Attachment – 13 Contact Details

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JICA DB TRAINING KIT

(Trainer's Version)

March 2010

Japan International Cooperation Agency (JICA)

JICA DB Training Kit
(Trainer's Version)

Table of Contents

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I. INTRODUCTION

Welcome to this training course!

Your goal is to serve as a member of a Dispute Board: or, if not to serve as a DB member, at least to understand what is required of a DB member and how a DB works . This course is designed to help you, but your trainers need *your* help!

If there is anything in these training materials which is not clear, please tell your trainers.

If anything your trainers say is not clear, please tell your trainers.

If your trainers ask you a question, please do not shy away or hesitate to answer.

Part of the training is intended to increase your skills in participating in discussion, often about difficult matters.

Within the limits of confidentiality, be willing to share with your trainers and your fellow trainees your past experiences in construction contract disputes and their resolution.

You must help your trainers, to enable them to help *you*!

A Sample Five-Day Training Workshop

The Training Kit was prepared for a Five-Day Training Workshop based on the sample programme which is attached in the following page. Trainers are required to adjust it as it fits for their needs.

The trainers are also required to prepare their own scenarios for interactive hypothetical case studies to satisfy the programme.

A Sample Programme for A Five-Day Training Workshop

	AM	PM	Evening Assignment
Day 1	Introduction of Trainers/Trainees Introduction to Dispute Board • What is FIDIC? • What is a Dispute Board • Arbitration Rules	Setting up a DB • Procedure • DB members' Qualifications • Adjudicators lists • DB costs	Prepare draft C.V.*
Day 2	Operation of Dispute Board (1) • Site visits • DB meeting • Site tour • Informal discussion of potential disputes	Operation of Dispute Board (2) • Site visit report • Supplying information to DB Members during intervals of Site visits	Preparation for Mock Hearing**
Day 3	Operation of Dispute Board (3) • Referral & Time Limit • Written Submissions • Hearing(s) • Transcripts	Operation of Dispute Board (4) • Mock Hearings for Workshop Participants	Possible extension of Mock Hearings
Day 4	Operation of Dispute Board (5) • DB Decision Purpose • DB Decision Structure • DB Dissents	After the Decision • "Amicable Settlement" period • Enforceability of DB decision	Preparation for Drafting of Mock Decision***
Day 5	Drafting of a Mock Decision	Review and Discussion of Mock Decision	None:

Note:

* to encourage the Trainees to present themselves as a competent DB member. Trainers are required to review the CVs and return them to the Trainees during the Workshop.

** Trainees are divided to form DBs and members in a same DB work together.

*** each trainee should write a DB decision as the Chairman.

What is FIDIC?

Many persons who are familiar with FIDIC Conditions of Contract know little or nothing about the FIDIC organisation. "FIDIC" is an abbreviation of the name, in French, "Fédération Internationale des Ingénieurs Conseil" (translated into English as "International Federation of Consulting Engineers")

To use its own description of itself, "FIDIC was founded in 1913 by three national associations of independent consulting engineers within Europe. The objectives of forming the federation were to promote in common the professional interests of national Member Associations and to disseminate information of interest."

At the time of the preparation of your training material there are 84 national Member Associations, as well as some 27Affiliate Members. FIDIC membership encompasses most of the independent consulting engineers practicing throughout the World. Details of its activities can be found on its website, www.fidic.org. The website also has a Bookshop from which a very large selection of useful publications can be obtained.

One of its most prominent FIDIC activities is the preparation and publication of recommended Conditions of Contract for use in various kinds of engineering and construction contracts. FIDIC also publishes guidance for the use of those Conditions. Your training is focused on one particular set of Conditions of Contract, but some reference is made to other sets.

FIDIC's Conditions of Contract are developed and maintained under the overall supervision of the organisation's Executive Committee, but the major work is effected by a "Contracts Committee" whose membership is small in number, considering the many sets of Conditions of Contract published by FIDIC: as of 2010 there are seven members of the Contracts Committee, and 13 sets of Contract Conditions in publication or in preparation. In its work, the Committee draws heavily on individuals from FIDIC Members for assistance in drafting. Also, the Committee invites commentary on its drafts of Conditions from persons and organisations outside FIDIC, including individuals and other groups prominent in the international construction industry, the international insurance industry, and the legal profession in various countries. It also seeks the views of international agencies developing and financing international engineering and construction projects.

The aim of this collaborative effort is to achieve Conditions which are balanced as between the concerns of those we know from the Conditions as the Employer, the Contractor, and the Engineer. In addition to being balanced, it is intended that the Conditions be effective in assisting the successful completion of the contract of which the Conditions form a part.

FIDIC has many other activities besides its Conditions of Contract. Examples are those of FIDIC's Committees on Capacity Building, Risk and Liability, and Sustainable Development. As you are or will be working with, or in, the consulting engineering profession, there is much in FIDIC activities which is of direct interest to you.

If you are not already a member of FIDIC, or a member of a FIDIC Member Association, you should become one, and become an active participant in your country's Member Association of FIDIC. Details on joining FIDIC are on its website, given above.

Why should you join? A first reason is because it is an excellent way for you to develop and maintain your experience as a Dispute Board member. Also, you can bring to the attention of FIDIC the lessons of your experience as a Dispute Board member so that they can be brought to bear on future development of FIDIC Conditions. It also will enable you take an active role

in FIDIC activities, and to strengthen FIDIC's contributions to the international engineering and construction industry.

Instead of just enjoying working as a Dispute Board member under Conditions of Contract which FIDIC has developed, you can "pay back" for that enjoyment by helping in the future improvement, and growth in use, of those Conditions. You can enable the benefits of working on FIDIC Dispute Boards to become reciprocal among yourself, your fellow members of FIDIC, and other users of the FIDIC Conditions.

What is a Dispute Board?

Your training is focused on the Dispute Board as used in the FIDIC MDB Harmonised Conditions for Construction. "MDB" stands for Multilateral Development Banks, which with other International Financial Institutions, have collaborated with FIDIC to develop those Conditions.

Such Boards also are used in other FIDIC Conditions of Contract, and in other contract conditions published by organisations other than FIDIC. Mention will be made of them, below.

Briefly, a Dispute Board is an entity which assists the Contract Parties to avoid formal disputes. If a formal dispute is unavoidable, the Dispute Board makes a decision which is intended to be contractually binding on the Parties, unless and until an arbitral award obliges the Parties otherwise.

Dispute Boards, when established at the outset of the Contract, have a strong record of avoiding litigation and arbitration, and this has led the international organisations which provide aid to developing countries to support the use of Dispute Boards in contracts financed by those organisations.

The Dispute Board is an important member of the Contract "team" which seeks the successful achievement of the Contract goals – the Employer, the Engineer, the Contractor, and the Dispute Board. The experience of the members of the Dispute Board is available to all of the rest of the team.

Where does a Dispute Board fit in the FIDIC Conditions' system of dispute resolution?

In summary, when a claim is made by either Party under the FIDID MDB Harmonised Conditions, it is dealt with by the Engineer. In due course, the Engineer makes a determination on the claim – either the claim is allowed or it is rejected. (See, Sub-Clauses 3.5 and 20.1). Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars, within 28 days from the receipt of the corresponding claim or request except when otherwise specified. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [*Claims, Disputes and Arbitration*].

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within the above defined time period.

Within the above defined period of 42 days, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

If the Engineer's determination is not accepted, the Dispute Board may be able to assist in resolving the disagreement and avoiding a formal dispute. If a formal dispute cannot be avoided, either Party may refer it to the Dispute Board, as described in Sub-Clause 20.4. The Dispute Board proceeds to make a decision on the dispute, and that decision is contractually binding on the Parties and they are contractually obliged to give effect to it promptly.

If either Party is dissatisfied with the Dispute Board decision, 28 days are allowed for such Party to give a notice of dissatisfaction and intention to commence arbitration to resolve the dispute. However, before actual commencement of arbitration, Sub-Clause 20.5 requires both Parties to attempt (for at least 56 days) to settle the dispute amicably. Sometimes such settlement can be achieved by further negotiations, or by use of a mediator. If, after the 56 days of attempting to achieve amicable settlement have expired and no settlement has been reached, either party may commence arbitration proceedings. However, it should be noted that neither Party *has* to start arbitration at that time: if both Parties are willing to continue settlement efforts, they can continue such efforts as long as both are willing to do so.

Sub-Clause 20.6 provides for the manner of arbitration to be used to achieve final settlement of the dispute.

Many Parties who sign contracts using the FIDIC MDB Harmonised Conditions have never experienced international commercial arbitration, and it is important that they understand the problems and risks of arbitration. Often, Dispute Board members review with the Parties the problems and risks of arbitration if disagreements are threatening to become formal disputes. Such a review often motivates further efforts by the Parties to settle the disagreement without embarking on the path of formal dispute.

Arbitration of international construction contract disputes typically is lengthy and costly. It is not unusual for arbitration to require, literally, years. Costs of an arbitration include not only the value of time of the Parties' managers and the fees and expenses of the arbitrators but also fees and expenses of legal advisors and of any independent experts used to assist in the arbitration. If the arbitration is administered by an independent organisation, the fees of such administration also add to the cost. Of special importance, and not always understood at the outset, is the fact that in many arbitrations the arbitrators have the power to award costs against the loser. It is typical that the loser will not only bear all of his own costs, but also will have to reimburse the winner a major part (if not all) of the winner's costs.

Arbitration Rules

To enable discussion with the Parties of the risks and costs of arbitration of a dispute, Dispute Board members should be familiar with the arbitration rules which the Parties are most likely to have adopted.

Sub-Clause 20.6 (a) of the FIDIC MDB Harmonised Conditions is a somewhat complex provision regarding arbitration: "[Unless otherwise agreed by both parties] for contracts with foreign contractors, international arbitration with proceedings administered by the institution appointed in the Contract Data conducted in accordance with the rules of arbitration of the appointed institution, if any, or in accordance with UNCITRAL arbitration rules, at the choice of the appointed institution."

You will note several points:

(i) Sub-Clause 20.6 (a) does not define "foreign contractor". Perhaps "foreign" is to be defined by reference to the country in which the Site of the Works is located (assuming that all of the Site is in one country). But what if the Contractor is a joint venture of one or more

"foreign" companies and one or more "domestic" companies – is it "foreign" or "domestic"? It is submitted that unless detailed in the Particular Conditions of the Contract, the position is unclear. Also it should be noted that Sub-Clause 20.6 (d) says that for "domestic" contractors, "arbitration with proceedings conduced in accordance with the laws of the Employer's country" but does not address the possibility that such law do not include provision for commercial arbitration.

(ii) "institution appointed in the Contract Data": the term "Contract Data" is defined in Sub-Clause 1.1.1.10 as "the pages completed by the Employer entitled contract data which constitute Part A of the Particular Conditions." The Employer is allowed to specify the arbitral institution to be used; but note that the words in Sub-Clause 20.6 (a) – "if any" – suggest that the Employer may choose not to have *any* institution administer the arbitration. (Were that done, it is likely that UNCITRAL Rules will be used as they are the only set of rules in general international use which allow for non-administered arbitration.

There are many administering institutions. Perhaps the largest number of international arbitrations are administered by the International Chamber of Commerce's International Court of Arbitration, which is headquartered in Paris, France. Other administering institutions include the American Arbitration Association, the London Court of International Arbitration, the Kuala Lumpur Regional Centre for Arbitration, and the Cairo Regional Centre for International Arbitration. All of these institutions have their details available on the internet, via Google. Details include the texts of their own rules and their charges for administrative services. Generally, all such institutions will administer arbitrations held under either the institution's rules or the rules of other organisations, including the UNCITRAL Rules. (UNCITRAL – the United Nations Commission on International Trade Law -- does not itself administer arbitrations and its arbitration Rules are designed so that they can be administered by administering institutions, or alternatively by the UNCITRAL arbitral tribunal itself. Opinions differ on whether to use the tribunal to administer itself, but it is correct to say that of the total number of all international arbitrations of construction disputes, the majority are institutionally administered.

Dispute Boards other than under the FIDIC MDB Harmonised Edition

Dispute Boards were developed in the USA, where they continue to be a popular feature of construction contracts. Some States in the USA require their use on State contracts for infrastructure work. The most popular title for the USA boards is "Dispute Review Board" and that term was adopted by The World Bank when, in January 1995, it began the regular use of Boards on contracts financed by the Bank. Later in 1995, FIDIC adopted the Board concept for its Design-Build Turnkey Conditions, and in 1996, FIDIC published a Supplement to the then "Red Book" 4th Edition to enable users to substitute use of a Board to decide disputes, instead of the Engineer. In both documents, FIDIC used the name "Dispute Adjudication Board" or "DAB", and that name was used also in the 1999 Editions of the major Conditions of Contract – Construction, Plant and Design-Build, and EPC Turnkey. The same terminology was retained in the 2008 Design Build Operate Conditions.

