

The clause then sets out two further ways to appoint an adjudicator. Appendix 1 provided that the adjudicator was to be a Mr George Ashworth of a particular firm, but no such person of that name worked at the firm. However, a person of a similar name, a Mr ‘Geoffrey’ Ashworth was engaged at that firm. The RIBA appointed a Mr Biscoe as adjudicator, but on 19 September 2003 Judge Humphrey LLoyd QC decided that Mr Biscoe had no jurisdiction and his decision was a nullity. A further notice of adjudication was served, but unfortunately Mr Geoffrey Ashworth had by that time sadly died. The RIBA once again appointed Mr Biscoe.

The issues that arose at the Court of Appeal were:

- 1 The scope of the appointment clause in the contract;
- 2 Whether there was a breach of natural justice by the adjudicator deciding something that he had already decided;
- 3 Whether there was an appearance of apparent bias carrying forward legal advice from the first decision to the second;
- 4 Whether the adjudicator had failed to deal with an issue in respect of Clause 27 in his decision;
- 5 Whether a telephone conversation amounted to an appearance of bias;
- 6 Whether advice in respect of his jurisdiction amounted to an appearance of apparent bias; and
- 7 Whether the possibility of a claim against the adjudicator could amount to the appearance of bias on behalf of the adjudicator.

The Court of Appeal held that the words ‘referred to him’ meant that a dispute had to be referred to the adjudicator before the two further ways of appointing a substitute adjudicator could apply. As the dispute had not been referred to the adjudicator before his death, Clause 30A.3 of the contract did not apply. The contract therefore did not provide for the appointment of an adjudicator in the event that the adjudicator named in the contract was unavailable. The Scheme<sup>43</sup> therefore applied and the appointment by the RIBA was valid.

The carrying forward of a decision in respect of principally the same dispute (though the first decision was a nullity) did not in itself create an appearance of bias. Dyson LJ stated:

‘The question that falls to be decided in all such cases is whether the fair-minded and informed observer would consider that the tribunal could be relied on to approach the issue on the second occasion with an *open mind*, or whether he or she would conclude that there was a real (as opposed to fanciful) possibility that the tribunal would approach its task with a closed mind, *predisposed* to reaching the same decision as before,

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43 See note 10 and linked main text.

regardless of the evidence and arguments that might be adduced.’<sup>44</sup>  
[emphasis added]

An adjudicator must approach the question the second time with an ‘open mind’ and consider the evidence submitted in the second referral and should not be ‘predisposed’ to reach the same conclusion. The judge went on:

‘In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. ... It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. ... He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct.’<sup>45</sup>

If approached with a ‘closed mind’ then the adjudicator would have been biased. The adjudicator had considered the matter again, and therefore was not biased.

The legal advice that he had received in the first decision did not deal with Clause 27, and therefore an informed third party would not consider that the adjudicator was biased because this issue was not dealt with in the initial legal advice, nor in his decision: there was therefore there was no basis upon which any bias could be found. Whitefriars had not made any submissions on this clause during the adjudication and so could not raise the issue now.

The allegation that the note of the telephone conversation between the adjudicator and legal advisors for Amec was incomplete could not be supported, as there was no evidence. The Court of Appeal stated that telephone calls should be avoided, but the telephone call in this case did not present a problem.

Once appointed, an adjudicator is still at risk of being perceived to be biased. Of particular interest is the decision in respect of the application of natural justice to the adjudicator’s conclusion that he did or did not have jurisdiction. As the adjudicator did not have jurisdiction to rule on his own jurisdiction, natural justice was not applicable. This was because the court was to decide whether the adjudicator had jurisdiction, and the conclusion reached by the adjudicator could not affect a party’s rights. In this respect Dyson LJ stated:

‘A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. ... The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decision which can

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44 See note 42 at paragraph [19].

45 See note 42 at paragraph [20].

affect parties' rights. Procedural fairness does not require that parties should have their rights to make representations in relation to decisions which do not affect their rights, still less in relation to 'decisions' which are nullities and which cannot affect their rights. Since the 'decision' of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make a 'decision' after giving the parties an opportunity to make representations.<sup>46</sup>

Nonetheless the judge warned that it will be appropriate for an adjudicator to allow both parties to make representations before coming to a conclusion about his or her jurisdiction.

Finally, the Court of Appeal considered whether the threat of a claim against the adjudicator for continuing with the adjudication when perhaps the adjudicator did not have jurisdiction might support an allegation of bias. Dyson LJ referred to paragraph 26 of the Scheme,<sup>47</sup> which provides that an adjudicator is immune from a claim, save in respect of bad faith. He therefore concluded that a fair-minded third party observer would not consider that a threat of litigation against the adjudicator would make the adjudicator biased, because the adjudicator enjoyed immunity from litigation save in exceptional circumstances.

In 2004 the IBA produced its *Guidelines on Conflicts of Interest in International Arbitration*.<sup>48</sup> These set out the general standards to be attained, and then list examples. The examples are divided between three types of situation: the red list, orange list and green list. The green list sets out situations where no conflict would exist. The orange list provides examples of situations where, from the parties' perspective, there are justifiable doubts as to the arbitrator's impartiality or independence. The red list contains examples of situations where there would be a conflict. That list is then further subdivided between waivable and non-waivable examples; some conflicts can be waived by the parties, but some clearly should not be.

