

**Paris Baby Investigation - Episode 7 :**  
**The implementation of dispute boards in construction matters,**  
**with Yann Schneller (English transcript)**

**[Introduction]**

**PBA:** Today, we have the pleasure of being with Maître Yann Schneller. Hello.

**Yann Schneller:** Hello.

**PBA:** You are a lawyer at the Paris Bar and a partner at Cartier Meyniel Schneller. You advise and represent your clients in commercial litigation, as well as in domestic and international arbitration. You are regularly appointed as an arbitrator in arbitration proceedings. You also act as a DB member in international construction projects and are listed on the FIDIC President's list as a FIDIC certified DB member. You are also a frequent trainer and lecturer on arbitration-related topics for in-house counsel, lawyers and law students. You are also very often invited to share your expertise at conferences with other experts specialized in construction matters. Finally, you have just graduated from the Master's degree in Construction Law and Dispute Resolution at King's College London. You therefore have considerable expertise as a lawyer, arbitrator and even teacher. This is the reason why you are with us today, and we thank you, Mr. Schneller, for giving us this time.

**Yann Schneller:** Thank you very much for the invitation.

**PBA:** For this podcast, we wanted to talk about DBs and how they work, their advantages and disadvantages, and the way they are deployed, especially in international construction projects. Indeed, DBs appear today, as the mode of resolution and even prevention of disputes in construction and we wanted to address this mechanism in order to present it to our listeners, who are familiar with arbitration and perhaps a little less familiar with this other type of procedure. The two present similarities, but also differences. I won't say any more about it because we are going to get to the heart of the matter right now. Mr. Schneller, could you possibly start by giving us a definition of DB?

**Yann Schneller:** First of all, thank you for this invitation. So how would I define DB? First of all, DB is an English term, in French it is often called Comité de règlement des différends. It is a panel of experts, usually composed of engineers and/or lawyers, who are appointed by the parties or by an appointing authority to render one or more decisions in relation to a project. Typically, this mechanism is used in construction projects. This panel is most often composed of 3 experts and sometimes, for smaller projects, of a single expert - thus a single member. In quite exceptional cases, 5 members. The Disputes Adjudication Boards (hereafter "DAB") make decisions. We know the Disputes Resolution Board (hereafter "DRB"), which makes recommendations and then there is a third type of Board, the Combined Dispute Board ("CDB"), which makes either recommendations or decisions. Another important element is that we have so-called Ad hoc DABs and permanent DAB.

Ad hoc DABs are formed in the course of a dispute (once the dispute has arisen) and that DAB will render a decision, which decides an issue that is referred to them. The Standing DAB is normally constituted at the beginning of the project and will come regularly to the site, to follow

the progress of the project and resolve disputes when seized by the parties. An important point to distinguish the DB from arbitration is the value of the decision that is rendered by the DB. In fact, the Decision has a contractual value and has no jurisdictional value. The Decision cannot be enforced. This is the most important point. If you want this decision to be enforceable, it will have to be converted into either an established court decision or an arbitration award in order to be able to pursue its enforcement.

**PBA:** Could you tell us more about the history of these committees? Are they comparable to arbitration, which has existed for a long time but has only really become widespread since the expansion of international trade? Or is this a procedure that is truly new?

**Yann Schneller:** Thank you very much for this question. It's very interesting to see how the mechanism came about. You were talking about arbitration, and this matter has existed since almost the dawn of time in fact. Finally, DBs are very recent, compared to arbitration. In what we find on the subject, in fact the first recorded DB would be the Tunnel Eisenhower in the United States, whose construction began in 1975. Then, the first DB outside of the United States is in Honduras, it was for the El Cajon hydro dam in 1981. In Europe, the first DB was the one set up for the Channel Tunnel, which was the object of a DB composed of 5 experts. The construction began in 1987 and it was Professor Philippe Malinvaud who chaired this DB.

In the history of DB, other dates are very significant. First, the appearance of a DB, including the FIDIC contract of 1994, which was the orange book, i.e. the free orange which was the EPC contract (Engineering, Procurement and Construction Contract) of FIDIC. The following year in 1995, there was a very important development in England and the appearance of what is called the Statutory Adjudication. This is a mechanism which is provided for by law and which allows all construction contracts, with a few exceptions, to be decided by an Adjudicator within 28 days.