In the 1999 Editions of the Conditions, in both those Plant and Design-Build and those for EPC Turnkey, FIDIC introduced the possibility of using a Board on a so-called "*ad hoc*" basis. In this approach, no Board is established unless and until the Parties have decided to elevate a disagreement to a formal dispute. The *ad hoc* Board is used only for the dispute which led to its appointment; should further disputes arise in the future, the same persons may – or may not – be used for another *ad hoc* Board.

Apart from the inefficiency of such an approach to disputes, the fact that the *ad hoc* Board is not created until after the Parties are locked into formal dispute means that the unique benefit of the Dispute Board has been lost. It is impossible for the Board to assist in prevention disputes so that disagreements do not develop into formal disputes. It should be noted that the 2008 Design Build Operate Conditions do not propose the use of an *at hoc* DAB.

You also should be acquainted with the Dispute Board Rules of the International Chamber of Commerce ("ICC"), a copy of which is included in your training materials. Published in 2004, these Rules are based on three types of Boards: Dispute Review Board, Dispute Adjudication Board, and Combined Dispute Board. There reportedly are instances when the FIDIC Clause 20 provisions have been modified by the Parties to the Contract to substitute the ICC Rules for the Clause 20 Dispute Board procedures, so as a student of Dispute Boards you should be aware of the Rules in case you are faced with a Contract using them.

Briefly, under the ICC Rules the *Dispute Review Board* (or DRB) makes Recommendations which are not immediately binding on the Parties and the Parties are given a time limit within which the dispute can be referred to arbitration. The *Dispute Adjudication Board* (or DAB) is essentially the same as the FIDIC Dispute Adjudication Board in that the *DAB*'s decision is immediately binding and the Parties are obliged to act accordingly. The *Combined Dispute Board* (or CDB) is unique to the ICC Rules. The *CDB* normally operates as a *DRB* but has the power to elect to operate as a *DAB* in certain prescribed circumstances: in other words, the *CDB* normally issues Recommendations which are not immediately binding but in certain circumstances it can make decisions which are immediately binding.

II SELECTION OF DB MEMBERS

Under the FIDIC MDB Harmonised Edition, Sub-Clause 20.2 provides that the DB shall be comprised of either 1 or 3 persons, depending upon what the Employer has stated in the Contract Data, which forms Part A of the Particular Conditions. Later in your training, you will be considering how an Employer decides between 1 or 3, but for now, your attention is directed to the *qualities* each DB Member should have, whether the membership is 1 or 3.

Sub-Clause 20.1 states that each person shall be "suitably qualified…[and] fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual documents." **Should "fluent" be regarded as applying to reading and writing as well as speaking? Why?**

What is a reasonable meaning of "a professional experienced in the type of construction involved in the Works"? (This criterion is worded slightly differently in Clause 3 (a) of the "General Conditions of Dispute Board Agreement" examined more fully below. Clause 3 (a) refers to the DB Member being "experienced in the work which the Contractor is to carry out under the Contract**".) Do these wordings exclude professionals who are not engineers? Is an engineer a "professional experienced…with the interpretation of contractual documents"?**

What about nationality or country of residence? Should that affect DB membership? The 2000 Edition of "The FIDIC Contracts Guide" states: "The [Conditions] are recommended for use on an international basis, so the Parties are usually not of the same nationality. The DAB may therefore perform better if the nationality of each member is not the same as that of either Party or of the other members (if any)." [p. 304 at (e)] **Why is this? Why should it matter whether the nationality of a DB Member is that of one of the Parties? Does it matter if the nationality of a DB Member is that of the Engineer? Why does it matter (or does it?) if DB Members share nationality?**

It is notable that these criteria are reinforced in the Dispute Board Agreement ("DBA"), in its "General Conditions of Dispute Board Agreement". The General Conditions are in the Appendix to the FIDIC MDB Harmonised Conditions, and there is an Annex to the DBA General Conditions. It is also reproduced in the FIDIC MDB Harmonised Conditions, and is entitled, "Procedural Rules". The DBA provides further insight into what is regarded by FIDIC as a "suitably qualified" person for service as a DB Member.

Clause 4 of the DBA General Conditions contains the DB Member's warranty of impartiality and independence of the Employer, the Contractor, and the Engineer, and obliges the DB Member to disclose any fact or circumstance which might appear inconsistent with this warranty.

Clause 4 also emphasises that in appointing the Member, the Employer and the Contractor relied upon the Member's representation of being experienced in the work which the Contractor is to carry out under the Contract, experienced in the interpretation of contract documentation, and fluent in the language for communications defined in the Contract.

The weight of this warranty and representation by the DB Member is supplemented by a series of General Obligations assumed by the DB Member under Clause 5 of the DBA General Conditions.

5. General Obligations of the Employer and the Contractor

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DB's activities under the Contract and the Dispute Board Agreement. The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member and the Other Members (if any):

(a) be appointed as an arbitrator in any arbitration under the Contract;
(b) be called as a witness to give evidence concerning any dispute before arbitrator(s) appointed for any arbitration under the Contract; or
(c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and hold the Member harmless against and from claims from which he is relieved from liability under the preceding paragraph.

Whenever the Employer or the Contractor refers a dispute to the DB under Sub-Clause 20.4 of the Conditions of Contract, which will require the Member to make a site visit and attend a hearing, the Employer or the Contractor shall provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the Member. No account shall be taken of any other payments due or paid to the Member.

You will be considering Clause 4, General Obligations, at some length during your training. Eleven separate Obligations are listed, and 7 of them buttress the warranty of impartiality and independence**. Look at those Obligations now; identify which are the 7 "buttressing" Obligations. Which (if any) of the Clause 4 General Obligations do you consider unreasonable?**

Also, refer now to Clause 8 of the tripartite Agreement which imposes significant financial forfeiture on the DB Member who fails to comply with the General Obligations.

8. Default of the Member

If the Member fails to comply with any of its obligations under Clause 4(a) – (d) above, he shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.

If the Member fails to comply with any of his obligations under Clause 4(e) – (k) above, he shall not be entitled to any fees or expenses hereunder from the date and to the extent of the non-compliance and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses already received by the Member, for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.

Do you consider that these forfeitures are reasonable? Are such forfeitures consistent with the indemnity from the Employer and the Contractor to the DB Member under Clause 5 (c) of the tripartite Agreement?

What else is important when considering a candidate? Experience suggests that one should investigate the extent of the prospective DB Member's existing commitments. A well qualified person is apt to be busy already. Yet a busy person may have difficulty being available for an unscheduled Site visit, or have problems arranging availability for a timely hearing, or ask to be excused from submitting a Site visit report before leaving the Site. Yes, the written agreement with the DB Member requires the Member (as part of the justification for a monthly retainer) to be available, but nevertheless it sometimes happens that over commitment by a DB Member causes delay to the DB process.

Let us turn now from the *qualities* of a DB Member to the *procedure* for selection

Sub-Clause 20.2 requires that appointment be made by the date stated in the Contract Data. The Contract Data form as circulated by FIDIC shows the date as fixed by the Employer at the time of the invitation to bid, as 28 days from "Commencement", which is not defined; however, it appears to refer to "Commencement Date" which is defined in Sub-Clause 1.1.3.2 as "the date notified under Sub-Clause 8.1". **It is important that we look Sub-Clause 8.1 as it is a major change from traditional FIDIC practice and from the 1999 Edition of the Conditions for Construction. It is a complex provision**.

8.1 Commencement of Works

Except [sic] otherwise specified in the Particular Conditions of Contract, the Commencement Date shall be the date at which the following precedent conditions have all been fulfilled and the Engineer's instruction recording the agreement of both Parties on such fulfilment and instructing to commence the Work is received by the Contractor.

(a) signature of the Contract Agreement by both Parties, and if, required, approval of the Contract by relevant authorities of the Country;
(b) delivery to the Contractor of reasonable evidence of the Employer's Financial arrangements (under Sub-Clause 2.4 [Employer's Financial Arrangement]);
(c) except if otherwise specified in the Contract Data, and possession of the Site given to the Contractor together with such permission(s) under (a) of Sub-Clause 1.13 [Compliance with Laws] as required for the commencement of the Works;
(d) receipt by the Contractor of the Advance Payment under Sub-Clause 14.2 [Advance Payment] provided that the corresponding bank guarantee has been delivered by the Contractor.

If the said Engineer's instruction is not received by the Contractor within 180 days from his receipt of the Letter of Acceptance, the Contractor shall be entitled to terminate the Contract under Sub-Clause 16.2 [Termination by Contractor].

The Contractor shall commence the execution of the Works as soon as is reasonably practicable after the Commencement Date, and shall then proceed with the Works with due expedition and without delay.

Note that there are 4 "conditions precedent" – a legal term which means that those conditions must be met before there can be a Commencement. Also note that there is no specific time limit by which Commencement is to occur. By implication the time should not be more than 180 days after the Contractor's receipt of the Letter of Acceptance of the Contractor's bid, because after those 180 days, Sub-Clause 8.1 entitles the Contractor to terminate the Contract.

However, experience suggests that many contractors would be willing to allow more time to achieve completion rather than terminate after the 180 days.

One aspect which may cause delay is that before the Engineer can instruct Commencement the 4 conditions precedent must be met *and* the Parties must agree they have been met so that the Engineer can "record" such agreement in his notice to commence.

Sub-Clause 20.2 says that if the Parties have not jointly appointed the DB 21 days before the Commencement Date, "…each Party is to nominate a member for the approval of the other Party and the first two members shall recommend and the Parties shall agree upon the third member, who shall act as chairman." As the Commencement Date is not known until it either arrives or is imminent, it is not clear how one is to know what date the 21 days before the Commencement Date will be. The practical approach would seem to be that as soon as the Letter of Acceptance is received by the Contractor, the initiative should be taken by each Party to nominate a member for approval by the other Party.

Sub-Clause 20.3 deals with failure to appoint the DB and provides that if the DB is not established by the Commencement Date, either or both Parties can request appointment by the "appointing entity or official" named in the Contract Data. Typical "appointing entities" are FIDIC and the ICC Dispute Board Centre. Others which have been noted in earlier guidance of The World Bank SBD Procurement of Works include the Secretary-General of the Permanent Court of Arbitration, The Hague; the Secretary-General of the International Centre for Settlement of Investment Disputes; and the Chairman of the London Court of International Arbitration. It is advisable to seek the agreement of the appointing authority in advance of stipulating it in the Contract Data, and in doing so to check on the current charges, if any, for the appointment service.

Obviously asking another to appoint someone to such an important position is appropriate only when the Parties have exhausted their ability to agree upon selections of their own.

But how do the Parties find appropriate nominees, and how can you and your fellow DB Member find a good candidate to recommend as chairman?

Often they are found by word-of-mouth from others who have used Dispute Boards, or by suggestions from colleagues who also serve on Dispute Boards. There are several organisations which have lists of candidates for whom they have available c.v.s:

FIDIC has its President's List of Approved Adjudicators, who have been independently vetted by FIDIC's Assessment Panel for Adjudicators. Also, national Member Associations are establishing National Lists of Approved Adjudicators from within each Member Association's membership. Details are at www.fidic.org.

Although it has no defined list of approved DB members, the ICC Dispute Board Centre has a system of suggesting nominees selected by its National Committees and its Centre for Expertise. A fee is charged for suggesting candidates. Details are at www.iccwbo.org.

Other organisations maintaining lists of potential DB members include: the International Centre for Dispute Resolution, www.icdr.org; The DRB Foundation, www.drb.org; The Dispute Board Federation, www.dbfederation.org

What determines whether a DB is one person or three persons?

The structure of the FIDIC MDB Harmonised Conditions leaves this choice to the Employer and provides that the size of the DB will be indicated in the Contract Data. **Two spaces are shown on page three of the published Particular Conditions, Part A – Contract Data.** The first is to be arranged by the Employer to indicate which is chosen – one person or three persons. The second space is for listing, presumably by the Employer at the time of the Invitation to Bid, of potential sole members or a note of "None".

The 2000 Edition of "The FIDIC Contracts Guide" offers this: "…a three-person DAB would typically be regarded as appropriate for a CONS contract involving an average monthly Payment Certificate exceeding two million US Dollars, at 2000 prices. If the average monthly Payment Certificate is unlikely to exceed one million US Dollars, a one-person DAB may be preferred for reasons of economy…" [p. 304 at (d)]

We should note also a point made on the same page, at (d), in discussion of the nationality and residence of DB Members: "...each of the regular visits of a full-term DAB may then require significant travelling expenses. If both Parties are of the same nationality, the member(s) of the DB could be residents of the Country, in which case it might be appropriate to reduce the Dollar thresholds…"

Some guidance also may be found from the earlier SBD of The World Bank requirements of Board size, based on estimated contract value (including contingencies): if the amount was more than US$£50 million, a three person Board was required; if the amount was less than that amount, either a three person Board or a one person "Dispute Review Expert" could be selected by the Borrower, "depending on the Employer's regulatory framework and preferences". Contracts for less than US$10 million were to use the SBD for Procurement of Works, Smaller Contracts. [These amounts were first established in 1995.]