It is, of course, quite feasible that the integrity of an appropriately qualified professional is such that he or she could still act in an impartial manner when acting as a DB member, despite professional relationships. The difficulty here is of course defining the proximity of those professional relationships. The DRBF *User Guide* uses the term 'close professional or personal relationships'.<sup>49</sup> One may assume that a close professional relationship might affect the judgment of a DB member. While it is probably correct, the difficulty is in defining precisely what a close professional relationship might be. The difficulty of course is that a vague or tenuous professional relationship that is not considered and disclosed, but later discovered, could be used to mount a challenge on the basis of a perception of bias.

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46 See note 42 at paragraph [41].

47 See note 10 and linked main text.

48 IBA, *Guidelines on Conflicts of Interest in International Arbitration* (2004); downloadable from [www.ibanet.org](http://www.ibanet.org).

49 See note 33 and linked main text.

The difficult issue for DB members is, therefore, the adequacy of disclosure. If a professional person is nominated for a board and discloses any and all potential links, ties and relationships of whatever nature, that in fact or might, no matter how tenuously, relate the member to any of the parties dealing directly or indirectly with the project, then if that person is selected it would be difficult to mount a challenge based on a perception of bias. This would be because the member would have already disclosed the issue which clearly was unimportant to the parties at the time that they appointed the person because clearly they knew about the relationship.

Before considering disclosure, it is perhaps useful to make the distinction between impartiality and independence.

### **3 *Independence***

Impartiality, and the perception of bias, is subjective in nature. Whether an individual is or is not biased is only something that that individual can truly know. An outside observer such as the parties or a judge attempts to measure whether the person is or is not biased, not by the actions of the person, but by reference to the fictitious neutral observer.

On the other hand, independence is objective. If there is a financial tie between one of the parties involved in the contract and the DB member, then the member is clearly not independent of the project. The outcome of the project may well have some financial effect upon the DB member. The member cannot, in those circumstances, be independent. But, in theory, the member could still be impartial. It may be that the integrity of the individual was such that it would not affect their professional judgment, but that is a matter of debate.

Article 8 of the ICC *DB Rules*<sup>50</sup> introduces an obligation of independence. Article 8.1 requires every DB member to be and remain independent of the parties. The members of the DB are required to provide written statements to that effect, as required by Article 8.2:

‘Every prospective DB Member shall sign a statement of independence and disclose in writing to the Parties, to the other DB Members and to the Centre, if such DB Member is to be appointed by the Centre, any facts or circumstances which might be of such a nature as to call into question the DB Member’s independence in the eyes of the parties.’

The ICC therefore requires written disclosure in respect of independence. Should the independence of the DB member change, then Article 8.3 requires immediate written disclosure to the parties and the other DB members of any facts or circumstances relating to the change in that DB member’s independence. Article 8.3 makes it clear that this obligation in respect of independence continues during the course of the DB member’s tenure.

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<sup>50</sup> See note 14 and linked main text.

A challenge procedure is also included within these rules. Article 8.4 allows any party to challenge the DB member in respect of an alleged lack of independence. A party can submit to the Centre a request for decision in respect of the lack of independence provided that the party, within 15 days of learning of the facts upon which a challenge would be based, makes a written submission to the Centre. The ICC can then make a final decision in respect of that challenge, after giving the DB member an opportunity to comment.

If the challenge is successful, then the DB member's agreement is immediately terminated. The vacancy is then filled either by agreement between the parties or by way of the default procedure.

#### **4 Disclosure**

Article 8.3 of the ICC *DB Rules* requires immediate written disclosure by a DB member to the parties and the other DB member of any facts or circumstances which might create the perception of bias. Regardless of this rule, it is vital that every potential DB member considers whether they have or might have, or might be seen to have, a conflict of interest. The initial consideration by the potential DB member would simply involve considering whether he or she recognised any of the parties, major subcontractors, key consultants or, indeed, key individuals engaged by any of those organisations. However, that would certainly not be sufficient.

If the DB member is employed by an organisation, then a conflict check should be carried out. This would involve considering whether that organisation, or any of its individuals, is currently working for or has worked for any of the key organisations or individuals that are working for the project. If any links, no matter how tenuous, are discovered, then they should be disclosed in writing. The duty is an ongoing one, and a DB member that has been appointed should be alert to any situations that might subsequently be seen to create the perception of bias.

A duty of disclosure requires a person to disclose all material facts known to them and not to misrepresent any of the material facts. This will include statements which are true but which are misleading because they are incomplete.<sup>51</sup>

The duty is a positive one and therefore omission can constitute a breach of the agreement between the parties and the DB members, and a decision made with the involvement of that member will be void. Importantly it may not be sufficient simply to answer the questions put by a party. Care needs to be taken and material facts not specifically requested must be disclosed.

It applies to the representations made by a potential, or appointed DB member, and the duty is an ongoing one.

The contractor and owner rely on the representation made in disclosure (or lack of it). While an owner and contractor can investigate a potential member

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51 *Aaron's Reefs v Twiss* [1896] AC 273, HL.

it will be extremely difficult to identify professional relationships and evaluate the extent of those relationships. This is why the requirement to give full and accurate disclosure is given such a high emphasis.