The mechanism then spread to a number of countries with a common law tradition, including Singapore, South Africa, Australia, Canada and Ireland. In 1999, the "Rainbow Suite" was introduced by FIDIC, which integrated a permanent ATM for its red book and ad hoc ATMs for its yellow and silver books. The most significant projects, which have adopted DBs internationally, are for example the London Olympics in 2012, the Rio de Janeiro Olympics in 2016, the CERN nuclear project between France and Switzerland. For those in France, the Paris-Bordeaux TGV line between 2010 and 2016, the Grand Paris is currently using a CRD system and the ITER nuclear fusion project in Cadarache, in the south of France. The last notable evolution is the appearance in the 2017 FIDIC, the latest edition of the "Rainbow Suite", of a DAAB - adding an "A" for "avoidance". There is now an emphasis on the dispute prevention role of DBs, and now all DBs are standing, so permanent throughout the FIDIC suite of contracts.

**PBA:** In order to allow our auditors to understand this mechanism, could you describe to us the concrete functioning of a DB?

**Yann Schneller:** The concrete functioning of the DBs in FIDIC contracts works as follows: you have 2 options, it is the permanent DB, the one appointed at the beginning of the project. The adjudicator comes to visit the construction site at regular intervals, normally it's 3 to 4 times a year. It is essentially on this occasion that he will play his role of prevention of disputes. It is at this time

that the members of the DB try to create a climate of confidence with the Parties and will try to identify and defuse any potential disputes.

The DB can be seized punctually either of request of opinion or of decisions, which it must return at this time within 84 days. Then you have the Ad hoc DAB, which is the one that is seized of a request on an ad hoc basis. This one is appointed when a party is going to launch the process and make a request for a decision. He or she will then have 84 days to render a decision.

It is a fairly informal process, less informal than arbitration, and which is ultimately quite comparable in the way it is conducted and also in the final product, which is a decision that may in form resemble an arbitral award.

**PBA:** You mentioned ad hoc and permanent DB. What do you think determines the choice of the parties in this matter?

**Yann Schneller:** Often it is the contract that will impose one or the other choice. In FIDIC contracts, this is already provided for in the contract. Very often the parties do not change what is provided for in the contract. When there's a permanent ATM, they'll just comply with what's in the contract. But when the parties think about it a little bit more, usually they are the ones who make the choice of a permanent ATM and an ad hoc ATM. At that point, it is really their will and because they see some advantage in it.

**PBA:** Would you advise a particular type of DB?

**Yann Schneller:** I would advise, without any doubt, the permanent DB because it is the one that presents the most advantages because it will really allow the deployment of all that is expected from a DB and in particular the role of prevention of disputes. This is really the main interest of this mechanism. We have observed two important drifts with ad hoc DABs, which are that it looks a bit more like a form of mini-arbitration. Very often, the process is a bit jurisdictionalized, especially when lawyers are involved. Finally, in this case, one can ask oneself, if it really has an interest. In the context of a large construction project, the permanent DAB allows for an efficient resolution of disputes, and therefore allows for the project to be delivered on time and on budget.

**PBA:** We understand the reasons why DBs are adapted to the complex needs of construction projects. Are there nevertheless other areas in which DBs could be effective?

**Yann Schneller:** Actually, I have been hearing about the use of DBs in other fields than construction for years. A priori, in a theoretical way, DBs can be useful in all medium to long term projects, as soon as there are both budget and time constraints. In practice, I have never seen them in other fields than construction.

**PBA:** On that note, could you enlighten us on the different construction projects, which most often require the setting up of DB?

**Yann Schneller:** The types of projects are usually construction projects itself. Since DBs are relatively expensive, below 5 million Euros, it doesn't make sense to have a permanent DB.

From 5 to 50 million, it is recommended to have a DB with a single member. And above 50 million, it is generally recommended to have a DB with 3 members. It is also possible to have a DB, which

continues its work after the construction operation, especially when there is an exploitation phase. I am thinking in particular of DBO - Design, Build, Operate - type contracts in the operating phase, or also of PPP - Public, Private, Partnership - we can also envisage keeping a DB who would follow his work throughout the operating phase.