Selection of Chairman

This early step is one of the most important things you will do as a DB Member. Of course, in choosing a candidate for Chairman, you should remember the various requirements for all DB Members. However, you must consider also additional qualities. The ability and the personality of the chairman will affect greatly both your success as a DB Member and the success of the DB in being a successful member of the project team. Consider the following:

- The DB has a duty to seek unanimity within the DB on all DB decisions. That is likely to require a "collegial" chairman.
- If you and your co-Member disagree, the point of disagreement will be decided by the chairman, so the chairman will have a *de facto* power akin to being a one person DB when the other two Members disagree;
- The Parties are likely to give special attention to the chairman during DB efforts to prevent disagreements from becoming formal disputes.
- In attempting to prevent disagreements, very effective powers of persuasion will be needed by the chairman in order to move the Parties to consensus.
- The chairman is likely to prepare much of any DB written decisions and almost certainly will wish to review all drafting of DB written decisions before they are put in final form so the chairman should be skilled in drafting.
- The chairman probably will be the "DB Programmer" and while being cordial the chairman must be firm in arranging for timely Site visits of ample duration, assuring that all DB Members remain on Site until Site visit reports are prepared, arranging any hearings on disputes so that matters are dealt with without delay, and generally assuring that time limits in the Contract (or otherwise agreed with the Parties) are observed by all DB Members and by the Parties.

Another consideration in selection of a chairman is what is sometimes called "balancing" of the DB. For example, if the Contract is one for a large hydroelectric project, it may be useful to have a "spread" of engineering experience on the DB: perhaps a civil engineer, a mechanical engineer, and a geologist or possibly a hydrologist. If the Contract is for a large building, it likely would be helpful to have a structural engineer, and perhaps a civil engineer and an architect. Contracts with large and complex Bills of Quantities may benefit from having a quantity surveyor member of the DB. Of course, achieving such a "spread" must not lead to any Member who does not have deep experience "in the type of construction involved in the Works." The Members' depth of experience will have a direct effect not just on the scope of their understanding of the Contract and the work it requires but also on the weight the Parties will give to the suggestions (and decisions) of the DB. The deep experience should include having been directly involved in field work during construction. Sometimes it is said that a good DB Member "has mud on his boots."

What about having a lawyer as a member of the DB? This question has been much debated. Many feel that having a lawyer on a DB will lead to too much formality and too much argument. Others feel that DBs for construction projects should have only technical professionals – engineers, architects, quantity surveyors, geologists. Opposing opinion says that Sub-Clause 20.2 includes the requirement of being "professionally experienced…with the interpretation of contractual documents" and that this describes a lawyer, and anyway a lawyer can be helpful on any procedural issues which arise before the DB as well as on any issue of law which arise. Those who favour having a lawyer on a DB also point out that there are many lawyers who also are engineers, architects, quantity surveyors, and so have "double" qualifications. Some lawyers who do not have such technical qualifications nevertheless have spent decades working mainly or entirely in the engineering and construction industry and thus have a lot of "on the job" technical training.

For your purposes, it suffices if you are alerted to the debate about lawyers, and we will close the point by quoting the "Father" of the Dispute Board, the late A.A. Mathews: "Being a lawyer is not necessarily a disqualification from serving on a Board."

Signing Your "Dispute Board Agreement" ("DBA")

The "DBA" controls your service as a DB Member. Read it carefully, and read carefully the text of Clause 20 of the Contract (including any Particular Condition numbered as part of Clause 20). Do not make the assumption which some have made in the past, that because the Agreement and the Clause 20 before you "look like" the FIDIC model, they are *verbatim* the provisions you have studied in this training!

Be prepared for your discussion with the Parties of your fee arrangement. Note that the FIDIC Harmonised Conditions foresee two kinds of fees – a monthly retainer fee and a daily fee (as well as reimbursement of "reasonable expenses" described in paragraph 6 (c) of the DBA). When the Dispute Review Board first appeared in The World Bank documents in January 1995, it was stipulated that unless the Parties agreed some other amount, the monthly retainer fee would be three times the daily fee, and the daily fee would be that for ICSID arbitrators. ("ICSID" stands for the International Center for the Settlement of Investment Disputes, which is a World Bank body.) When FIDIC developed its Dispute Adjudication Board it omitted any stipulation of the monthly retainer fee, as did the ICC under its Dispute Board Rules. However, the Parties to many FIDIC DABs and DBs, as well as ICC DBs have used the ICSID daily fee for the Board Members' daily fee and tripled that daily fee in setting the amount of the monthly retainer.

Currently the ICSID daily fee = US$ 3000.

Thus, this structure can make the DB expensive for the Contract. For example, if a 3 person DB is established for a Contract which will require 24 months to achieve TOC, and if as foreseen in paragraph 1 of the Procedural Rules, the DB visits the Site "at intervals of not more than 140 days" [whether or not the visit will include a hearing], and if as experience suggests, even a routine Site visit (without any hearing of a formal dispute) is approximately 3 days, and if travel time allowed is the 2 days maximum foreseen in paragraph 6 (b) (i), this DB fee picture emerges:

Two years construction period = 730 days/maximum 140 days intervals = at least 5 Site visits during the two years
Site visits = 3 days on Site + up to 4 days travel time = 7 days x 5 Site visits = 35 days
Retainer = 24 months @ 3(daily fee)/month = equivalent of 72 days.
Total of Site visits + monthly retainer = equivalent of 107 days x US$3000 = US$721,000

Assume DNP of 365 days; 140 days maximum intervals = 2.6 Site visits; but assume only 2
Assume DNP Site visits only 2 days instead of 3 days + maximum days travel time = 12 days
Assume no increase in retainer or daily fee during the DNP (even though allowed under the DBA
Retainer = 12 x 2 (reduced retainer per DBA paragraph 6) = equiv. of 24 days @ ICSID rate
Total of Site visits + reduced monthly retainer = 36 days x US$3000 = US$108,000

Grand total for 1 DB Member = US$829,000

To this cost must be added 7 sets of return air fares and if no Site accommodation is available during Site visits, 19 hotel room nights.

You can do the mathematics for a 3 person DB. You also can see that if the DB is unable to avoid having formal disputes to decide, more time and therefore *more* money may be required for the DB, to cover the costs of hearings which cannot be completed during a 3 day (or in DNP, 2 day) Site visit, the study of written submissions of the Parties, preparation of DB written decisions, and likely private meetings of the DB to discuss the dispute and to reach consensus and prepare written decisions.

In passing, you also can sense the extent of your financial exposure under paragraph 8 of the DBA General Conditions!

So, pressure has arisen within the construction industry to economise on DBs! Various cost reductions have been attempted.

What do you think of each the following measures? Good? Bad? Why?

- Increase the interval between Site visits
- Dispense with Site visits and have the DB visit the Site only when there is a dispute
- Reduce the daily fee from the level of ICSID arbitrators' fees
- Reduce the retainer
- Eliminate the retainer
- Have DB serve more than one contract
- Have price competition to identify the cheapest qualified candidates for the DB
- Always have a one person DB
- Omit the DB and reinstate the Engineer as the decider of disputes
- Omit the DB and provide that all disputes will go straight to arbitration

Termination of the DB

This is covered in paragraph 7 of the DBA This enables termination of the Member by joint action of the two Parties, and it enables the Member to resign if the Member wishes. **Suppose that one Party makes known its wish that the DB Member should resign because it considers that the Member has displayed prejudice during a hearing on a dispute. You are that Member: what will you do? Why? Suppose that the complaining Party says that unless the DB Member resigns, the complaining Party will not participate in further Site visits or hearings on any disputes? What will you do? Why?**

Suppose a fellow DB Member becomes angry with you and says to you that you should resign: would you? Why? Would it change your view if the angry DB Member is the Chairman?

Disputes

Disputes under the DBA are to be resolved under the Rules of Arbitration of the ICC by one arbitrator appointed in accordance with these Rules of Arbitration. **Let us look now at those Rules and what they say about selection of a sole arbitrator, and consider that in the context of a possible arbitration involving alleged default of the DB Member and the application to that DB Member of paragraph 8 of the DBA. [HERE THE ICC RULES WILL BE CONSIDERED BRIEFLY SO THAT TRAINEES UNDERSTAND GENERALLY HOW SUCH ARBITRATION WORKS.]**

III. OPERATION OF A DISPUTE BOARD

The General Conditions of Dispute Board Agreement, at article 4 (i) require that each Member "become conversant with the Contract and with the progress of the Works…by studying all documents received…"

Typically, a DB will arrange a Site visit as soon as possible after being constituted. Sometimes, to expedite matters, the DBA is signed at such initial Site visit instead of requiring DBA signature prior to the initial Site visit.

An early Site visit is important for many reasons, even if there has not yet been much "progress of the Works" to be viewed:

- The DB members may have not met one another previously, and early acquaintance will facilitate future work together;
- The Parties and the Engineer need to become acquainted with the DB Members, who are an important part of the team to achieve successful completion of the Contract, and equally the DB needs to become acquainted with each of the Parties and the Engineer;
- The Site visit allows an information briefing of the DB on the Works, typically by the Engineer, so that the DB has an early overall grasp of what will be constructed. Such a briefing also allows a detailed discussion of the Contract Programme and identification of what aspects the Contractor and the Engineer foresee as the most challenging;
- Even if no significant construction has begun, the DB is able to get a general grasp of the Site and what the layout of the Works will be, and absorb some impressions of its environment;
- The Site visit affords an opportunity for the DB to arrange for supply to each Member a copy of the Contract Documents (if not already received by the DB) and to agree what periodic reports or other data will be provided to the DB by the Parties and the Engineer. The DB Members are well advised to consider having as much as possible of such documentation provided to them in A5 format so that they are easily housed at home, and easily transported for use when away from home and not on Site..
- At the initial Site visit, it is good practice to arrange that there will be kept at the Site for the sole use of the DB during their visits a set of the Contract Documents, including variations, programme revisions, and any other Contract amendments, so that the DB Members do not have to transport such documents to and from each Site visit. Also, if future Site tours are likely to need special clothing, such as safety helmets, safety vests (reflective or inflatable or whatever), steel reinforced shoes, rubber boots, rainwear, etc., the initial Site visit is the time to arrange these for the DB Members, and for the storage of such items on Site for ready availability during the future Site visits..

Establishing relationships

At the initial Site visit, the DB should set the tone for its future regular visits, and assure that they are informal, with easy and relaxed communication. It is essential that the DB meets and talks with the persons who are implementing the Contract on a day-to-day basis, for the Employer, the Engineer, and the Contractor. This is sometimes expressed as "meeting with those who are at the work face" as distinct from meeting representatives from area offices or head offices of the Parties or the Engineer.

The DB must meet and come to know the persons who will be those first to encounter any problems or difficulties in the execution of the Works. Rapport must be established with these people so that any future disagreements can be dealt with at this "working level", and prevented from escalating into formal disputes.

Usually during at least the first Site visit of the DB, social hospitality will be extended to the DB, such as a welcome dinner. It is important for the DB to assure that for such a welcome and for all future social occasions during Site visits both Parties and the Engineer attend.. This "team" approach to socialising is important not only in establishing congeniality among all members of the team but also to avoid any impression of partiality which might arise if only one Party is present, or the Engineer is not invited. Also, DB Members should socialise as a unit, not as individuals. A DB Member should not be seen socializing alone with only one of the Parties or only the Engineer. This DB-as-a-unit approach to socializing is to assure that there is not any possible appearance of partiality to a Party or to the Engineer; it protects the DB and its members from any suspicion of lacking the independence and impartiality they have warranted to maintain, under the terms of the TPA.

Perhaps it is obvious but DB Members should remember that the channel of communication between the DB and the Parties and the Engineer is the DB Chairman. This is true for correspondence, during Site visits, and in hearings. A DB Member may receive a copy of a communication from a Party or the Engineer to the DB, but any response is to be coordinated by the DB Chairman. During meetings at Site, the DB Chairman will chair the meeting, and should assure that other DB Members participate actively in the meeting, but under the control of the DB Chairman.

This limitation of access to a single DB Member is underlined by the first paragraph of section 5 of the DBA General Conditions:

5. General Obligations of the Employer and the Contractor

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DB's activities under the Contract and the Dispute Board Agreement. The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

Planning future Site visits

At the initial Site visit, it is good practice to agree with the Parties the planned dates for the next Site visit. Normally the interval between the first two Site visits will be the interval between all future regular Site visits, at least until completion of construction. During this planning at the initial Site visit, it is useful to determine whether there are any especially important construction events at which the DB should be present and the timing of those special Site visits agreed.

