non final and non binding recommendation. However, such recommendation is admitted as evidence in a subsequent judicial proceeding before the federal courts. Any law suit is being barred until the Expert Committee has rendered its recommendation.

The construction of the Hospital Bajío finished ahead of the contract schedule and the hospital has recently been taken into operation. No relevant conflicts occurred during the construction phase. The inclusion of a Dispute Review Board in such project will certainly mark the way for other Dispute Boards in other industrial sectors in Mexico such as in power production and oil projects.

One may only hope, that the Dispute Board in form of an Expert Committee gains further powers in order to issue even final and binding decisions, if necessary. □

About the Author:

Dr. Herfried Wöss is an attorney trained in Austria, Great Britain, Brussels (legal service of the EC-Commission) and Mexico, and counsel and arbitrator/panelist in arbitrations and pre-arbitral⁴ dispute resolution procedures. He actively promotes Dispute Boards in Mexico and Latin America. Dr. Wöss is a “rapporteur” of the Dispute Resolution Sub-Committee of the International Construction Projects Committee of the International Bar Association, a fellow of the Australian Centre for International Commercial Arbitration (ACICA), a member of the Chartered Institute of Arbitrators (MCI Arb.) and of the panel of international arbitrators of the International Centre for Dispute Resolution (ICDR), amongst others. He recently integrated a multi-disciplinary team together with an independent engineering firm in order to further engage in claim management, expert proceeding, dispute boards and complex arbitrations⁵. Dr. Wöss can be reached by email at hwoess@woessetpartners.com.

¹The author thanks Neil Kaplan and Peter Chapman for their help and suggestions back in 1999; the SGS rules were *ad hoc* dispute adjudication board rules based on the FIDIC 1999 rules.

²See: Wöss, Herfried, Panel de Adjudicación de Desavenencias, “Una Retrospectiva”, ICC Mexico, Pauta 50, junio 2006, p. 12-20.

³Wöss, Herfried, Long-term performance monitoring in public-private partnerships conference paper, IBA Construction Law Conference, Public-private-partnerships - the road ahead in Latin American construction projects, Mexico-City, May 2006.

⁴Wöss, Herfried, Enforceability of pre-arbitral procedures in international construction projects, conference paper, Arbitration and International Construction Projects Committees, IBA Chicago Conference, September 2006.

⁵Wöss, Herfried, “Consolidation of Arbitration Proceedings and Joinder of New Parties by the Respondent Under the ICC Rules,” IBA Legal Practice Division Arbitration Committee Newsletter, September 2005.



The Dispute Resolution Board Foundation is a not-for-profit, worldwide volunteer organization of over 600 construction industry professionals interested in promoting the avoidance and resolution of construction disputes through a Dispute Board process. For more information, visit www.drb.org.