## **5 *Qualifications***

Categories of qualifications will include:

- Education and professional qualifications
- Seniority, in particular the length of service in a senior position
- Specific qualifications in DB
- Inclusion on recognised DB lists, eg FIDIC, ICC, AAA or ICE
- [Ideally] the ability to demonstrate adequate and appropriate continuing professional development relating to DBs.

Article 8 of the ICC *DB Rules* states:

‘When appointing a DB Member, the Centre shall consider the prospective DB Member’s qualifications relevant to the circumstances, availability, nationality and relevant language skills, as well as any observations, comments or requests made by the Party.’

The question is not the number of qualifications that a DB member has. The qualifications held should be appropriate for the project, and ideally there should be a spread of focused appropriate qualifications between the three DB members. In addition to formal qualifications, it is also important that each DB member is a good communicator, which of course cannot be assessed by any formal qualifications.

## **6 *Experience***

It is important that any DB member nominated for appointment has appropriate experience. This is a difficult question. It is not just a question of identifying individuals with appropriate experience in respect of the type of project, but also in the construction methods and, ideally, experience of the cultural backgrounds that may be brought together for any particular project. One of the benefits, but also the challenges, of a three-person DB is that each member may have different qualifications and experience.

The blend of qualifications and experience of the three-person DB can provide a powerful combination of decision-making abilities. In this respect the selection of the three-person DB should be more refined than the selection of three arbitrators for an arbitral tribunal. The arbitral tribunal will be hearing a possibly substantial dispute, most usually many years after the end of the project. A three-person DB will be on hand during the course of the project and will need to interact with individuals with key decision-making powers during the course of the project.

Identifying available and appropriate DB members will become more difficult as the use of DBs increases. Those with some experience will be preferred, making it more difficult for those that have not sat as DB members to gain DB

experience. One solution would be the introduction of a mentoring system. In the UK the Association of Independent Construction Adjudicators (AICA) has adopted this approach in order to develop and improve the quality of adjudicators.<sup>52</sup> Recently qualified adjudicators on the AICA list are assisted by an experienced mentor adjudicator. This approach could be adopted by the international DB appointing bodies. The three-person DB lends itself to such as process, as the more experienced chairperson can guide the two wing members and assist them to develop their DB skills.

Some DBs, in particular, the American approach of the DRB, provide informal advice or direction during the course of the project. Clearly, a DB that is active, interested in the project and respected by the participants, is more likely to have a potentially substantial effect upon the success of the project and, as indeed research shows, may well act as an effective dispute avoidance procedure.

## **7 Availability**

An appointment to a DB is a personal (non-delegable) obligation. The difficulty, of course, is that the most appropriately qualified and experienced individuals are busy people in high demand. There is also the greater chance that they may be unable to act due to conflicts or arguable perceptions of bias because of their relationships with key contractors and employers. Initially, some of the most appropriate individuals may not be available, quite simply because of conflict issues or their busy schedules.

A second consideration is whether in fact a dispute member will be able to make available the appropriate time to act in relation to particular projects. This depends upon location and duration. If the project requires considerable travel, then that will of course be a factor. Further, if a project is a mega one, then it may last for a considerable number of years. The DB member should consider whether they can dedicate sufficient time, not just in terms of their existing workload but also in some cases in terms of retirement planning. The parties should also give this separate consideration, as DB members' optimism to take part may not translate into adequate dedication once the project has commenced.

## **8 Confidentiality**

Article 9 of the ICC *DB Rules* provides that DB members shall keep confidential any information obtained by the DB member during the course of their activities as a board member. Further, and as a related matter, a DB member is not to act in any judicial, arbitral or similar proceedings relating to any dispute arising from the project. This means that they cannot act as a judge, arbitrator, expert, representative or advisor of any party.<sup>53</sup>

The duty restricts a DB member from fulfilling certain other roles in respect of the same project that would most likely lead to the perception of bias. The

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<sup>52</sup> See [www.aica-adjudication.co.uk](http://www.aica-adjudication.co.uk).

<sup>53</sup> ICC *DB Rules*, Article 9.3.

duty to keep confidential, however, restricts a member's ability to make the full disclosure that might be required in respect of his or her nomination to another DB. Care will be needed to ensure that full disclosure is given without breaching the requirement of confidentiality.

## **How are board members selected in practice?**

It may be cynical to suggest that the selection of board members in practice is somewhat limited by the sphere of appropriate individuals known to the key decision-makers and the perception that a board member should be disposed towards the party nominating him or her. Some employers and contractors consider that the member nominated by them should perhaps decide all issues in their favour, or even act as an advocate 'on the inside'.

An informed employer or contractor would consider all the issues raised above, and when considering a nomination would identify a series of attributes that should be displayed by any potential candidate. Some of these attributes should apply to all DB members, whilst others would be project-dependent. So, for example, all potential DB members should be impartial (although a nominating party may hope for partiality), while the type of project and construction techniques will dictate the final profile of the individual sought.