It also should be noted that many DBs find it helpful to distribute and agree with the Parties and the Engineer in advance of arrival for a Site visit an agenda for the Site visit. The Parties and the Engineer should be invited to add any agenda items they may wish. In the unlikely event of a disagreement about agenda items, the DB is to decide. (See, ANNEX, Procedural Rule 2)

The agenda for a Site visit always should include a specific entry for discussion of current or impending problems, including any disagreements. A Site visit is the typical time at which informal views of the DB may be sought. The following are relevant to this matter:

- Sub-Clause 20.2 says: *If at any time the Parties so agree, they may jointly refer a matter to the DB for it to give its opinion. Neither Party shall consult the DB on any matter without the agreement of the other Party*. [Seventh paragraph]
- Procedural Rule 2, in the Annex: *The purpose of the site visits is to enable the DB to become and remain acquainted with…any actual or potential problems or claims, and as far as reasonable, to endeavour to prevent potential problems or claims from becoming disputes.* (This is an MDB addition to the 1999 Edition of the Red Book and obviously is important to the MDB which is providing finance to the Contract.) It follows that the DB itself should take the initiative in exploring these matters, and not await the joint action of the Parties foreseen in Clause 4(k) of the General Conditions of the DBA or Sub-Clause 20.2 of the Contract.
- Clause 4 (f) and (k), DBA: *The Member shall…(f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules; …(k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any*

The reference in (f), to advice on "the conduct of the Contract" was made to clarify that the DB is not a Board of Consultants on the design of the Works, not is it Consultant to the Contractor on the sequence and methods of construction; it is a Board to assist the Parties in the avoidance of formal disputes, and if (despite efforts at prevention) a formal dispute arises, then to give a decision on the dispute which the Parties are to follow unless and until they agree otherwise or the DB decision is altered by arbitration.

The reference in (k), to giving advice and opinions on "any matter relevant to the Contract" gives broad scope to any enquiry which both Parties agree to make. However it is clear that such joint agreement of the Parties is not necessary for the DB to address, on its own initiative, any actual or potential problems or claims and to seek to prevent them from becoming formal disputes.

It is important to note that the DB can provide informal assistance to the Engineer as well as the Parties, including discussing matters before an Engineer's determination is made.

It should be added that the Parties' agreement is necessary under paragraph 4(k) of the DBA is agreement which should be freely given because such discussion is in the best interests of both parties. Early resolution of disagreements saves money and preserves the important spirit of cooperation, of acting as a team, to achieve successful Completion. The "advice and opinions" of the DB may not be accepted by the Parties, but may stimulate further discussions and negotiations between the Parties which results in amicable settlement of the disagreement without the disagreement becoming a formal dispute.

There is no particular form for the giving of DB advice and opinions. Often they are oral only. However, there are occasions where maximum assistance to the Parties requires that the advice or opinion be in writing. It is best practice to require that the Parties agree that such advice or opinion, being informal, shall not bind the DB in any way should the matter later become the subject of a formal dispute. In this regard, Article 16 (3) of the ICC Dispute Board Rules gives guidance: "The DB, if called upon to make a Determination [i.e., a decision] concerning a disagreement with respect to which it has provided informal assistance, shall not be bound by any views, either oral or in wiring, which it may have given in the course of its informal assistance."

Between Site visits

To assist the DB in its duty to become and remain informed about the progress of the Works, the DB should receive copies of all progress reports which are prepared under the Contract. Typically the Contractor is required to prepare and submit to the Engineer and the Employer a monthly progress report which is quite comprehensive. Also, the Engineer often prepares a monthly report to the Employer. Copies of these should be provided to the DB, although some redactions of confidential portions may be necessary from the Engineer's reports.

The DB also should be on distribution for Contractor requests for variations, all variations issued by the Engineer, and any supplemental agreements or other documents altering the Parties' obligations under the Contract.

The Contractor and the Engineer should arrange that the DB is alerted immediately (without leaving it to mention in normal monthly reports) if unforeseen problems arise which apt to affect adversely the progress of the Works, such as events of Force Majeure, labour strikes, or significant accidental damage to or destruction the Works (such as a tunnel collapse).

The Programme and all Revisions to it should be distributed to the DB so that the DB is aware of such matters as changes in planning, changes in rate of progress, re-sequencing of work, and revisions of any interim completion dates.

In most Contracts, claims are an inescapable feature and typically there will be more claims by the Contractor than the Employer. Most Contractor claims will be for additional cost or extension of time(s) for Completion, or both. When claims arise, they should be listed and reported in the Contractor's monthly reports, with the listing done in a way which enables the reader of the report to see what progress has been made during the month reported. Usually it is helpful for the DB to receive in addition to such monthly update of progress on claims copies of all Minutes of meetings which seek to resolve the claims.

Many Contracts now establish File Transfer Protocol ("FTP") internet sites which allow computer access to key project data by the Parties and the Engineer at all times and from any geographical location. The DB Members should be given access to the Contract FTP site, even if some parts of that site are reserved as confidential to a Party or the Engineer. Typically, the regular monthly reports of the Contractor and the Engineer are among the data kept on the FTP site; also it is common to have the full, current Contract Documents available on the FTP site. The advantages to a DB and its work of access to such a site 24 hours a day, 365 days a year, regardless of geographical location, are obvious.

Some Contracts also establish a Site camera network, which enables viewing of many areas of the Contract Site in "real time". Those with access to the camera network can examine at any time the progress of the Works and current on-Site activity. The viewing can be from multiple locations – in some cases, continents away from the Site. DB access to such visual network can be advantageous, too.

Also of considerable convenience is the inexpensive telephone communication available via Skype. Especially for simultaneous conferring with more than one person at more than one location, the conference facility on Skype is very valuable to an international construction project. As part of the Contract team, the DB should be on the Skype network established by the Parties and the Engineer.

Generally, telephone calls, emails, and faxes from and to the DB are via the DB Chairperson and not to or from individual DB Members and a Party or the Engineer. Communications of

the DB with a Party are made known to the other Party and the Engineer, and those with the Engineer made known to both Parties. Usually, knowledge of the communication is by copies of the communication, or distribution of a note summarizing a telephone discussion. Such sharing avoids misunderstandings which might arise from undisclosed communications.

Site tour

A regular feature of each periodic Site visit is a tour of the Site by the DB, accompanied by representatives of the Parties and the Engineer in attendance. Many DB Members like to take their own cameras with them so that they can photograph any feature or activity which they wish, and normally such photography is allowed. It assists the DB in later recollection of the Site visit and particular features which they noticed. Typically, DB Members are happy to distribute to the Parties and the Engineer copies of the photos, if desired.

Generally, it is the Engineer who will "guide" the tour and offer any comments the Engineer wishes to make, and the Contractor will offer comments as well. DB Members usually ask questions but refrain from offering any judgemental comments. Experience shows that especially on a large Site, it is possible for the tour group to get separated as they progress. However, it is very important that the DB Chairperson assure that the DB Members stay together as a unit. If they are travelling in separate vehicles, the DB Members should be regrouped at each stop. The reason for this "solidarity" is to assure that all DB Members hear and see the same things, and that the Parties and the Engineer see that the DB is acting as a unit.

Meetings during the Site visit

Usually either the Contractor or the Engineer have on Site a large conference room which can be made available during Site visits of the DB. Such rooms usually have convenient chalk boards or "white boards" or "flip charts" to enable visual descriptions to be used during meetings. Sometimes, if both the Engineer and the Contractor have such rooms available, the DB will "rotate" the rooms, using one for one Site visit and the other for the next Site visit.

Meetings with the DB should be informal, and are unlikely to feature neckties! Meetings should be chaired by the DB Chairperson, who should aim to keep the meetings relaxed but business-like, and even when matters may be under debate the atmosphere should not be allowed to become hostile or involve personalized comments. There may be tensions within the team but the tensions must not be allowed to develop into violent argument or verbal attack on any individual. However, it is at these meetings that the DB Chairperson should proactively ask each Party and the Engineer whether there are any problems foreseen and whether there are any disagreements which require solution if formal dispute is to be avoided. This is a vital part of the DB's work and of every Site visit.

The discussion of disagreements is an apt time for the DB to review the record of claims made and the progress of the Engineer's determinations on them. If the record shows that a claim is progressing slowly or languishing without progress, the DB should find out why, and explore whether the DB can assist in resolving whatever is impeding disposition of the claim.

As the DB's time on Site is limited, every effort should be made to avoid interruption of meetings with the DB, including interruptions by telephone calls. Meeting attendees should switch their mobile telephones to voicemail. This is not just a matter of courtesy, it also is a matter of efficient use of an expensive meeting!

DB Site Visit Report

This is a vital document. It is to be delivered by the DB before departing from the Site visit.

Unfortunately, some DBs are known to fail to meet this obligation and to prepare and distribute the report *after* departure from the Site. The excuse given is the pressure of other business, but this is a poor excuse for failure to give the Parties the priority they deserve, especially if the DB is receiving a monthly retainer. It also is a breach of the DBA: paragraph 3 of the Annex states "At the conclusion of each site visit and *before leaving the site*, the DB shall prepare a report on its activities during the visit…" (Emphasis added) Also relevant is paragraph 5(h) of the DBA: "[The DB Member shall] "ensure his/her availability for all site visits…"

It is best practice for the DB to prepare the Site Visit Report in draft and distribute copies to the Parties and the Engineer, then to meet with them to determine whether any clarifications or corrections are required. This step is particularly important if the participants in the Site visit do not have as a first language the language in which the report is written. If the report covers discussions of a disagreement the review helps to assure that the DB has understood fully and accurately the facts relevant to the disagreement. Also, the report serves as a reminder, or even a "check list", of any suggestions the DB may have made for resolving the disagreement before it escalates into a formal dispute. Experience indicates that the report usually is circulated within the organizations of the Employer, the Engineer, and the Contractor to all persons involved in administration of the Contract, even if not based on Site and not in attendance at DB Site visits.

A list of attendees at each session during the Site visit should be prepared, with each person's name and position printed by the person, then signed. A record of who attended should be included in the Site visit report, either by a list at the end of the report or by appending copies of the signed attendance lists to the report.

Procedural Rules

This Annex is the result of much careful consideration. It is not by accident that it is so short. Roughly 1.5 pages of A4 size paper contain the entirety of the Rules. Is this enough? Should the DB establish additional rules? Certainly there are Dispute Boards which have done so, and some publications on Dispute Boards provide examples of the longer and more detailed procedural rules which have been used on some Boards.

However, experience indicates that DBs enlarge upon the Annex, and establish additional procedural rules at their peril. The more detailed and prescriptive the rules established, the greater the chance of procedural error and subsequent attack on the DB decision in arbitration.

There is a saying which is applicable: "If it isn't broken, don't fix it!" What is in the Annex is the result of long and careful consideration. Those who change it do so at serious risk to themselves.

The Annex gives the DB great flexibility and extensive powers of procedural control. The DB should be most hesitant to sacrifice that flexibility and circumscribe itself with more detailed and specific procedures and timetables which ultimately may frustrate the DB's efficient and economical disposition of disputes. The Annex says simply:

- *…the DB shall…give [each Party] a reasonable opportunity of putting his case and responding to the other's case…* [Rule 5 (a)]

- *…the DB shall …adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.* [Rule 5 (b)]
- *The DB…will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.* [Rule 6]
- [Except as otherwise agreed in writing by the Parties]…*the DB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer, and to proceed in the absence of any party who the DB is satisfied received notice of the hearing…* [Rule 7]
- In Rule 8, the DB is empowered on eight important matters. **Let us review together those eight points.**

The Employer and the Contractor empower the DB, among other things, to:

(a) establish the procedure to be applied in deciding a dispute,
(b) decide upon the DB's own jurisdiction, and as to the scope of any dispute referred to it,
(c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,
(d) take the initiative in ascertaining the facts and matters required for a decision,
(e) make use of its own specialist knowledge, if any,
(f) decide upon the payment of financing charges in accordance with the Contract,
(g) decide upon the provisional relief such as interim or conservatory measures, and
(h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.

Having reviewed those eight points, are there any procedural points which you think should be added? With respect to each addition which you think should be made, what reason(s) are there for addition?

The Greatest Procedural Risk

The greatest procedural risk lies in the fourth paragraph of Sub-Clause 20.4:

"Within 84 days after receiving [the reference of the dispute in writing to the DB for decision] …the DB shall give its decision."

The reason for the 84 day time limit is that the Parties wish an early decision on a dispute which probably will have been ongoing for some time before referral of it to the DB. However, **consider these points:**

- **The Contract defines "day" as "calendar day"** (Sub-Clause 1.1.3.9) **Weekends and holidays count when calculating the 84 days**
- **History suggests that most disputes require a hearing either because one or both Parties wish to have one, or the DB considers that it needs to have one**
- **Most hearings take place in the country in which the Works are located, thus travel days are almost certain to be required for a hearing**
- **Typically, each Party will wish to make at least one written submission, and sometimes one or both of the Parties will wish to make more than one submission with the further submission not due until after enough days for the other Party's initial submission to have been analyzed. It is not unusual for a Party to want 30 or at least 14 days preparation time before the date for filing of written**

submissions. Also, the DB may find it helpful to have a closing submission from each Party after conclusion of the hearing. Additionally, it is common that written submissions are delivered to the DB by air courier which, while quick, necessarily consumes some of the total of 84 days, and the same transmission time days may apply to the DB decision. Even if transmission is electronic, there may be days consumed in the downloading, printing, and assembling of the submission

- **The DB is under a duty to seek unanimity in is decision** (Annex, Rule 9) **and achieving unanimity can be a lengthy process, and if unanimity is not achieved, the DB may require preparation of a dissenting opinion.** (Annex, Rule 9)
- **The entire procedure leading up to the DB decision must "avoid unnecessary delay or expense" but at the same time it must give each Party "a reasonable opportunity of putting his case and responding to the other's case…"** (Annex, Rule 5) **It is common for Parties to seek additional time beyond dates initially established**
- **Importantly, the DB needs to reserve sufficient time to assure that its written decision reflects that the DB has understood the facts and the arguments of the Parties, is "reasoned" (as required by Sub-Clause 20.4) and is clear to a reader whose first language may be other than the language of the decision. Achieving these goals usually requires more time than foreseen at the outset of the dispute.**

So, except for the occasional dispute on which the Parties are content to have the DB proceed on documents only, there is tension about time by having the decision due within 84 days of referral of the dispute to the DB.