**PBA:** Still on the subject of construction, what are the problems most often encountered?

**Yann Schneller:** The most frequent problems are those that can be encountered in construction. It can be requests for extension of time, assumption of additional costs, the question of additional work, payment of invoices, questions of termination. Recently, and obviously, there are a lot of claims related to the pandemic. Even more recently, the consequences of the pandemic and the war in Ukraine have caused energy costs and production costs to skyrocket, and we have a lot of claims related to the increase in raw material costs.

**PBA:** You mentioned that the decisions of a DB are not binding. In your opinion, in what way would this mechanism constitute an effective means of dispute resolution?

**Yann Schneller:** This is one of the major criticisms made of this mechanism - efficiency. When it is a recommendation, it is not mandatory, it is not binding. But when it is a decision, it has a contractual value, which is binding on the parties, even in case of disagreement. Even if one party issues a decision to disagree, the decision is binding and the parties have a contractual obligation to comply with it. It is simply the enforcement aspect that is postponed - that is, the decision must be converted into a decision of a state court or an arbitral award.

Having said that, there are two important factors that allow the efficiency of the DBs, first, it is that in any case in the FIDIC system, it is a decision rendered in 3 months, so very fast. The second factor which is probably the most determining is that in fact, especially when it is a permanent DB, these are people who have known the site and who render decisions, therefore, of very good quality. This is what will usually give a very strong indication to the parties of how the arbitrators might decide the issues on the merits. It is this indication that often has the effect of allowing the parties either to perform spontaneously or to find the basis for a compromise.

In this regard, let me quote two things, which illustrate my point. First, the experience of the Channel Tunnel. An article written by Professor P. Malinvaud, on this subject, where he explained that the DB constituted for this project was seized 20 times. Of these 20 referrals, 7 were withdrawn following an agreement between the parties, 12 decisions were rendered, most of which were accepted, or were the subject of a settlement, and only one was the subject of an arbitration and was finally referred to the DB and settled by the parties.

It is a rather eloquent example of the effectiveness of the mechanism and we see that, finally, on a rather complex project and moreover, which was the subject of many difficulties, the arbitration was avoided, globally in its entirety. The other element I wanted to mention is a study conducted by the Dispute Resolution Board Foundation in 2018, which shows that when in international construction projects, DBs that are set up: the permanent DBs, in less than 1% of cases, there were requests for decisions that were subject to arbitration. This is a pretty good example of the effectiveness of the mechanism.

**PBA:** Speaking of efficiency, what do you think are the main advantages but also perhaps the disadvantages of the different types of DB?

**Yann Schneller:** For permanent DABs, the advantage is immense. It can allow to settle disputes and to complete the project on time and on budget. Obviously, it allows to avoid an arbitration which can be long and expensive. As far as ad hoc DABs are concerned, the main advantage is the speed of the decision and it gives a useful indication of the decision that the arbitrators might render at the end of the process. It can, therefore, favor an amicable resolution of the dispute. Concerning the disadvantages, the permanent DAB is a rather expensive mechanism because finally the company, the builder and the client will have to pay a panel of 3 experts if there are 3 of them. They will come regularly to visit the site, there are travels, there is also the mobilization of the teams. All this has a cost. But finally, if we compare this cost to that of an arbitration, it is absolutely ridiculous. That's how it should be seen. It allows you to avoid a much higher expense.

The major disadvantage is in the ad hoc DAB: first, the first drift is that of the mini-arbitration or the first instance of the arbitration. The parties will first test their arguments before the DB and then bring them to the arbitrators. When we are finally in this configuration, the parties often see the DAB as a procedural obstacle before going to arbitration. Therefore, the mechanism allows for all its interest. In this case, if the parties do not really want to play the game, it is better in this case to go directly to arbitration.

**PBA:** On the criteria that determine the decision of the DB. We know that construction projects are environmental and human rights issues. Do DB members take these issues into account in their decision-making?