A list of potential attributes, based upon the above factors and a list provided by the DRBF,<sup>54</sup> should include:

- 1 [Ideally] complete objectivity, neutrality and impartiality as a fact;
- 2 Independence (in the objective, freedom from financial ties, sense);
- 3 No conflict (in other words, passing the 'perception of bias' test, which could be said to be distinct from the fact position in 1 and 2 above);
- 4 Experience with the type of project (for example, experience in the construction of hydro-electric power stations, as distinct from other forms of power station);
- 5 Experience with the types of construction technique (which may be peculiar to that particular project);
- 6 Have eg 10 years experience in a 'senior position';
- 7 Experience with interpretation of contract documentation, the standard forms that might be applicable and sufficient legal understanding to deal with bespoke forms or amendments or interpretation issues;
- 8 Experience in substantive law [desirable, although not necessary for all panel members];
- 9 Experience with the procedural rules of the DB;
- 10 Experienced training and understanding of the DB process;

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<sup>54</sup> See note 33.

- 11 Experience with the resolution of construction disputes;
- 12 Availability;
- 13 A dedication to the objectives of the DB process;
- 14 Membership of a recognised DB panel;
- 15 A qualification from a recognised DB training centre; and
- 16 Well-developed communication skills, both orally and written.

In addition, the potential chairperson should perhaps be selected because they have chaired DBs before, but predominantly because they have experience in dealing with adversarial situations, the ability to effectively run meetings and, in particular, have conducted meetings in difficult circumstances.

### ***Identifying potential board members***

Potential board members could be identified from:

- 1 Existing DB members or other appropriate professionals who might be able to serve as DB members, identified by the employer or contractor or the project team;
- 2 Requests to the employer, contractor or project team organisations in order to see whether any individuals may have experience of appropriate DB members. This may result in a recommendation, which may be that such a person is appropriate or, indeed, inappropriate;
- 3 Contacting one's own professional institution;
- 4 Considering the published lists (or websites) of potential DB members from the DRBF, ICC, FIDIC and/or the ICE [the ICE list in preparation in 2006].

### ***The process of selection***

Ideally, any party nominating a range of DB members for selection and then appointment should investigate those individuals thoroughly and carefully. Any potential DB members who are not appropriately qualified or would in any event be rejected because of a perception of bias should already have been identified and eliminated from the list.

The ideal situation is for the employer and contractor to agree upon all three members. This would usually require employer and contractor to identify their own shortlists of individuals and exchange these in order to select and appoint a panel of three.

In an ideal world, at least one of the names on each shortlist would be the same, so that person could perhaps be the chairperson, the two 'wing members' then being agreed from the remaining individuals. This is rarely happens in practice.

## ***Selection of final board members***

There are three recognised ways to identify the final board members: (1) the parties select jointly; (2) the parties agree on two and those two nominate the third or the parties select from a range, or (3) the selected two nominate the third.

The actual process will, of course, depend on the procedural rules. In the absence of an adequate process, then any of the above could be adopted or, indeed, some other hybrid process. As these three are the predominant ones, each is considered in turn below.

### ***1 Parties' joint selection***

The parties jointly select all three members of the DB. The parties might exchange written criteria or, indeed, meet and discuss the qualifications for the prospective board. They will most likely exchange lists and CVs and then in writing agree which of the nominations will be selected for appointment. They can then approach the final selection in order to see whether those individuals will accept the appointment.

The parties may decide which of the members is to be the chairperson, or leave that responsibility to the members themselves. There are several advantages in allowing the panel of three to decide who is to be the chair. One apparent advantage is that it will be difficult for any particular member to have allegiance to any particular party. Further, if the board is unable rapidly and easily to agree upon its chair, then it is highly unlikely that the board will be able to resolve difficult construction disputes during the course of the project. One would therefore hope that the board would quickly and easily establish the chairperson without any difficulty.

### ***2 Parties agree on two, those two nominating the third***

Each party nominates a member for approval by the other parties. This may be done once again by the exchange of lists and rejections, until two members are approved. Once approved, those two members will then be appointed. The two appointed members will then nominate the third member, who requires the approval of the employer and contractor. The third member then most usually serves as chairperson. This procedure is more likely to lead to a board member being referred to as 'the contractor's representative' or 'the owner's representative'. This method appears to be the most frequently used.

### ***3 Parties select from a range, the selected two nominating the third***

The contractor and the employer each propose a list of prospective board members, containing a minimum of three prospective board members. The contractor will then select from the employer's list, while the employer selects from the contractor's list. Difficulties can arise when the entire list is rejected; then a further list must be submitted. The best potential candidates may therefore be lost in this initial round. Once the two board members have been selected, then those board members will, subject to the approval of both

parties, nominate the final board member. Most frequently, this third person serves as chairperson.

### ***Selecting the chair***

The chairperson could therefore either be identified by the agreement of the parties, or by agreement by the first two DB members nominated, or by agreement between the three appointed DB members. Ideally, the chairperson should have DB experience, although the majority of DB members acting as chairpersons have most frequently obtained their dispute resolution experience by acting as arbitrators.

### ***Should lawyers be board members?***

Returning to the theme of experience and qualifications, it seems rational to suggest that one of the panel members may be a specialist construction lawyer. That person could then complement the panel by focusing on the procedural issues and provide, in particular, advice with regard to interpretation and legal points. This philosophy is not universally shared.