But should you be concerned about the 84 day limit? After having had a disagreement for so long, will it really matter to the Parties if the DB decision is received after the 84 days have elapsed, especially if the delay is only a week or so? What do you think? Why?

There is potential relief from the tension we have noted; it is in the words of the fourth paragraph of Sub-Clause 20.4:

"Within 84 days after receiving such reference, *or within such other period as may be proposed by the DB and approved by both Parties*, the DB shall give its decision…" [Emphasis added]

So, how should the DB approach the matter of agreeing a different period?

Should the DB plan to make the proposal as soon as it sees that the 84 day time limit for its decision *might* be overrun? When might the risk of overrunning the time limit be evident to the DB? Would it be better to wait until most of the 84 days have gone and thus hope to create maximum pressure on the Parties to agree to a time extension for the DB? If you are chairing the DB, what will you propose to the Other Members?

[TRAINER: EXPLORING THE ABOVE QUESTIONS SHOULD LEAD THE TRAINEES TO THE IDEA OF FIXING THE TIME LIMIT FOR THE DECISION AS FROM CLOSE OF THE HEARING AND DB RECEIPT OF ANY POST-HEARING WRITTEN SUBMISSIONS, INSTEAD OF FIXING THE TIME LIMIT FROM THE DATE OF THE REFERRAL OF THE DISPUTE TO THE DB.

A SIMPLE NOTE OF AGREEMENT SHOULD SUFFICE UNDER THE CONTRACT, ALTHOUGH SOME GOVERNMENT EMPLOYERS' STAFF MAY TAKE THE VIEW THAT A FORMAL CONTRACT AMENDMENT MUST BE PROCESSED – WITH ALL THE HURDLES THAT WOULD ENTAIL IN GOVERNMENTAL BUREAUCRACIES.

THE IMPORTANCE ARISES FROM THE FACT THAT IF THE PRESENT 84 DAY LIMIT IS NOT MET, IT IS ARGUABLE THAT THE DECISION DOES NOT COMPLY WITH THE CONTRACT, AND IS VOID. I AM AWARE OF ACTUAL CASES WHERE THAT WAS THE OUTCOME.]

Written Submissions

You have extensive experience with construction contracts and will know that claims under them typically generate a lot of paper! Claims consultants and quantity surveyors are experts in the preparation of such papers, as are many engineers who have specialized in claims work. So, when you think of a written submission to a DB, you may imagine that it will require multiple large volumes, perhaps even bound like books, with gilt lettering on the spines.

If so, you will be surprised when you study the FIDIC MDB Harmonised Conditions, for there is only one matter which must be stated when a dispute is referred to the DB – the first paragraph of Sub-Clause 20.4 says that the reference to the DB "…shall state that it is given under this Sub-Clause."

Why is this? [TRAINER: APART FROM BEING CERTAIN THAT A FORMAL REFERRAL IS INTENDED, THE AIM OF DISCUSSION HERE IS TO CAUSE THE TRAINEES TO RECALL THAT UNDER SUB-CLAUSE 20.1, THE CONTRACTOR HAS SUBMITTED ALREADY THE INITIAL NOTICE OF CLAIM, FOLLOWED BY "A FULLY DETAILED CLAIM WHICH INCLUDES FULL SUPPORTING PARTICULARS"; THERE MAY BE "DETAILED COMMENTS" OF THE ENGINEER AND THERE MAY HAVE BEEN A REQUEST BY THE ENGINEER FOR "ANY NECESSARY FURTHER PARTICULARS." IN MAKING HIS SUB-CLAUSE 3.5 DETERMINATION, THE ENGINEER WILL HAVE CONSULTED WITH THE PARTIES, AND THEN PROVIDED THE PARTIES WITH HIS DETERMINATION "WITH FULL SUPPORTING PARTICULARS". IN SHORT, *BEFORE* THE REFERENCE OF THE DISPUTE TO THE DB, THE FULL PICTURE OF THE DISPUTE COULD BE IN WRITTEN FORM REQUIRING NO FURTHER PARTICULARISATION. ALSO, IF THE DB HAS WORKED PROPERLY THE PARTIES ARE APT TO HAVE CONSULTED THE DB ON AN INFORMAL BASIS ABOUT THEIR DISAGREEMENT, AND THUS THE DB IS LIKELY FAMILIAR WITH THE DISPUTE BEFORE IT IS REFERRED FORMALLY TO THE DB.]

If, despite the written material which has preceded the reference of the dispute to the DB, one or both Parties feel that more will be needed by the DB to reach its decision, how should the DB proceed?

Clearly neither the reference to the DB nor any additional written submission allowed by the DB should raise issues not presented to the Engineer for determination. Otherwise, the DB is likely to be faced with arguments that it lacks jurisdiction over the dispute because the new issues were not processed first in accordance with Sub-Clause 20.1.

Good practice requires that the DB familiarise itself with the documents prepared leading up to the Engineer's determination and the Engineer's determination itself before deciding on what further written submissions will be allowed. The aim should be that written submissions are taken only for purposes of providing clarification thought necessary by the DB of the

exchanges and submissions preceding the reference of the dispute to it. The DB's actions in this respect should be controlled by second sentence of Procedural Rule 5: "*Subject to the time allowed to give notice of a decision and other relevant factors*, the DB shall: (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a *reasonable* opportunity of putting his case and responding to the other's case, and (b) adopt procedures suitable to the dispute, *avoiding unnecessary delay or expense*. " (Emphasis added)

It may be that no submissions are required beyond those made to the Engineer prior to the reference of the dispute to the DB. If the DB considers further submissions helpful to the DB, perhaps a single simultaneous exchange will suffice. If alternating exchanges are made, they normally should not exceed a submission by the Claimant, a response from the Respondent and a reply from the Claimant to any issue raised in the response which had not been addressed in the Claimant's submission.

If a hearing is held, the DB may consider it helpful to provide for simultaneous closing submissions to be made shortly after close of the hearing. However, in considering each and all of the possible written submissions, the DB ***must*** keep in mind the time limit for publication of its decision. Of course it is possible that the DB may seek, and the Parties may agree, to an extension to the date of publication of the DB decision; sadly, it often happens that one or both Parties will not agree to extend the time limit for the DB's decision, no matter how fervent the request of the DB: and, an out of time decision is apt to be attacked as void.

One aspect of document management which is helpful to the DB is to require the Parties to submit a single agreed statement of relevant facts, including an agreed bundle of the documents relevant to those facts. This does require some cooperation between the Parties, but such effort will benefit the Parties as well as the DB because it greatly reduces the duplication which occurs if each Party is allowed to submit a separate document outlining the relevant facts, supported by a separate bundle of documents relevant to those facts.

Hearing(s)

Is it necessary that the DB have a hearing in order to decide a dispute? Procedural Rule 6 says "The DB ***may*** conduct a hearing on the dispute…" That is permissive wording, not mandatory wording. So, a hearing is not explicitly required. In practice, it is not unusual for a dispute to be decided upon written submissions alone.

But if a hearing is not mandatory, should there be one anyway? **What do you think, and why?** [TRAINER: THE AIM IS TO BRING OUT THE "BALANCE" BETWEEN PROCEDURAL RULE 5(A) AND 5(B) – "A REASONABLE OPPORTUNITY OF PUTTING HIS CASE AND RESPONDING TO THE OTHER'S CASE" *vs* "AVOIDING UNNECESSARY DELAY OR EXPENSE"]

If a hearing is to be held, and if the time limit for issuance of the DB decision allows, it clearly is a cost saving if the hearing is held during a regularly scheduled Site visit. Often this is achievable if the Parties cooperate with the DB in the timing of the reference of the dispute to the DB.

Unfortunately, the word "hearing" suggests to many people that the DB will or should act as if it were a judicial body or an arbitral tribunal, with attendant formality, and special seating arrangements. Experience suggests that a hearing is best held in a conference room normally used for regularly scheduled Site visits. No dais or elevated platform for a threesome sitting

above everyone else is required for a DB hearing. Nor are attendees or the DB expected to appear in suits, ties, and glossy shoes. Normal Site attire is appropriate for all.

Apart from the procedural aspects of a hearing (or hearings), the tone or atmosphere of a hearing is important. Some Parties approach a hearing as if it were a TV drama, or a High Court proceeding, or an arbitration. It is a meeting to assist the DB in assuring that the DB has understood each Party's position on the dispute, and that the DB has the information it considers necessary to enable it to prepare its decision.

One is tempted to suggest that at any DB hearing, there should be a large sign with big letters reading "THIS IS ***NOT*** AN ARBITRATION!"

The Parties and the Engineer should be reminded that the DB is (or should be) familiar with the details of the dispute because the DB has (or should have) been involved in discussions about it already, in an attempt to *avoid* a formal dispute. Further, before the hearing, the Parties will have submitted comprehensive written submissions of their positions on the dispute and there is no need to use time during a hearing to repeat what has been said in those submissions. A diligent DB will put a stop to attempts to repeat what already has been submitted to the DB. While the DB is required to give each Party "a reasonable opportunity of putting his case and responding to the other's case" such opportunity does not require permission to repeat arguments, especially in light of the requirement that the DB "avoid unnecessary delay". [Annex, PROCEDURAL RULES, Rule 5 (a) and (b)]

A principal purpose of the hearing is for the DB to ask any questions it may have from its study of the Parties' written submissions. In this respect it is important to note that the DB does not have to follow the style of "refereeing adversarial combat" between the Parties; the DB is specifically empowered to "adopt an inquisitorial procedure" where the role of the persons putting the Parties' cases primarily respond to questions from the DB. (Annex, PROCEDURAL RULES, Rule 7) Also, the DB is empowered to "take the initiative in ascertaining the facts and matters required for a decision." (Rule 8 (b))

The hearing is not a place for eloquent speeches, passionate pleas, or emotional argument, and any such behaviour by either Party's representative should be halted immediately by the DB Chairman. Also, a hearing is not a "round table discussion". It is essential that the DB Chairman assure that each Party has a principal presenter of its case and that no one else participates in the presentation without the request of the principal presenter and the prior permission of the DB Chairman. The principal presenter should be the person in charge of the management of the Contract at the Site – the person most familiar with the details of Contract performance. Such a principal presenter may not know the answer to every question from the DB, but should know who in his organization can provide the answer.

A frequent question is whether a Party should, or can, have a lawyer as its principal presenter. Experience suggests that to use a lawyer as principal presenter is counterproductive. If issues of law are involved in a dispute, presentation of legal opinions typically is allowed, but normally a lawyer has little to contribute to the DB on technical matters of engineering and construction, and will not have the familiarity with the construction of the Works which the DB will desire.

Assuming that a hearing is held, the DB should establish a timetable for the hearing, establishing an equal time limit for each Party to make the oral presentation of its case. This is done by consultation by the DB with the Parties prior to the hearing, and once established should be put in writing and distributed by the DB to the Parties and the Engineer.

During the hearing, best practice is for the DB not to interrupt with questions. It should reserve its questions until both presentations have been completed. Of course if some thing is said which is not heard clearly or not understood, the DB should interrupt for clarification.

If for some reason, the DB does interrupt with a substantive question, the DB should keep track of the time spent by the Party answering the DB question, and should allow that Party the same amount of time for completion of its presentation. In other words, DB intervention during a presentation should not result in diminishing the time remaining to the interrupted Party after conclusion of the DB intervention.

If the DB considers that the presentation of the Respondent has raised issues not addressed in the Claimant's presentation the DB should allow the Claimant to reply to those issues only.

Questions raised by the DB after conclusion of the Parties' submissions: normally, after a Party replies to the question, if the other Party has any comment, the comment is allowed, although the DB must be alert to avoid any extended exchange of argument.

It is important for a DB Member to remember always the Procedural Rule 9 restriction. "The DB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties." Good practice extends this prohibition to opinions expressed by any experts. Also, good practice extends the prohibition beyond oral expression to include facial expressions and other "body language".

If the DB requests, or if the DB allows the Parties to present, independent expert witnesses it is best practice to emphasize that independent expert witnesses owe their duty to the DB, not the Parties. Increasingly, DBs are finding it efficient when hearing experts with conflicting views to have the experts exchange views directly with each other in the presence of the DB and the Parties, instead of the common law practice of direct examination followed by cross-examination. This sometimes is referred to as "hot tubbing" of the experts.
Generally witnesses are reminded of their duty to bear witness truthfully, and if the law applicable to the Contract includes penalties for failure to do so, witnesses are reminded of this. In most DB proceedings, no sworn oaths are used for witnesses.