**Yann Schneller:** In my experience, very rarely because the DABs apply contracts. Human rights and environmental issues are not yet formalized in these contracts. But this will come, especially the environmental aspect because the construction industry is one of the most polluting in the world. And there is a very strong reflection at the moment in this industry. I am thinking in particular of FIDIC, which is working in particular on net zero clauses, which aim to impose environmental performance criteria, both in the construction project and in the operation. These clauses will probably appear in contracts within a few years and will therefore have to be applied by DB members. On human rights, there is a notable evolution since 2010 - the WB, in the projects they finance, requires DB members to ensure that builders comply with certain obligations, notably in terms of prevention of violence against women. This is a first evolution in this field.

**PBA:** Let's hope that these improvements will be pursued. If not, what do you think will be the next developments in this area? In particular, we wondered if DBs could in the future replace arbitration in construction projects?

**Yann Schneller:** That is an excellent question. Regarding the next developments, first of all, it will be the informal assistance. The assistance aspect of DB members will be stronger and stronger. There is a growing expectation from the parties in this area. There is also a dissemination of knowledge. FIDIC is currently working on a note that aims to disseminate knowledge on the informal assistance provided by DB members.



A second development could be the collaborative contract. There is a very big tendency in the construction industry to use collaborative contracts, firstly, between builder and client, but also in a general way on projects by involving all the stakeholders of a same operation around the same contract. I think that a possible evolution is that DB members no longer intervene only for the execution of a contract, but rather for the execution of a project in a general way. We talked about net zero clauses and that will be a significant evolution. Another evolution, I mention it because the International Chamber of Commerce and in particular arbitration work a lot on these subjects is the decompartmentalization between the various alternative dispute resolution methods. In particular, there is currently talk in arbitration circles of having more and more recourse to other modes of dispute resolution during an arbitration, with in particular "mediation windows" possible during an arbitration.

I see the same thing for DB members because I think that DB members will try to use other methods of informal assistance first, such as using external mediators or even arbitrators to decide complex issues that the parties cannot agree on so that they can concentrate on the informal assistance aspect. Concerning the question of whether DBs will replace arbitration: it is probably not entirely clear that DBs have replaced arbitration in many cases. Generally, it is said that once you go to DB, there is probably only a minority that would go to arbitration. And that the extreme majority is purged at the DB level. In some ways, there are many, many cases where DB replaces arbitration. But it will never totally replace it because arbitration is the only mechanism that is a jurisdictional mechanism, and that renders a decision that is enforceable. DB and arbitration are two different mechanisms that are quite complementary. Arbitration will continue to exist.

**PBA:** We are heading towards the end of this exchange and this is an opportunity for us to ask you some professional questions. Among all your hats, that of referee, lawyer, member of DB, teacher, which is the one you prefer and why? And as a DB member, what skills do you consider necessary to practice this profession?

**Yann Schneller:** At the risk of disappointing you, I do not prefer any of them. I like them all, and that is why I chose to do all of them at the same time.

I made the deliberate choice to be involved in the board, as a referee, as a member of DB and then to teach and do a lot of training because I am convinced that these disciplines enrich each other. I am firmly convinced that you are a better lawyer when you work as an arbitrator or as a DB member. And vice versa. I also like to teach and pass on. I learn a lot when I have to prepare trainings. And it is something I do with great interest.

**PBA:** As a member of DB, what skill(s) do you think are necessary to be able to practice this profession?

**Yann Schneller:** When you simply have to render a decision, the skills are quite similar to those of an arbitrator. You have to know how to conduct a procedure and write a decision. These are the two essential skills. And when you do that as an arbitrator, you're able to replicate it as a member for the DB.

I would say that the other skill, which you don't learn when you're a counsel or an arbitrator, is when you're a permanent member of a DB and you have to do the informal insistence function. It requires to work in a totally different way and to be much more in soft skills, everything that is

communication, inter-personal exchanges, understanding what is going on during a site visit. We have to get people to talk, but especially those who don't speak up and who we can see don't agree with what is being said. It is extremely important to know what everyone involved in a project thinks about the execution of the contract. That's when you can do extraordinary things. There are stories of DBs literally saving projects and I find that satisfying. So it requires training and developing skills that you don't necessarily have as a lawyer or as an arbitrator.

**PBA:** Mr. Schneller, we thank you for your advice and more generally for your time spent answering all our questions. It was a very interesting podcast and I hope that our listeners will agree. Thank you.

**Yann Schneller:** Thank you, see you soon.