Many involved in DRBs, in the US in particular, take the view that DRBs – and now DABs – are practical dispute resolution procedures to be used during the course of projects, so should comprise construction professionals, most usually engineers. The challenges for DABs and DRBs are, without doubt, different from those faced by an engineer when making decisions during the course of the project. That is not to say that an engineer has an easy task, but a DB is a legalistic and most frequently adversarial process that may lead to a binding decision being imposed on the parties. The key question is not whether a lawyer should be involved, but whether the experience and qualifications of all three members provide a sufficient blend of appropriate skills that is the best for the project in question.

### ***Constituting the board: back to the contract***

Once all three DB panel members have been agreed, then they need to be formally appointed. The standard forms in the contract provide the obligations between the contracting parties to appoint a DB, or in default for one party to begin the process of default appointment by a nominating body. The standard form contracts also provide for a tripartite agreement between employer, contractor and each individual board member, as well as a schedule setting out the powers of the board.

### **Default appointments**

All contracts that include contractual DB provisions should provide a default appointment mechanism, should the parties be unable to agree on the identity of any or all of the board members. The final paragraph of Clause 20.3 of FIDIC provides that that person named in the Appendix to the Tender may appoint ‘after due consultation with both parties’ any member of the dispute

adjudication board. An appointment would be final and conclusive. The default procedure applies in four situations:

- 1 If the parties fail to agree upon the appointment of a sole member of a one-person DAB within 28 days of the effective date;
- 2 If either party fails to nominate an acceptable member in respect of a three-person DAB within 28 days of the effective date;
- 3 If the parties cannot agree upon the appointment of a third member (in this case acting as chairman) within 28 days of the effective date; or
- 4 If the parties cannot agree on a replacement member 'within 28 days of the date on which a member of the Dispute Adjudication Board declines to act or is unable to act as a result of death, disability, resignation or termination of appointment'.

The ICC *DB Rules* also provide a default appointment procedure. First, Article 7.2 states that if the contract does not deal with the number of persons that are to comprise the board then the DB shall be composed of three members. If the contract provides that a DB will comprise only one member, then the default procedure is dealt with at Article 7.3:

'If the Parties fail to appoint the sole DB Member within 30 days after signing the Contract or within 30 days after the commencement of any performance under the Contract, whichever occurs earlier, or within any other time period agreed upon by the Parties, the sole DB member shall be appointed by the Centre upon the request of any Party.'

The default procedure in the ICC *DB Rules* is triggered either by the signing of the contract or a performance of the contract. In any case either party may request the ICC to appoint the DB member within 30 days. A similar appointment procedure is provided in Article 7.4 in respect of a three-person DB, which anticipates that the parties are to jointly appoint the first two DB members. In default of appointment of one or both of those members, then either party may once again ask the ICC to appoint within 30 days of the same two trigger events.

Article 7.5 provides that the third DB member is to be proposed by the two appointed DB members within 30 days of the appointment of the second DB member. The parties are then to appoint the DB member within 15 days from receipt of the proposal. If they do not, or the two appointed DB members fail to propose a third member, then either party can request the ICC to appoint the final DB member. Finally Article 7.5 provides that the third DB member is to act as the chairman 'unless the DB members agree upon another chairman with the consent of the Parties'.

The ICE *DRB Procedure* default appointment system applies in the following situations:<sup>55</sup>

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55 ICE *DRB Procedure* (see note 15), Clause 3.1.

- 1 If the parties fail to agree on the sole DB member by the date nominated in the contract;
- 2 Either party fails to nominate or approve a member (either for approval by the other party or to act as chairperson) or a replacement member of a three-member DB;
- 3 The parties fail to agree upon the appointment of a replacement member within 42 days after the date on which the existing member's appointment was terminated;
- 4 If there is no DRB in place for any reason.

The ICE will, within 14 days upon the request of either or both parties, select and appoint the necessary DB member. Such a selection and appointment is final and conclusive.

The AAA adopts a different approach. The DRB 'assistance' terms provide:

- 1 Within 14 days of the effective date of the contract, the contractor and the owner file a request with the AAA to identify a list of potential DRB members;
- 2 The AAA arranges a telephone conference with the parties to identify the qualifications required of the DRB members;
- 3 The AAA produces a list for review within 14 days of the telephone conference;
- 4 Those on the list carry out disclosure;
- 5 The owner and contractor each have 14 days to propose a person from the list; and
- 6 There are then 14 further days for the owner and contractor to accept the other party's proposal.

If the nomination is not accepted, then the process is repeated; there is no default appointment process. The AAA merely assists the owner and contractor to agree its DRB members. Once two members have been selected the AAA notifies the owner and contractor. The AAA then sends the two members a list, from which the two nominated members are to select a third within 14 days. Once selected, the AAA informs the owner and contractor, who have 14 days to accept the third nomination. If they reject the third person, the process is repeated until the final board member is agreed. If the two board members reach an impasse, then the owner and contractor are to agree the identity of the final board member.

The AAA does not at any stage impose its choice on the parties. That is because under the AAA process the DRB makes recommendations that the owner and contractor may adopt; it does not give binding decisions. There would therefore be little benefit in imposing a panel on the parties. The owner and contractor need to agree the identity of a board that they respect in order for the parties to feel compelled to accept the recommendations of the DRB.