As with Site visit reports, it is good practice to keep a daily record of attendance at hearings, indicating name and position of each attendee. In extremely complex disputes, the DB may decide that it is worth the cost to the Parties to have a *verbatim* transcript of the hearing, but normally no transcript is required because of the DB's familiarity with the substance of the dispute from time prior to the referral of the dispute to the DB.

Only in the most unusual circumstances would adjournment of a hearing be justified, and typically unexpected absences of a Party during a hearing are not allowed to delay the proceedings. The DB should remember that it has been empowered ***very*** broadly in respect of conduct of any hearing: the DB can "conduct any hearing *as it thinks fit* not being bound by any rules or procedures other than those contained in the Contract and these Rules."(Procedural Rule 8(c), with emphasis added)

Location of a hearing: most often it is at the Site or at least in the same country as the Site. However, it is possible to hold a hearing anywhere: Procedural Rule 6 says "The DB may conduct a hearing on the dispute, in which event *it will decide on the date and place for the hearing*..." (Emphasis added) Indeed, it is possible to have a hearing with the participants in different geographical locations, especially with the use of Skype or teleconferencing.

Decisions

There is no guidance in the DB provisions of the Contract of how the decision should be prepared. It increases the collegiality of the DB and the sense of participation in the decision if the drafting of the decision is shared by the members of any 3 person DB, although if any Member does not have as a first language the language of the Contract, such Member may be uncomfortable with drafting a major part of the decision, and accommodation should be made to that, perhaps by having such Member prepare part of the decision in "skeleton" or outline form, to be fleshed out in collaboration with the other Members.

The first stage of the preparation of the decision is agreeing an outline of the decision. The outline will facilitate the division of the work of drafting the various sections of the outline.

The division of drafting work should be under the leadership of the Chairman and to the extent practicable, the work divided evenly among the three Members. Each Member's work should be in initial draft to be circulated to the other two Members. Achieving a final and cohesive document remains the responsibility of the Chairman.

At no time should "pride of authorship" be allowed to impede the drafting, and all Members should be willing to accept additions, deletions, and rewordings. All Members must keep in mind the goal of achieving a decision upon which all agree are which all are willing to sign.

Again, Clause 20 gives scant indication of what should be contained in a DB decision. It is not even stated that the decision must be in writing, although it is implicit. The fourth paragraph of Sub-Clause 20.4 simply requires that the decision "shall be reasoned and shall state that it is given under this Sub-Clause."

Procedural Rule 9 states "If the DB comprises three persons: (a) it shall convene in private after a hearing, in order to have discussions and prepare its decision; (b) it shall endeavour to reach a unanimous decision: if this proves impossible the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor…"

This sparse guidance raises some considerations for you. **Having in mind the purpose of the decision, how should it be written? Should it be written immediately after the hearing and before the DB Members go their separate ways? If not, when should it be written and if a meeting of the DB is required where should it be? What is the purpose of a majority of the DB Members requiring a minority Member to prepare a written report?**

[TRAINER: AN EFFORT SHOULD BE MADE TO ELICIT ANSWERS FROM THE TRAINEES, BUT THE FOLLOWING MUST EMERGE FROM THE TRAINEES' RESPONSES AND THE DISCUSSIONS OF THOSE RESPONSES.]

The fundamental purpose of the decision is to provide a reasonable basis on which the Parties can conclude their dispute amicably. From this flows the purpose of enabling the Parties to avoid the delay and expense of arbitrating their dispute. So, in addition to being reasoned, a decision should be *persuasive* to the Parties.

- It should set forth the relevant facts to demonstrate that the DB has understood those facts;
- It should set forth, even if only in skeletal form, the arguments of each Party for its case and against the case of the other Party, to show each Party that its analysis and thinking have been understood by the DB;

- Each argument should be responded to in the decision so that it is clear that the DB did not overlook any argument of either Party;
- The decision should be written as simply as possible. Very likely not all of the Parties, the Engineer, and the DB Members will have as their first language the language of the Contract; thus it is important that sentence structures are not complex, and the vocabulary is as simple as possible;
- Any words which can be read as condescending, derogatory, or emotional should be omitted – the aim is to persuade, not to criticise, belittle, or otherwise anger.

Also, the DB should have in mind the fact that the decision is admissible in evidence in any later arbitration over the dispute. (Sub-Clause 20.6, last sentence of third full paragraph) A well written DB decision is apt to be given great weight by the arbitral tribunal, in part because of the length of the involvement of the DB, especially if the decision is unanimous and by three experienced persons selected jointly by the Parties at the outset of the Contract. The Parties will be aware of this when trying to decide whether to resort to arbitration. The more clear and convincing the decision, the greater the likelihood that despite dissatisfaction with the decision, the dispute will be resolved without pursuing an arbitration to conclusion. Either the decision will be accepted as is, or taken as a basis for further negotiations.

In many instances, the Parties have not accepted a DB decision in all its terms, but have used the decision as a starting point for new negotiation to reach a mutually acceptable compromise and avoid arbitration.

When should the decision be written? Unless the matter is complex, it is quickest and least expensive to issue the decision immediately after the conclusion of the hearing (and without post-hearing written submissions by the Parties). Evidence and arguments are fresh in the memory, the DB Members are in the same geographical location, and each Member is less likely to be distracted or delayed by other matters than after return to the Member's office. Also, the Parties will know the outcome as quickly as possible.

However, it is foreseen that the DB may have to meet later and elsewhere than where the hearing was held. Payment for such a meeting is foreseen in section 6 (b) if the APPENDIX:

"The Member shall be paid…(b) a daily fee which shall be considered as payment in full for:
(i) each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and …[the]… location of a meeting with the Other Members (if any);
(ii) each working day on…preparing decisions…"

DB Members should keep in mind that the Parties are apt to scrutinize the location and duration of such meetings, with the remembrance of the duty of the DB of "avoiding unnecessary delay or expense." (Procedural Rule 5 (b) Usually, with email and telephone or Skype travel to private meetings can be avoided. If not, then economical solutions should be chosen. There is a good story, perhaps apocryphal, that illustrates the point: a three person DB invoiced for a private meeting to complete and sign its decision and the invoice relating to the meeting showed that it had taken place in Hawaii during the Winter. The Parties, objected to such a luxurious location for the DB private meeting. Only after a flutter of correspondence was it made understood that all three DB members already were in Hawaii to attend a professional convention, and took advantage of being co-located to have a DB meeting!

Why would the majority of a DB want the minority to write a separate opinion? First, the work of preparing such a dissent inhibits one from hasty dissent. Second, the mental discipline of writing a reasoned dissent requires the dissenter to examine very carefully the reasoning

supporting the dissent. Third, the dissent serves as a "double check" for the majority on their own reasoning. Fourth, it likely will assist in post-decision negotiations of the Parties to reach a compromise settlement instead of proceeding to arbitration.

The Recalcitrant DB Member

Generally DB Members are collegial and conscientious, and if required to decide disputes they achieve unanimity on their decision.

However, there are instances of persons who have been "recalcitrant" or "less than cooperative". How should one respond to such behaviour?

- There have been occasions when a DB Member threatened to resign because of disagreements with Other Members. Although under the final sentence of clause 2 of the APPENDIX , a Member can resign on 70 days' notice to the Parties, to resign because of disagreements with fellow DB Members is unprofessional, and is apt to affect adversely the reputation of the person resigning.
- There also have been instances of a DB Member absenting himself from a meeting or hearing. Procedural Rule 9 (c) states "If a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless: (i) either the Employer or the Contractor does not agree that they do so, or (ii) the absent Member is the chairman and he/she instructs the other Members not to make a decision."

If an absence is for a valid reason, such as a family emergency, often it is possible to arrange acceptable presence by videoconferencing or telephone conferencing by Skype or by regular telephone lines. Obviously, it remains possible under the DB provisions for a Member to disrupt/delay/frustrate the operation of the DB but any thought of such behaviour should be accompanied by thought of potential consequences. Reputation has been mentioned. More immediate are the financial risks arising under clause 8 of the APPENDIX:

8. Default of the Member

If the Member fails to comply with any of his obligations under Clause 4(a) – (d) above, he shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor fore any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.

If the Member fails to comply with any of the obligations under Clause 4 (e) – (k) above, he shall not be entitled to any fees or expenses hereunder from the date and to the extent of the non-compliance and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses already received by the Member, for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.

IV. FINANCIALASPECTS OF THE DB

From the beginning of the use of Dispute Boards, the arrangements for their use have to establish a balance between the individual interests of the Parties and set a spirit of cooperation aimed at amicable resolution of disputes. Thus, all DB Members are agreed by both Parties, and those Members undertake to be and remain impartial and independent between the Parties. The DBA includes restrictions on activities or agreements which could risk that impartiality and independence, or at least appear to. And, on the matter of the cost of the DB, equal sharing is established:

"The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one half of the remuneration." [Sub-Clause 20.2, sixth paragraph]

The most frequent procedure for sharing in the payment of the remuneration is for the Contractor to pay the DB and invoice the Employer for one half. The remuneration includes both the DB fees and the DB expenses. The details of these are established in the DBA General Conditions, at paragraph 6, "Payment".

[PowerPoint presentation of paragraph while proceeding with below]

6. Payment

The Member shall be paid as follows, in the currency named in the Dispute Board Agreement:

(a) a retainer fee per calendar month, which shall be considered as payment in full for:

(i) being available on 28 days' notice for all site visits and hearings;
(ii) becoming and remaining conversant with all project developments and maintaining relevant files;
(iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and
(iv) all services performed hereunder except those referred to in sub-paragraphs (b) and (c) of this Clause.

The retainer fee shall be paid with effect from the last day of the calendar month in which the Dispute Board Agreement becomes effective, until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works.

With effect from the first day of the calendar month following the month in which the Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by one third. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Board Agreement is otherwise terminated.

(b) a daily fee which shall be considered as payment in full for:

(i) each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and the site, or another location of a meeting with the Other Members (if any);

(ii) each working day on Site visits, hearings or preparing decisions; and
(iii) each day spent reading submissions in preparation for a hearing.

(c) all reasonable expenses including necessary travel expenses (air fare in less than first class, hotel and subsistence and other direct travel expenses) incurred in connection with the Member's duties, as well as the cost of telephone calls, courier charges, faxes, and telexes: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (b) of this Clause;

(d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The retainer and daily fees shall be as specified in the Dispute Board Agreement. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months, and shall thereafter be adjusted by agreement between the Employer, the Contractor and the Member, at each anniversary of the date on which the Dispute Board Agreement became effective.

If the parties fail to agree on the retainer fee or the daily fee, the appointing entity or official name in the Contract Data shall determine the amount of the fees to be used.

The Member shall submit invoices for payment of the monthly retainer and air fares quarterly in advance. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

The Contractor shall pay each of the Member's invoices in full within 56 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Board Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the DB; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Sub-Claus 14.8 of the Conditions of Contract.

If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under Clause 7.

We have seen earlier in this training that the DBA establishes both a monthly retainer and a daily fee for specified work, plus reimbursement of "reasonable expenses", some of which are defined in paragraph 6 (c).

Also, 6(d) says the Member will be paid any taxes "properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country)". No indication is given regarding the meaning of "properly levied". Arguably there is no entitlement to reimbursement of taxes "improperly" levied; but it would seem contrary to the basic intent of paragraph 6 (c) to deny reimbursement to the Member of taxes which he/she has been required to pay by the government of the Country. Also it should be noted that some countries regard reimbursement of income taxes as additional income and seek to tax such reimbursement!

Unless otherwise agreed, paragraph 6 (c) remain fixed for the first 24 months, and thereafter are adjustable annually by three Party consensus.

The final six paragraphs of paragraph 6 (c) establish a "failsafe" mechanism for fixing fees, and the mechanism for payments to the DB Members.

Termination

[PowerPoint presentation of paragraph 7]

7. Termination

At any time: (i) the Employer and the Contractor may jointly terminate the Dispute Board Agreement by giving 42 days' notice to the Member; or (ii) the Member may resign as provided for in Clause2.

If the Member fails to comply with the Dispute Board Agreement, the Employer and the Contractor may, without prejudice to their other rights, terminate it by notice to the Member. The notice shall take effect when received by the Member.

If the Employer or the Contractor fails to comply with the Dispute Board Agreement, the Member may, without prejudice to his other rights, terminate it by notice to the Employer and the Contractor. The notice shall take effect when received by them both.

Any such notice, resignation and termination shall be final and binding on the Employer, the Contractor and the Member. However, a notice by the Employer or the Contractor, but not by both, shall be of no effect.

Note that the termination for DB Member default is effective upon receipt of notice by the Member. Nothing more having been said in the DBA, it is not certain whether paragraph 8 can be applied effectively after a termination for default under paragraph 7.

[PowerPoint presentation of paragraph 8]

8. Default of the Member

If the Member fails to comply with any of its obligations under Clause 4(a) – (d) above, he shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.

