

# **Romanian Infrastructure 2014 the Statutory Contract Users Conference**

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## **Alternative Dispute Resolution (ADR) a Way to Prevent Litigations**

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# I. Usual Parties' Way of Thinking

- ❖ Common aim to sign a « perfect » contract.
- ❖ The Parties are fully aware of the risk of disagreement.  
*« We are the best, we are sure to avoid disagreements and, if any, we are sure to solve amicably the problems. »*
- ❖ Worst case: the disagreement evolves into a dispute and in the absence of a settlement, litigation is unavoidable except when the Parties have agreed upon arbitration.

## II. What is an ADR ?

ADR = Alternative Dispute Resolution  
( in the USA, arbitration is also an ADR)

ADR = Amicable Dispute Resolution

The Parties wish to settle their disputes or differences amicably, often but not necessarily using a third party, within an institutional framework or not.

ADR = Any method of resolving an issue susceptible to normal process rather than an imposed binding decision

# III. Various ADR Techniques

1. Partnering
2. Claims Appeal Committee
3. Early Neutral Evaluation
4. Dispute Board (DRB, DAB, CDB)

And also

- ❖ Expert Determination
- ❖ Mini Trial
- ❖ Conciliation/Facilitation (Mediation in facilitative process)
- ❖ Mediation in evaluative process
- ❖ Med – Arb (Mediation – Arbitration)
- ❖ MEDALOA (Mediation and Last Offer Arbitration)

## IV. Advantages of the ADR

1. ADR process is not a first-tier jurisdiction but a management device to settle a difference under its own ways and procedures. It is a contractual device to prevent as far as possible a difference to reach the ultimate stage of a dispute in its legal meaning and implications.
1. ADR, when specified in the contract, is more and more considered by Tribunals as a compulsory stage before going into litigation.
1. The Parties prefer to keep their options open: either to settle amicably or to litigate, depending on the nature of the dispute.

# V. How to Get the Best Out of the ADR

1. To have clearly stated in the contract the principle of submitting a disagreement or a dispute to ADR Proceedings.
1. Whenever a disagreement or a dispute arises: to select the appropriate ADR Technique.
1. If « Prevention » is the main objective, the appropriate technique must also be contractually specified.

## VI. ADR Implemented at any Time

ADR can be implemented at any time during the life of the contract, even in case of breach of contract.

ADR might be the only solution when:

1. the termination of the contract is impossible from a technical point of view or leads to excessive financial and commercial damages for both Parties.
2. both Parties under litigation prefer to achieve the contract under the supervision of a third party having the authority to decide interim measures.

## VII. Green Light to ADR

No green light for ADR proceedings without a careful analysis on success probability!

1. Strong involvement of the top management of both Parties
1. Preliminary audit of the disagreement / dispute
1. Watching the behavior of the other Party during the preliminary approach of an ADR action
1. Last but not least: background understanding



# VIII. Clear Background Understanding

1. Not too late for ADR ?
1. Is the other Party in the position of making a decision along the ADR proceedings ?
1. Influence of the national culture of the other Party and/or influence of the individual culture of the manager(s) of the other Party
1. If no ADR, is the other Party in the position to comply with an arbitral award ?
1. Is the settlement of the dispute depending on the decision of others: financial institutions, insurances, subcontractors, suppliers, etc.?

# IX. ADR Techniques

## 1. Partnering

1. Aim: Maintain an on-going dialogue
1. Periodical meetings held during the implementation phase of the contract (Steering Committee)
1. This concept is based on the notion that it will be more efficient to discuss problems and causes for dissatisfaction, rather than to allow them to influence the relationship between the Parties
1. Senior management involvement will be expected
1. Meetings are usually chaired by a neutral person

# IX. ADR Techniques

## 2. Claims Appeal Committee

1. The Committee is composed of a senior executive of each Party, who is not otherwise involved in the matter
1. This way the Committee has more of an objective look on the issues
1. The Committee may also review differences or potential conflicts which were not solved at a lower level
1. Procedure is formal and structured
1. Written reports may be exchanged on the issues

# IX. ADR Techniques

## 3. Early Neutral Evaluation

1. This procedure allows the evaluation of important issues of fact or law
1. A recognized independent expert is jointly appointed by the Parties
1. The evaluation is based on facts finding and provides concrete solutions and recommendations
1. The expert's evaluation is set up in the form of a report including conclusions which are not binding to the Parties
1. The professional experience of the expert is essential