A default appointment can be made by the person, persons or organisations named in an appendix to the contract or identified by the applicable rules. These include:

FIDIC 1999 editions	The President of FIDIC, or a person appointed by the President
World Bank	The appointing entity, or an official named in the Contract Data
ICE <i>DRB Procedure</i>	The ICE
ICC <i>DB Rules</i>	The ICC

## Replacing dispute board members

A DB member might need to be replaced as a result of death, disability, termination or resignation.

Clause 20.2 of FIDIC states that the contract with a board member can only be terminated by the mutual agreement of both parties. The FIDIC *DAB Agreement* provides that the employer or contractor may, acting jointly, terminate the DAB by giving 42 days' notice.<sup>56</sup> If the member fails to comply with the Agreement, or the employer or contractor fails to comply with it then those affected may terminate the tripartite Agreement. If a member breaches the Agreement then he or she will not be entitled to any further fees. Any disputes arising under the tripartite Agreement are to be dealt with by ICC arbitration comprising a single arbitrator.<sup>57</sup>

The employer or contractor acting alone cannot terminate the DAB or a single member of the DAB once the DAB has been constituted. Once constituted, the DAB's principal obligation is to make binding decisions. However, the parties may jointly agree to refer a matter to the DAB simply for an advisory opinion.

If the parties do agree to terminate the appointment of an individual member of the DAB, then they should replace that person by agreement; or if the parties cannot agree, a new member should be nominated by the appointing entity. The parties might also need to replace a member if the member declines to act, resigns, becomes disabled or dies.

Article 7.6 of the ICC *DB Rules* provides:

‘When a DB Member has to be replaced due to death, resignation or termination, the new DB Member shall be appointed in the same manner as the DB Member being replaced, unless otherwise agreed by the Party. All actions taken by the DB prior to the replacement of a DB Member shall remain valid. When the DB is composed of three DB Members and one of the DB Members is to be replaced, the other two shall

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<sup>56</sup> Clause 7 (Termination).

<sup>57</sup> Clause 9 (Disputes).

continue to be DB Members. Prior to the replacement of the DB Member, two remaining DB Members shall not hold hearings or issue determinations without the agreement of all of the parties.’

The ICC’s *DB Rules* therefore embellish the simple replacement mechanism by confirming that an incomplete DB remains in place, but cannot hold hearings or issue determinations unless the parties agree.

Similar provisions regarding termination exist in the ICE *DRB Procedure*: a DB member’s appointment may be terminated by mutual agreement of the parties by giving the member 84 days’ notice.<sup>58</sup>

## **Selling one’s services**

DBs are increasingly being used on a global scale. Contractors and employers will turn to those already known by them in the dispute resolution arena as potential DB members. Those who operate within the dispute resolution field may therefore have the opportunity to obtain DB experience. Many are now attempting to join the limited lists that are available, although there is little evidence that contractors and employers are using those lists to identify DB members.

## **The initial dispute board meeting**

It would be usual for the DB to meet in private in order to discuss the project and agree, at least the agenda for the first and future DB site meetings. The procedural rules of the DAB should be further considered by the board members at their initial private meeting, as these rules set out the minimum procedures that the DB must follow.

The Annex to the General Conditions of the FIDIC *Dispute Adjudication Agreement* sets out procedural rules for the DAB. The DAB is to visit the site ‘at intervals of not more than 140 days’ and should visit the site during critical construction events. Consecutive visits should not be less than 70 days apart.<sup>59</sup> The timing and the agenda for each site visit should be agreed between the DAB and the parties.<sup>60</sup>

In practice the DAB sets out the agenda, the chairperson putting it to the parties, and unless an objection is received from either of the parties the board then proceeds upon that basis. At the conclusion of the site visit, the DAB is to prepare a report setting out its activities during the site visit and identifying those individuals who attended the site visit.<sup>61</sup>

Clause 4 of the Annex requires the parties to furnish the DAB with a complete copy of the contract, progress reports, variation instructions, certificates and

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58 ICE *DRB Procedure* (see note 15), Clause 2.6.

59 Annex, Procedural Rule 1.

60 Annex, Procedural Rule 2.

61 Annex, Procedural Rule 3.

other documents which are ‘pertinent to the performance of the Contract’, and communications between the DAB, employer and/or contractor are to be copied to the other party and all the members of the DAB.

Clause 6 of the General Conditions of the *Dispute Adjudication Agreement* deals with payment. There are two main elements to payment. The first is the retainer fee, which is paid on a monthly basis in consideration for the member being available for site visits and hearings, becoming conversant with the project and providing general services. The second aspect of the fee comprises a daily payment for travelling to and from the site (a maximum of two days travelling in each direction), as well as for each day spent working on site, the hearings, preparing decisions and reading submissions. Reasonable expenses together with taxes properly levied are then to be paid in addition. The retainer fee is paid from the last day of the month in which the DAB becomes effective until the last day of the month in which the taking-over certificate is issued for the whole of the works. After that date, the retainer fee is reduced by 50% until the DAB is terminated or a member resigns.