If the Member fails to comply with any of his obligations under Clause 4(e) – (k) above, he shall not be entitled to any fees or expenses hereunder from the date and to the extent of the non-compliance and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses already received by the Member, for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.

It seems to be the *intention* that paragraph 8 can be applied after a paragraph 7 termination, but the matter is one of the effect of the termination under the law applicable to the DBA.

It seems likely that the law applicable to the DBA will be that applicable to the Contract because of the linkage between Sub-Clause 20.2 and the Appendix which (with its Annex)

forms the DBA. The law applicable to the Contract is that stipulated in the Contract Data, most commonly the law of the "Country" as defined in Sub-Clause 1.1.6.2.

How do you think the above paragraph 8 "Default of the Member" is to be reconciled with paragraph 5(c) of the same document:

5. General Obligations of the Employer and the Contractor

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member and the Other Members (if any):

...

(c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith

Is there an inconsistency here? If so, what should you do about it?

V AFTER THE DB DECISION

[Show PowerPoint presentation of final chart at end of FOREWORD to 1999 Edition of Red Book, Chart is entitled "Typical Sequence of Dispute Events envisaged in Clause 20"]

V AFTER THE DB DECISION

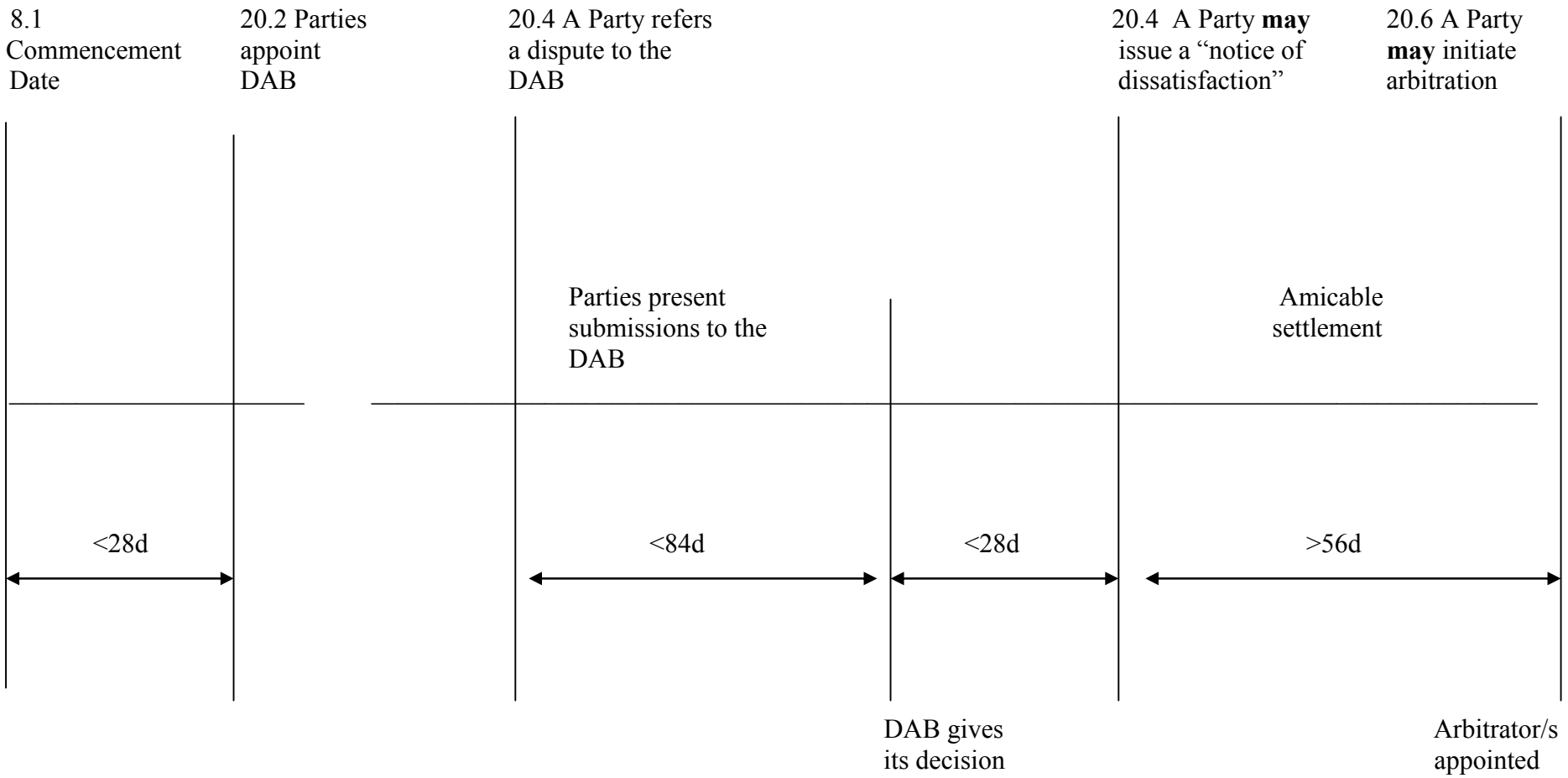

Figure: Typical Sequence of Dispute Events envisaged in Clause 20

After the DB has given its decision, the Parties have 28 days during which to decide whether to accept the decision or to refer the dispute to arbitration. After those 28 days, the decision is not only binding but also final. [Sub-Clause 20.4, final paragraph] If a Party is dissatisfied with the DB decision, within the 28 day period that Party can give to the other Party notice of dissatisfaction and intention to commence arbitration. This triggers a sequence of events, but before examining them, it is important to note that even if a Party gives notice of dissatisfaction, that Party is obliged to implement that DB decision: "…promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below." [Sub-Clause 20.4, fourth paragraph]

What is this reference to "an amicable settlement" or "an arbitral award" following the DB decision?

Amicable Settlement

This is Sub-Clause 20.5 of the General Conditions:

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifth-sixth day after the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

[PowerPoint presentation of Sub-Clause 20.5]

Sub-Clause 20.5 is entitled "Amicable Settlement" and it sets a compulsory period of not less than 56 days during which the Parties are to seek amicable settlement of the dispute. No commencement of arbitration is permitted to be given before those 56 days have expired.

You may think "What is the point? These Parties have been fighting for months. First there was a claim, and most likely there were informal discussions with the DB. After investigation and evaluation, an Engineer's determination was made on the claim. Then one Party, or perhaps both Parties, referred the dispute to the DB. Detailed written submissions were made to the DB, and probably there was a hearing. The DB made a reasoned decision, but one Party (or possibly both Parties) were dissatisfied, and within 28 days time limit gave notice of dissatisfaction and intention to refer the dispute to arbitration. So after all of that, what is the point of imposing a period of amicable settlement efforts before the start of the arbitration? Why not let the Parties get on with and start their arbitration immediately? They are unlikely to find an agreeable compromise during this two month detour!"

Two explanations have been offered by FIDIC. One is that in some countries, a governmental Employer may lack the legal power to compromise a claim unless the Contract giving rise to the dispute contains a specific authorization for such action. The other is that experience shows that both Parties may benefit from a "cooling off" period before they proceed to arbitration which probably will be lengthy and certainly will be costly.

Although not articulated by FIDIC another justification for the delay before start of arbitration is to give the Parties (and the Engineer) adequate time to explore whether, using the DB decision, they can re-open discussions and find a solution not yet discussed between the Parties. It does happen sometimes that Parties do not accept the DB decision, but they do use part (or parts) of a DB decision as the basis for crafting a mutually acceptable compromise.

In this regard, it is important to note that Sub-Clause 20.5 does not set a 56 days time limit on efforts for an amicable settlement. Such efforts can continue as long as both Parties consider the efforts are promising, and think that continued efforts may yield a settlement which both can accept in preference to proceeding to arbitration.

Also, there is nothing which requires arbitration to be commenced immediately after the expiry of the 56 days – or indeed by any specific date other than that prescribed by the law applicable to the Contract. Typically national laws set a number of years within which legal action must be commenced or the right to start legal action is lost. Those from common law jurisdictions will have heard of "the Stature of Limitations". Whether such a limitation exists for the Contract, and if so when the limitation applies is a matter of the law applicable to the Contract.

Arbitration

You probably are aware that international commercial arbitration is a highly specialized kind of dispute resolution, and that you are well advised to seek expert advice and assistance before commencing arbitration.

The 1999 Edition of the Red Book stipulates that unless otherwise agreed by the Parties arbitration will be conducted under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. ["ICC"]. In the model DBAs for the 1999 Edition and the MDB Harmonised Edition, ICC arbitration is stipulated for final resolution of disputes under the DBA. However, for disputes between the Contract Parties, the MDB Harmonised Edition has a potentially problematic provision, which is Sub-Clause 20.6:

[PowerPoint presentation of Sub-Clause 20.6]

20.6 Arbitration

Unless indicated otherwise in the Particular Conditions, any dispute not settled amicably and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration. Unless otherwise agreed by both Parties:

(a) for contracts with foreign contractors, international arbitration with proceedings administered by the institution appointed in the Contract Data conducted in accordance wit the rules of arbitration of the appointed institution, if any, or in accordance with UNCITRAL arbitration rules, at the choice of the appointed institution,
(b) the place of arbitration shall be the city where the headquarters of the appointed arbitration institution is located,
(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language], and
(d) for contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DB to obtain its decision, or to the reasons for

dissatisfaction given in its notice of dissatisfaction. Any decision of the DB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

As we have noted earlier in this training, there is no definition of "foreign contractors" which may cause a question regarding a joint venture of one or more "domestic" contractors with "foreign contractors".

Sub-Clause 20.5 (a) refers to "the institution appointed in the Contract Data" but there are in circulation sample Contract Data sheets which have a space for naming the institution to appoint DB Members but no space for naming an institution to administer an arbitration.

That provision goes on to say that either the appointed institution's rules or the UNCITRAL Rules will be used "at the choice of the appointed institution". Leaving the choice of rules up to the appointed institution is unusual in arbitration, which is founded on the concepts of agreement of the Parties. Here a vital decision is left up to a third party, with no time specified by which the third party is to decide what rules will apply to an arbitration. There are some countries whose law may consider this provision unenforceable. Also it is possible that an administering institution will not agree to choose which rules to use.

Perhaps the intention behind the insertion of the words "at the choice of the appointed institution" is to deal with the previous words "if any" – referring to the possibility that an administering authority might not have its own rules; thus perhaps giving that authority the power to choose UNCITRAL Rules was meant to cover what otherwise would be a "gap" in the procedure for selecting the rules for the arbitration. Yet, no administrative authority comes to mind which does not have its own rules; and, UNCITRAL has no administrating authority.

UNCITRAL Rules have long been suggested by the MDBs as one set of rules which can be used for contracts financed by the MDB. That may stem from the fact that UNCITRAL is, like the MDBs, an international institution. However, use of its arbitration Rules requires the Parties either to designate a separate administrating authority or to leave the arbitral tribunal to administer itself.

Potential problems lie also in Sub-Clause 20.6 (b). Usually (unless the Parties otherwise agree) the law of the place of arbitration (sometimes called "the seat of the arbitration") is the law which governs procedural matters arising during the arbitration. So using as the "seat" the city of the headquarters of the administrating organization could produce procedural aspects not anticipated by the parties. For example, ICC Rules would result in Paris, France, as the seat; and French procedural law – civil law – would apply even if the substantive law of the Contract is that of a common law country.

Sub-Clause 20.6 (b) also may be problematic. What is the meaning of "arbitration with proceedings conducted in accordance with the laws of the Employer's country"? One interpretation is that the words mean the Parties must use the system of arbitration described in the laws of the Employer's country. An equally appropriate reading would be that rules such as those of the ICC or UNCITRAL can be used so long as that does not violate the laws of the Employer's country – i.e., such rules are "in accordance with" those laws. Note that many countries allow the unrestricted use of such international rules of arbitration with its nationals.

Another aspect which may be problematic is that the laws of the Employer's country may not be the same as the laws of the country in which the Contract is performed. If so, does that mean a "domestic contractor" is one incorporated in the Employer's country or in the country in which the Contract is performed?

So, we have had a "taste" of the complexities of arbitration. What about the cost of arbitration?