# IX. ADR Techniques

## 4. DB Roles: How and What?

1. The DB members should gain confidence of both Parties
1. The DB plays a key role to facilitate and/or improve communication between the Parties
1. By taking account of differences in culture/experience/custom between the Parties, the DB will be recognized as a professional partner
1. To prevent dispute by acting before a difference becomes a dispute
1. To provide the Parties with an efficient process to settle actual and/or potential disagreements or disputes
1. In case of dispute: to issue a Recommendation (DRB) or a Decision (DAB)

# IX. ADR Techniques

## 4. DB Duties

### 1. In terms of prevention

1. Urge the Parties to submit disagreement or difference at an early stage to the DB (informal referral)
1. In doing so, prevention is time saving, cost saving and prevents damaging the relationship between the Parties
1. Draw the attention of the Parties on the costs of a litigation

# IX. ADR Techniques

## 4. DB Duties (cont.)

### 2. In terms of dispute resolution

1. Respect the procedural rules

1. Act fairly and impartially

1. Adopt procedures suitable to the dispute, avoiding unnecessary delay or expenses

1. Respect “the right to be heard”

1. Issue clear, self-supporting Decision or Recommendation

# IX. ADR Techniques

## 4. DB's Main Features

1. Appointed at the outset of the contract
1. One or three members
1. DB members have a good knowledge of the contract and follow-up the progress of the project

### **Important Notice**

The so-called “Ad-hoc DB” is usually appointed too late. Compared to a standing board, it does not allow to timely prevent the dispute and denies the Parties the assistance role of a standard standing board.



# IX. ADR Techniques

## 4. DB Members' Requirements

1. Availability for meetings and site visits at regular intervals (2 to 4 months)
1. Board members are and remain conversant with the project
1. Board members are ready to address problems as they arise - execution of the contract/works is not delayed
1. Confidentiality throughout the procedure
1. Availability to give advice and opinions = informal assistance

# IX. ADR Techniques

## 4. DB and Prevention of Disputes

### How and why?

1. The regular meetings/visits on site improve the communication and develop confidence
1. Parties and DB members get to know and trust each other
1. Opportunity is given to the Parties to settle their difference in a mood of cooperation
1. Disagreement or difference is submitted at an early stage to the DB – “informal referral”
1. Such prevention is time and cost saving and preserve the relationship between the Parties

# IX. ADR Techniques

## 4. DB's Informal Assistance

The informal assistance may take the form of:

1. Regular meetings and conversations with the Parties, separate or in common
1. Regular site visits
1. Site visit reports
1. Any matters of concern

# IX. ADR Techniques

## 4. DB's Informal Assistance (cont.)

### 1. FIDIC Conditions of contract /sub-clause 20.2

1. At any time if the Parties agree, they may jointly submit a matter to the DB for it to give its opinion

1. Must be by agreement of the Parties

### 1. ICC Dispute Board Rules / Article 16

1. With the agreement of all of the Parties, the DB may informally assist the Parties in resolving any disagreements

# IX. ADR Techniques

## 4. DB's Advantages

### 1. The spirit

1. Opportunity is given to the Parties to settle their difference in a mood of cooperation
1. The professional experience of the DB members is a key success factor
1. The regular meetings on site improve the communication and develop the mutual confidence

# IX. ADR Techniques

## 4. DB's Advantages (cont.)

### 2. The time frame

- ❖ The issues are settled as soon as they happened
- ❖ The decisions are quick and are not delaying the performance of the works

### 3. The efficiency

- ❖ Most of the issues are settled according to the proposals of the Board
  - ❖ It often prevents the Parties to take a unilateral decision (e.g. suspension of the works or of the payment)
2. The costs should be taken into consideration, but are limited in comparison with an arbitration or a litigation

# X. Conclusions

- ❖ Preventive methods allow avoiding dispute by acting before a difference becomes a dispute
- ❖ These methods provide the Parties with an efficient process to settle actual and/or potential disagreements
- ❖ The DB plays a key role to facilitate and improve communication between the parties
- ❖ DB is an efficient tool for any middle and long-term contract
- ❖ DB preserves relationship for future business together
- ❖ DB procedure is cost and time saving

# Thank you!

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