It is therefore highly likely that each of the three members of the DAB will receive a different retainer fee and claim a different hourly rate. Each member submits their invoices for the monthly retainer and airfares quarterly in advance. Invoices for daily fees and other expenses are then submitted at the conclusion of a site visit or hearing. The contractor is to pay each of the members’ invoices in full within 56 calendar days from receipt.

From a practical perspective it is often sensible for the two ‘wing’ members of the DAB to submit their invoices to the chairperson, who then submits those, together with his or her own, in one go to the contractor. This means that the chairperson can remain the single point of contact for any issues arising in respect of the DAB’s charges and that the final date for payment for all of the members will be the same, thus allowing the chairperson to take up the issue of late payment for the whole DAB if necessary.

If the contractor does not pay, then the employer is obliged to pay the amount due. If a member has not received payment within 70 days from receipt of invoice by the contractor, then that member may suspend his or her services until the payment is received; and/or resign.

Annex Clause 7 (Procedural Rules) states that the DAB has the power to act inquisitorially. Further, the DAB is to establish the procedure before deciding a dispute and may refuse admission to the hearings and proceed in the absence of any party who has received notice of the hearing. The DAB may also decide upon its own jurisdiction, conduct any hearings as it thinks fit, take the initiative and ascertain the facts, make use of its own specialist knowledge, decide upon the payment of interest if any, provide provisional or interim relief, as well as open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer.<sup>62</sup>

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62 Annex, Procedural Rule 8.

Once a hearing has been concluded, the DAB meets in private in order to discuss and prepare its decision.<sup>63</sup> Decisions should be reached unanimously, but if this ‘proves impossible’, then a decision may be made by the majority. In practice, a single decision is usually issued by the DAB: a majority decision and a further section where the minority member sets out his or her written report. If a member fails to attend the hearing then the other two members may proceed to a unanimous decision, unless the employer and contractor agree otherwise or the absent member is the chairperson and he or she instructs the other members not to proceed. The contractor and employer could of course ask the other two members to proceed and make a unanimous decision.<sup>64</sup>

## **The move towards legislation for international adjudication**

The legislation in the UK, and other jurisdictions introducing adjudication, has merely dealt with the domestic position. However, it has been radically suggested that adjudication legislation could be provided by a two-part statute.<sup>65</sup> The first part would deal with the domestic territorial position, whilst the second part could provide for adjudication in respect of a construction contract anywhere in the world.

This adopts the legislative approach already used for international arbitration. Most national arbitration statutes provide for domestic arbitration in the country of origin, whilst also supporting, recognising and enforcing international arbitration. In other words, the international adjudication section of such a statute would provide an adjudication procedure, together with the ability of a local court to support the process through nominating adjudicators by default, or identifying a nominating body by default, and enforcing decisions. Parties anywhere in the world could choose the adjudication procedure of another jurisdiction.

Any international adjudication statute should bear the following points in mind:

- 1 Be drafted on a ‘minimum interference, maximum enforceability’ basis;
- 2 Adopt the New York Convention for the purposes of enforcement;
- 3 Provide for the local courts to identify an adjudicator or nominate an adjudicator-nominating body in the appropriate part of the world. This could be done by a judge on a documents only (email) basis;
- 4 Provide a limited ability for challenges. There would always be the ability to challenge on the basis of no jurisdiction, but how restricted should challenges be based upon grounds of natural justice?

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63 Annex, Procedural Rule 9(a).

64 Annex, Procedural Rule 9(c).

65 Robert Fenwick Elliott.

- 5 A decision would be binding, unless or until subsequent arbitration, litigation or settlement; and
- 6 Detailed procedural rules would need to be included.

The advantages of such an approach would be that international projects could make use of adjudication procedures in any country supported by a competent court system – not always the case in some developing countries where considerable construction projects are being carried out. Further, the parties could choose a particular adjudication system that appears to be more effective than others, or a system whose procedures appear to suit their project or their needs to a greater extent than their domestic adjudication process, if any.

## Conclusions

In order to establish a DB, it will be necessary to identify potential appropriate candidates, to nominate them and then to appoint them. Contractors and employers tend not to focus on disputes at the start of projects. DBs are therefore frequently not appointed and established at the commencement of projects. In those projects where a dispute subsequently arises, the contractor and employer will then struggle to agree upon and establish their DB. It is arguable that the benefits of it are substantially reduced by not having those individuals available at the commencement of the project, especially as suggested procedures are well established internationally under which DBs can be appointed in good time.

Ideally, the DB should be established before work starts on the site. The DB can then follow the project and deal with any issues that might arise. The identification of appropriate DB members is crucial. Those members will need to be impartial and experienced in a wide range of matters, such as the type of construction in question, interpretation of contract and legal issues. In addition, they will need to have excellent management and communication skills, and be sufficiently available for the duration of the project, as well as to deal promptly with any disputes that may arise.

