

# Real Time Dispute Resolution in Rio de Janeiro...Since you Cannot Delay the Olympic Games

## **Kluwer Arbitration Blog**

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The Rio 2016 Olympic and Paralympic Games and the Dispute Resolution Board Foundation are implementing dispute avoidance and resolution provisions in a unique way across 35 contracts for this upcoming international event. Successful delivery for these high profile projects is critical, since there is no possibility of delay to completion of the contracts, and everything is in the public eye. Dispute Boards have built up a track record of facilitating successful delivery of major construction projects.

### **Dispute Boards and the Dispute Resolution Board Foundation (DRBF)**

Dispute Boards (DBs) provide a contractual mechanism for real-time dispute avoidance and rapid dispute resolution during the course of a project. They have been developed primarily on major construction projects, with their background commencing in the 1970s in the USA, and thereafter from the 1980s developing worldwide.

In essence, a DB is a panel of three (and occasionally only one) experienced, impartial and independent members who have a dual role under the contract: to visit site regularly and meet with the parties, to facilitate resolution of issues as they arise and before they escalate into formal disputes; and to be available to provide a recommendation or a decision on a dispute if formally referred to the DB.

The DB concept used in the USA is that of a 'DRB', a Dispute Review Board which, in addition to the dispute avoidance role, will provide a recommendation for the resolution of a dispute which is referred to it.

In contrast to this, the concept used most widely internationally is the 'DAB', a Dispute Adjudication Board, which has both the dispute avoidance role, and the role of dispute adjudication providing an interim-binding decision on a dispute when required, which dispute can still be referred on to international commercial arbitration if either party decides to do so.

The Dispute Resolution Board Foundation (DRBF) is a not-for-profit Foundation dedicated to promoting the use and understanding of DBs, and providing training, worldwide. The DRBF is recognised as the leading international organisation in the field of DBs. Accordingly it was approached by the Rio 2016 Olympic and Paralympic Games organisation to assist them in providing an appropriate dispute avoidance and rapid dispute resolution procedure for use on the Rio 2016 contracts.

## **Rio 2016 Olympic and Paralympic Games**

The Rio 2016 Games are to be run in August and September 2016. The Brazil Government (Federal, State and Municipalities) is responsible for the delivery of city bid commitments, being the main venues and infrastructure; and Rio 2016 is responsible for delivery of the Games, including what are described as the 'overlay contracts' which are mostly temporary constructions such as the media building, pools, an arena, ramps and decking, barriers, lighting and signage, bridges, cranes, water and waste treatment, stands and seating.

Under the leadership of Augusto Barros de Figueredo e Silva Neto, Legal Manager - Dispute Prevention and Resolution of the Rio 2016 Organising Committee for the Olympic and Paralympic Games, Rio 2016 has introduced DBs ('Comitê de Resolução de Disputas') for the delivery of 35 of these overlay contracts for the Games.

### **Panels of DB Members**

The DRBF has created two panels of DB members for these Rio 2016 games: a panel of DB Chairs, who will chair the three-person DBs; and a panel of DB Members, from which each party can select one member.

Each panel member has passed through a two-part process of assessment and training prior to listing:

- a pre-selection process which required applicants to demonstrate an extensive background of relevant experience and qualification, as well as the required language skills (fluent Portuguese for DB Members, and fluent Portuguese or Spanish with some English for DB Chairs).
- Successful completion of a DB training course run by the DRBF.

The panel make up therefore brings together Brazilian, Latin American and other international lawyers, engineers and other construction professionals. On each three-person DB, therefore, it can be expected that the combination of experience and skills, and ability to work with the contracting parties in the rapid resolution of differences and avoidance of disputes, will be highly effective. For the one-person ad hoc DBs, the selection of the one-person member will be important for the type of project and individual DB member's background.

### **Dispute Board Rules**

The established international DB rules are those of the FIDIC suite of contracts and the ICC DB Rules. In the USA ConsensusDocs also provides standard DB rules.

Special DB Rules had to be drafted for the exceptional circumstances for which the Rio 2016 DBs are required in Brazil. In putting the rules together, we considered the provisions and concepts in ConsensusDocs 200.4 and 200.5, as well as rules and DB agreements from other sources. The Rio 2016 rules also are drafted to work alongside local law. The DB Rules form part of the contract between Rio 2016 and each contractor.

Key features of the Rio 2016 DB Rules are:

- Each party selects a DB Member from the DRBF Rio 2016 panel, to be approved or rejected by the other party; grounds for rejection are limited in scope.
- The two DB Members in turn select the DB Chair from the panel.
- Each DB Member and Chair must sign a statement of independence and disclosure.
- In the event of a failure to appoint or agree on the DB selection, the President of the DRBF will make the appointment from the DRBF Rio 2016 panel.

- Short timetables are in place to accord with the short programs for the procurement of these Rio 2016 projects: for appointment of the DB at the outset of the contract; setting frequent DB site visits; and requiring rapid delivery of the DB's adjudication opinions and decisions.
- The DB has the power to provide written advisory opinions when jointly requested.
- A formal referral of a dispute may be made to the DB, to obtain a binding decision.
- Later, further referral of the DB decision and the dispute to judicial or arbitral proceedings remains possible.
- Operational assistance is provided by a 'DB Program Manager'. The Program Manager assists the parties in the initial establishment of the DBs, and thereafter assists in the procedural operation of the DBs. This is necessary due to the very short timetables, and to provide consistency of operation across the 35 DBs.
- Remuneration rates for the DB are fixed as a daily rate and monthly retainer.

Special tri-partite agreements have also been drafted, for the employer-contractor-DB member agreements.

The first DB's are now launched on these Rio 2016 contracts. Of course there remains much work to be done by all parties to bring these Rio 2016 Olympic and Paralympic Games to a successful conclusion.