[PowerPoint presentation of ICC summary cost scale]

A general impression of the cost of the arbitrators' fees and the administrative charges for administering an arbitration can be had by studying the scale of fees for those costs as published by the ICC International Court of Arbitration:

Cost of Arbitration

A. ADMINISTRATIVE EXPENSES	
Sum in dispute (in US Dollars)	**Administrative Expenses(*)**
up to 50 000	$ 2 500
from 50 001 to 100 000	4.30%
from 100 001 to 200 000	2.30%
from 200 001 to 500 000	1.90%
from 500 001 to 1 000 000	1.37%
from 1 000 001 to 2 000 000	0.86%
from 2 000 001 to 5 000 000	0.41%
from 5 000 001 to 10 000 000	0.22%
from 10 000 001 to 30 000 000	0.09%
from 30 000 001 to 50 000 000	0.08%
from 50 000 001 to 80 000 000	0.01%
over 80 000 000	$88 800

B. ARBITRATOR'S FEES		
Sum in dispute (in US Dollars)	**Fees(**)**	
	Minimum	**maximum**
up to 50 000	$ 2 500	17.00%
from 50 001 to 100 000	2.50%	12.80%
from 100 001 to 200 000	1.35%	7.25%
from 200 001 to 500 000	1.29%	6.45%
from 500 001 to 1 000 000	0.90%	3.80%
from 1 000 001 to 2 000 000	0.65%	3.40%
from 2 000 001 to 5 000 000	0.35%	1.30%
from 5 000 001 to 10 000 000	0.12%	0.85%
from 10 000 001 to 30 000 000	0.06%	0.225%
from 30 000 001 to 50 000 000	0.056%	0.215%
from 50 000 001 to 80 000 000	0.031%	0.152%
from 80 000 001 to 100 000 000	0.02%	0.112%
over 100 000 000	0.01%	0.056%

(*) For illustrative purposes only, the table on the following page indicates the resulting administrative expenses in US$ when the proper calculations have been made.

(**) For illustrative purposes only, the table on the following page indicates the resulting range of fees when the proper calculations have been made.

Summary Cost Scale by ICC International Court of Arbitration

This scale is also in the ICC Rules booklet included in your training materials. You see that under the ICC Rules, the fees of the arbitrators, and the charge of the ICC Court for administering the arbitration are calculated using the total amount of money in dispute including the amount of any counterclaims.

Under UNCITRAL Rules, consideration of the total amount of money is considered, along with other factors, such as the likely complexity of the case and the time spent by the arbitration, in recommending suitable fees for arbitrators; time spent also is used in calculating the administering institution's charges.

In addition to the fees of the arbitrators and the charges of an administering institution, the Parties also are required to reimburse the expenses of the arbitrators, including high cost items such as air fares and hotel accommodations, and any experts which the tribunal may employ to assist it.

In addition, the typical expenses of arbitration will include:

- the cost of travel and accommodation for a Party's own team to the city which is the headquarters of the administering institution [unless some other seat is selected], as well as the "hidden" cost of the time of the Party's own team
- the cost of any independent experts which the Party may employ to assist in presenting its case
- document reproduction
- transcription service for hearings [may involve international travel for the transcribers and their equipment, plus accommodation at the seat of the arbitration]
- probably the greatest of all, the cost of legal services, including travel and accommodation expense of the lawyers.

In 2010 money, the arbitration of construction disputes easily can cost millions of US Dollars. In very complex cases, the costs can approach the amount in dispute. Importantly, most arbitration rules provide for the arbitral tribunal to award costs in favour of the victor. This means that the loser suffers the burden of all of its own costs *and* pays a substantial portion [or even all] of the costs of the winner! This greatly increases the financial gamble of arbitrating disputes.

How long the arbitration take? It is impossible to predict the duration of any particular arbitration, but some indication can be had from published records of the ICC Court. Although the ICC Rules foreseen an award being made within 6 months of the filing of the Request for Arbitration, in fact the average for *all* commercial arbitrations under the ICC Rules is about 18 months. Experience indicates that it is unusual for arbitration of construction disputes to be completed within that time. It is not unusual for considerably longer to be required to achieve the arbitral award in a construction case.

It is appropriate to note, also, that many arbitrations – some say *most* arbitrations – are settled before an arbitral award is reached. As in court litigation, the Parties decide to staunch the financial drain and end the long delay by making a painful compromise.

So, that is an overview of arbitration. Why have you been subjected to it? To alert you to the fact that when you are serving as a DB Member and seeking to persuade the Parties to accept the DB's informal advice, or its formal decision, you should remind the Parties of the hazards of arbitration. Often the Parties will not have had any previous experience of international arbitration. You will do them a real service by reviewing with them the kind of information

covered in this training regarding the cost, risk, and delay inherent in arbitration. You may be able to persuade them to find a mutually acceptable compromise which will enable them to avoid arbitration, and maintain friendly commercial relations for the future.

There is a further point regarding arbitration and that is about what DB decisions can be referred to arbitration.

In the event that a Party fails to comply with a final and binding DB decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*], Sub-Clause 20.4 [*Obtaining Dispute Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference.

[PowerPoint presentation of Sub-Clause 20.7]

Unfortunately, Sub-Clause 20.7 has been used to argue that since the failure to observe a "final and binding" decision can be referred itself to arbitration without proceedings under Sub-Clause 20.5, a decision which is "binding" but not final *cannot* be referred directly to arbitration. This is a misconstruction of Sub-Clause 20.6.

The only DB decision that is "final and binding" is one to which neither Party has given notice of dissatisfaction and intention to refer the dispute to arbitration within the 28 days after receiving the decision. (Sub-Clause 20.4, fifth paragraph). Sub-Clause 20.5 establishes that if a timely notice has been given under Sub-Clause 20.4, then the Parties must observe a minimum 56 day period of amicable settlement efforts before commencement of arbitration. However, after that 56 day period, Sub-Clause 20.6 makes it clear that "any dispute not settled amicably and in respect of which the DB's decision…has not become finally and binding shall be finally settled by arbitration."

Sub-Clause 20.7 is directed to the situation where no timely notice of dissatisfaction and intention to commence arbitration has been given, the decision has become final and binding, but a Party does not comply with the decision. In such circumstances, FIDIC Conditions do not require that such non-compliance be treated as a further matter of dispute, and instead foresee that the non-compliance will be taken to arbitration in order to get an award which can be enforced by a Court having jurisdiction over the non-complying Party.

Expiry of DB Membership

Sub-Clause 20.8 refers to no DB being in place "by reason of the expiry of the DB's appointment"; however there is no specific provision in the DPA for the "expiry" of the DB's appointment. Paragraph 7 of the General Conditions of the DPA provide for "termination" by joint action of the Parties or by either resignation of termination by the DB Member, there is no indication in the DBA of when the DB Member's appointment "expires".

The provision for "expiry" is in the final words of Sub-Clause 20.2: "… when the discharge referred to in Sub-Clause 14.12 [*Discharge*] shall have taken place." Sub-Clause 14.12 says:

14.12 Discharge

When submitting the Final Statement, the Contractor shall submit a discharge which confirms that the total of the Final Statement represents full and final settlement of all moneys due to the Contractor under or in connection with the Contract. This discharge may state that it becomes effective when the Contractor has received the Performance Security

and the outstanding balance of this total, in which event the discharge shall be effective on such date.

[PowerPoint presentation of Sub-Clause 14.12]

Under Sub-Clause 14.12, the Contractor's discharge is submitted with the Final Statement. The Final Statement is developed under Sub-Clause 14.11 by a process which starts within 56 days after the Contractor's receipt of the Performance Certificate. (The Performance Certificate is a document described in Sub-Clause 11.9 and in which the Engineer certifies that the Contractor has completed his obligations under the Contract. It is deemed to constitute acceptance of the Works.)

The Final Statement is intended to be a statement for the amount agreed as "the value of the work done in accordance with the Contract, and any further sums" which are considered to be due to the Contractor under the Contract, or otherwise. It is the basis for the Final Payment Certificate under Sub-Clause 14.13.

As you will know, the process of agreeing "the value of the work done" and the amount of "any further sums" due is a lengthy and contentious process. Indeed, the final paragraph of Sub-Clause 14.11 makes specific reference to possible use of the DB to resolve Final Statement Disputes:

[PowerPoint presentation of the final paragraph of Sub-Clause 14.11]

Within 56 days after receiving the Performance Certificate, the Contractor shall submit, to the Engineer, six copies of a draft final statement with supporting documents showing in detail in a form approved by the Engineer:

(a) the value of all work done in accordance with the Contract, and
(b) any further sums which the Contractor considers to be due to him under the Contract or otherwise.

If the Engineer disagrees with or cannot verify any part of the draft first statement, the Contractor shall submit such further information as the Engineer may reasonably require within 28 days from receipt of said draft and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed. This agreed statement is referred to in these Conditions as the "Final Statement".

However, if following discussions between the Engineer and the Contractor and any changes to the draft final statement which are agreed, it becomes evident that a dispute exists, the Engineer shall deliver to the Employer (with a copy to the Contractor) an Interim Payment for the agreed parts of the draft final statement. Thereafter, if the dispute is finally resolved under Sub-Clause 20.4 [Obtaining Dispute Board's Decision] or Sub-Clause 20.5 [Amicable Settlement], the Contractor shall then prepare and submit to the Employer (with a copy to the Engineer) a Final Statement.

So, the "expiry" of the DB is likely to be at the very end of the Contract. It is likely that the Discharge will be effective after receipt by the Contractor of any payment due under the Final Payment Certificate, and this could be after the expiry of the Defects Notification Period. Your period of service could be long, especially if the DNP is longer than the traditional 365 days. However, for family budgeting, you should remember that paragraph 6 of the DBA foresees reduction of the DB Member's retainer by one-third after the issue of the Taking Over Certificate!

Your future

Serving as a DB Member is a specialist professional qualification. You should keep current your professional development as a DB Member. You should join the DRB Foundation, a not-for-profit organisation whose members are dedicated to the successful use of Dispute Boards. Details of membership are available at www.drb.org. and they include special subscription rates for members resident in developing countries. The Foundation has Country Representatives in various countries and these Representatives arrange in-country programs. Also on that web site are details of Conferences, Workshops, and other training programs operated by the Foundation. The Foundation issues a quarterly journal which will assist you in keeping current with new developments and which provides a forum for discussions with fellow Foundation members throughout the world. The Foundation also has a Manual which contains much information about Dispute Board practice in the USA and the Manual contains also information about international practice.

You also will wish to consider joining the Dispute Board Federation, which has details of its activities at www.dbf.org. Those activities include many training programs in many countries, and a regular newsletter to members. Earlier in this training program, you were urged to join FIDIC activities, either via your country's Member Association or via direct individual membership in FIDIC. A visit to FIDIC's web site, www.fidic.org, will show you on the home page a range of training programs on offer in a large number of countries, arranged either by FIDIC-approved commercial training organisations or by FIDIC Member Associations.

As of 2010, there also are two recent books about Dispute Boards: "Dispute Boards: Procedures and Practices", by Gwyn Owen and Brian Totterdill, published by Thomas Telford Ltd (www.thomastelford.com), ISBN 978-0-7277-3508-9; "Chern on Dispute Boards", by Dr. Cyril Chern, published by Blackwell Publishing Ltd., ISBN-13: 978-1-4051-7062-8. In addition, learned articles regarding dispute boards are published in various journals such as The International Construction Law Review, published by Informa. There also are papers on Dispute Board published by the Society of Construction Law; see, www.scl.org.

So, there are plenty of materials to assist you in continuing your study and improvement. On a more personal level, keep in regular contact with your fellow trainees and share your experiences with one another as you become increasingly involved in Dispute Board service.

[PowerPoint presentation of big "THANK YOU!"]

Thank you for your attention. Good luck in your future work with Dispute Boards! May the Dispute Boards you serve have few formal disputes, and may none of your decisions be referred to arbitration!

Attachment – 14 Hypothetical Case

JICA Hypothetical Case

This is a sample of the type of hypothetical case which Trainers should develop for use in interactive training on use and operation of DBs under the FIDIC MDB Harmonised Conditions for Construction.

The aim of the interactive training is that the trainees will identify the contractual issues arising from the facts of the hypothetical case, and apply the correct provision(s) of the MDB Edition to the facts. There may not be in the MDB Edition a "correct" or "incorrect" solution to an issue, and an issue may instead call for a judgement by the DB member, and on such issues the Trainer will be looking for the reasoning used to support the judgement.

MONDONIAN BYPASS PROJECT

Toptown, the capitol of Mondonia, has become increasing congested as both the population and the number of vehicles in Mondonia has increased. The principal highway into and out of Toptown links the major agricultural area of Mondonia with the seaport from which Mondonian agricultural products are exported. The same highway is used to transport imported products for use in the major agricultural region of Mondonia.

To reduce the vehicle traffic through Mondonia, a contract has been let to construct a bypass highway, so that agricultural traffic can flow efficiently without passing through metropolitan Toptown. The bypass involves bridging Red River which flows from Mondonia to the sea. The bypass also involves constructing an underpass beneath the Mondonia National Railway ("MNR") line which connects Toptown with the major agricultural region of the country. MNR is owned and operated by the Mondonian Ministry of Railways ("MoR") The contract is popularly referred to as the Toptown Bypass Project, or "TBP".

Mondonian roads and highways are owned and maintained by a Government-owned company, Mondonian Motorways Ltd. ("MML")

Within the time required by the TBP contract, the DB was established and it is a three person DB, and it is chaired by a Mondonian national who is an experienced civil engineer whose entire career, until shortly before the TBP contract, was spent working outside Mondonia. The other two DB members are not Mondonian nationals, one of whom is a national of the neighboring country Elbonia, to which he has retired after spending most of his career working in Mondonia for the MNR, for which he became ultimately the MNR manager of rail line maintenance. The other of the three DB members is an English barrister who was born in England of a English father and a Mondonian mother, educated in England, and practices from London Chambers near Fleet Street in London.