**Nicholas Gould** is chairman of the Society of Construction Law and a partner of the law firm Fenwick Elliott LLP.

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## Appendix – PROCEDURAL RULES COMPARED

	AAA	FIDIC Red Book	ICC	ICE	World Bank
<b>Who appoints?</b>	Parties, from a list provided by AAA – <i>1.02</i>	Parties, by date in appendix to tender – <i>Clause 20.2</i>	Parties, in accordance with contract or if contract is silent, in accordance with ICC Rules – <i>Article 7(1)</i>	Parties, by date in contract data; if no date stated, then within 56 days after contract formed – <i>Rule 2.2</i>	Parties, by date in contract data – <i>Clause 20.2</i>
<b>How?</b>	Each party nominates 1 member – <i>1.02</i> .	Jointly, by date in appendix to tender <i>or</i> each nominates 1 member – <i>Clause 20.2</i>	Jointly, for sole member DBs; each party nominates 1 member for 3-member DBs – <i>Article 7(3)</i>	For 1 member DB, by agreement between parties; for 3 member DB, each party nominates 1 member – <i>Rules 2.3 and 2.4</i>	Jointly, 21 days before date in contract data or after this time, each nominates one member – <i>Clause 20.2</i>
<b>Who appoints chair?</b>	2 members nominate chair and parties approve – <i>1.02</i>	Members nominate chair and parties agree – <i>Clause 20.2</i>	2 members nominate chair and parties agree – <i>Article 7(5)</i>	2 members nominate chair and parties agree – <i>Rule 2.4</i>	2 members nominate chair and parties agree – <i>Clause 20.2</i>
<b>By when?</b>	Within 14 days after receipt of list of persons from AAA – <i>1.02</i>	By date in Appendix to Tender – <i>Clause 20.2</i>	Within 30 days after appointment of 2nd DB member – <i>Article 7(5)</i>	Date specified in contract data or if no date is specified, within 56 days after contract formed – <i>Rule 2.1</i>	21 days or less before date stated in contract data – <i>Clause 20.2</i>
<b>How do you replace Board?</b>	Either party may object for cause to AAA; if, for any reason a Board member is unable to perform duties of office, AAA may declare office vacant – <i>1.02</i>	1. On a member's: - death - disability - resignation - termination of appointment. 2. Contractor and employer acting jointly – <i>Clause 20.2</i>	On a member's: - death - resignation - termination of appointment – <i>Article 7(6)</i>	1. On a member's: - death - disability - resignation – <i>Rule 2.7</i> 2. Parties agree and give member 84 days notice of termination – <i>Rules 2.6 and 2.7</i>	1. On a member's: - death - disability - resignation - termination of appointment. 2. Contractor and employer acting jointly – <i>Clause 20.2</i>
<b>Replacing Board</b>	As original appointment procedure – <i>1.02</i>	As original appointment procedure – <i>Clause 20.2</i>	Same manner as replaced DB member – <i>Article 7(6)</i>	As original procedure – <i>Rule 2.8</i>	As original appointment procedure – <i>Clause 20.2</i>

	AAA	FIDIC Red Book	ICC	ICE	World Bank
<b>Default appointment</b>	No default procedure	<p>Third party can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> <li>- for 1-member DBs, if parties fail to agree by date in contract data</li> <li>- for 3-member DBs, if either party fails to nominate member by date in contract data</li> <li>- chair: parties fail to agree on appointment by date in contract data</li> <li>- fail to replace within 42 days of death, disability, resignation or termination</li> </ul> <p>– <i>Clause 20.3</i></p>	<p>ICC can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> <li>- for 1-member boards: if parties fail to appoint with 30 days after signing contract or within 30 days after commencement of any performance of contract, whichever occurs earlier</li> <li>- for 3-member boards: if either party fail to appoint one of both DB members with 30 days after signing of contract or within 30 days after commencement of any performance under contract, whichever occurs earlier</li> </ul> <p>– <i>Article 7</i></p>	<p>Third party can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> <li>- for 1-member DBs: if parties fail to agree by date in contract data</li> <li>- for 3-member DBs: if either party fails to nominate a member or fails to approve a nominated member by date in contract data</li> <li>- chair: parties fail to agree on appointment by date in contract data</li> <li>- fail to agree upon replacement within 42 days after existing member's appointment terminated</li> <li>- there is no DRB in place for any reason</li> </ul> <p>– <i>Rule 3</i></p>	<p>Third party can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> <li>- for 1-member DBs: if parties fail to agree by date in contract data</li> <li>- for 3-member DBs: if either party fails to nominate a member or fails to approve a nominated member by date in contract data</li> <li>- chair: parties fail to agree on appointment by date in contract data</li> <li>- fail to replace within 42 days of death, disability, resignation or termination.</li> </ul> <p>– <i>Clause 20.3</i></p>
<b>Who appoints in default?</b>	n/a	Person named in contract data after consultation with both parties – <i>Clause 20.3</i>	ICC	ICE, within 5 days of request of either/both parties (for HGCRA-affected projects) and within 14 days of request of either or both parties (for international projects and UK contracts not subject to HGCRA) – <i>Rule 3</i>	Appointing entity or official named in contract data upon request of either or both parties and after consultation with parties – <i>Clause 20.3</i>

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in the construction industry’*

**MEMBERSHIP/ADMINISTRATION ENQUIRIES**

Jackie Morris  
67 Newbury Street  
Wantage, Oxon OX12 8DJ  
Tel: 01235 770606  
Fax: 01235 770580  
E-mail: [admin@scl.org.uk](mailto:admin@scl.org.uk)

Website: [www.scl.org.uk](http://www.scl.org.uk)