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Strategic Tools For Dispute Prevention and Resolution In A Globalized World

(By Tsisana Shamlikashvili)

Dispute Boards (DB's) as a form of alternative dispute resolution (ADR) can be very flexible. They may be established as a permanent body within a project, at different stages of the project, or may be created on an ad hoc basis.

If a permanent Dispute Board is established, a reasonable question is: *When is the proper time to establish a permanent dispute board?* Establishing the DB may be a provision in the process of structuring the project, signing a contract between its main stakeholders, or a dispute board may be involved in active work already at the stage of developing the agreement between the contracting parties. In recent years, deal-making mediation has proven to be an effective tool and is gaining more and more popularity. This approach allows the parties to clarify the main aspects of future interactions at the initial stage of the agreement, signing contracts, or developing complicated multilateral treaties.

Deal-making mediation is also an effective tool of preventive risk-management, facilitating the quality of agreements by taking into consideration underlying motifs of the key participants for their engagement in the project. At the same time, this deal-making approach allows key participants a chance to look at the project from a panoramic viewpoint and see its vulnerable aspects. This may result in exposing hidden factors, such as the possible impact of the activities during the realization of the project and/or its effect on society, or within certain social groups which can result in negativity towards the project. If these opinions are not taken into account, this in turn may cause unpredictable consequences such as freezing the project after investments have already been made. It is not just a figure of speech that we call deal-making mediation an instrument for exposing hidden risks and making it possible to predict the unpredictable. Not the least important is the vision of the project in development--even more so, as complicated infrastructure projects of social importance usually demand quite a long time before their launch and often presuppose participants' interaction in the process of their subsequent exploitation.

It is impossible to foresee everything; but if the participants have agreed on the mechanisms which they can apply in case of controversies, difficulties, and obstacles of all kinds, then the risk of losses become less probable. Dispute Boards are one of these mechanisms. In our contemporary world there is a need for ADR as an appropriate dispute resolution to allow the parties to combine the advantages of mediation, adjudication and early neutral evaluation, etc. If a Dispute Board is established at the beginning of the project, one can be sure that the project is in safe hands. Applying a metaphor from medicine, *"the Dispute Board is a qualified family doctor able to prevent illness timely and professionally, and if necessary, to cure it with minimum harm to the patient."*

The Dispute Board is an instrument aiming at the needs and demands of the parties themselves; but under the condition that the parties in general are aiming at cooperation and are ready to adhere to mutually accepted rules. An additional advantage provided by DB's is working with the intercultural aspect of a project, which is present now in almost any relationship or in almost any middle-sized business projects. Moreover, in the age of globalization, most projects are international and cross-border.

It is no coincidence that in recent times financial organizations and banks, investing in development of infrastructure, pay more and more attention on the quality of developed agreements and how realistic participants of the “enterprise” are about its risks. For instance in Russia there are big expectations put on the development of public-private partnerships (PPP’s); not only in the field of production and industry, but also in the social sphere. Such projects are complicated not only in structure, but also because of their project longevity they need quality, flexible instruments of effective prevention and resolution of conflicts-both in the process of their realization and in the subsequent exploitation of objects. Dispute Boards as a strategic approach can provide additional support for effective operation of the enterprise.

Instruments such as Dispute Boards may even be included in the list of important criteria for approval of project funding, or for allowing a credit. Some banks look upon DB’s as an efficient instrument of risk management under project financing.

Since 2008, one of the spheres of activity for the Center for Mediation and Law is mediative support of projects, including deal-making mediation. In the concept proposed by the Dispute Board Federation (DBF), the Dispute Board is a step forward that should be promoted in Russian business practice and in Post-Soviet territory.

So who can be a member of a dispute board? It may consist of one or several persons, but they need to be professional mediators/neutrals with work experience in DB’s. The Dispute Board Federation (DBF) as a leader in this field, provides a lot of opportunities to work in and learn about ADR and Dispute Boards, including educational programs for those who want to study professional participation in DB’s. The Dispute Board should be established on the basis of agreement of the key participants of the project. When choosing members of DB’s, it is not only experience and expert knowledge in this or that professional field related to the project that should be taken into account, but also experience as an international mediator/neutral with the professional skills of intercultural communication.

In some cases, an expanded Dispute Board is formed where professional experts constitute the core, and additional authorized representatives of all project participants (often taught the basic principles of work in DB’s) constitute the rest of the members. This configuration, especially in long term projects with multiple participants (who may enter and exit the project at different stages), makes the dispute board more flexible, providing opportunities for timely and productive participation in decision-making for all parties involved in project realization. Expanded DB’s also support a growing level of awareness and responsibility among the project participants.

We hope that the presence of Dispute Boards in Russia will play a role in integrating this approach into the complex measures taken by companies, business associations, investment groups, and financial institutions in the improvement of risk management, as well as efficiency in the realization of complicated projects, including those in the form of Public Private Partnerships.

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