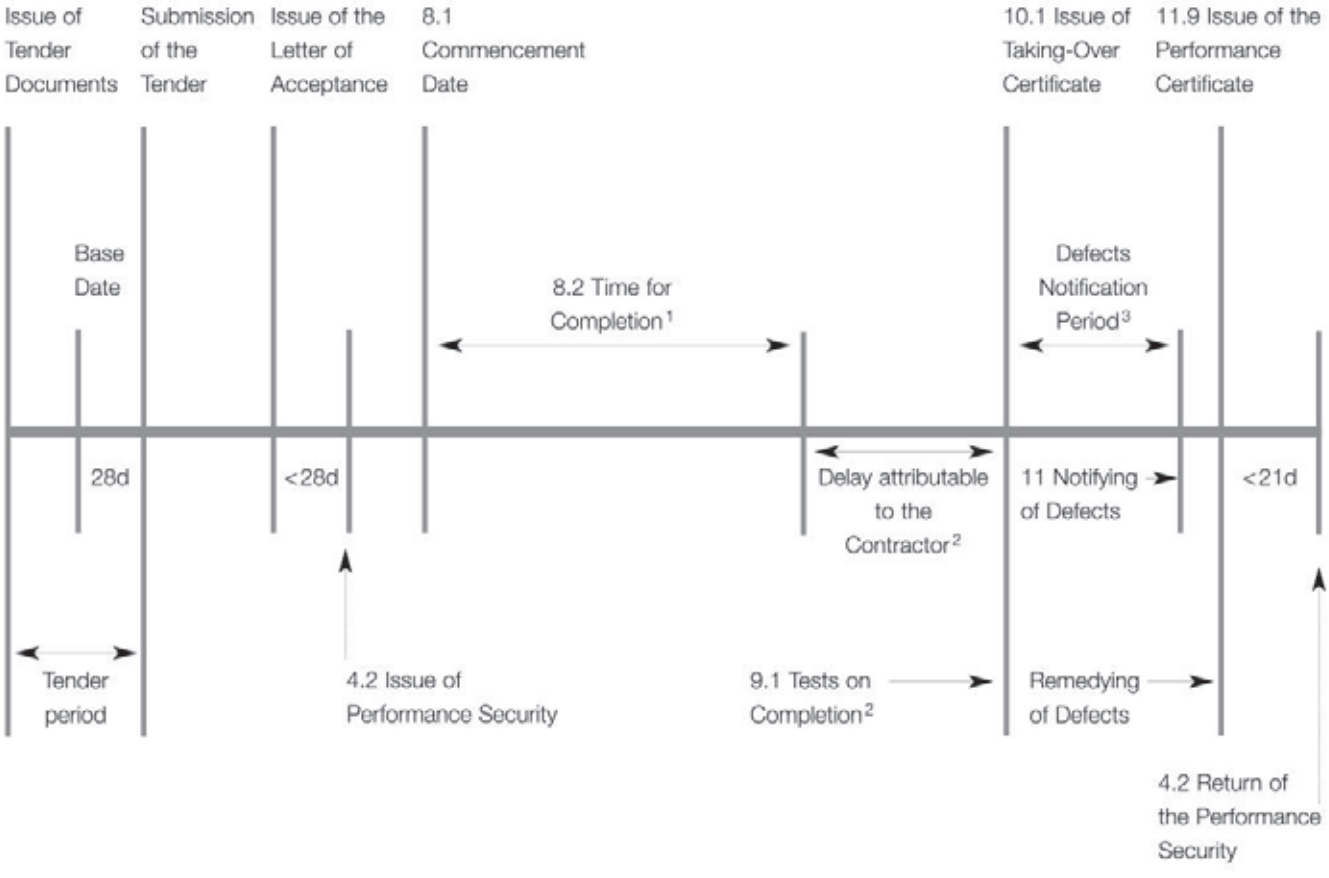
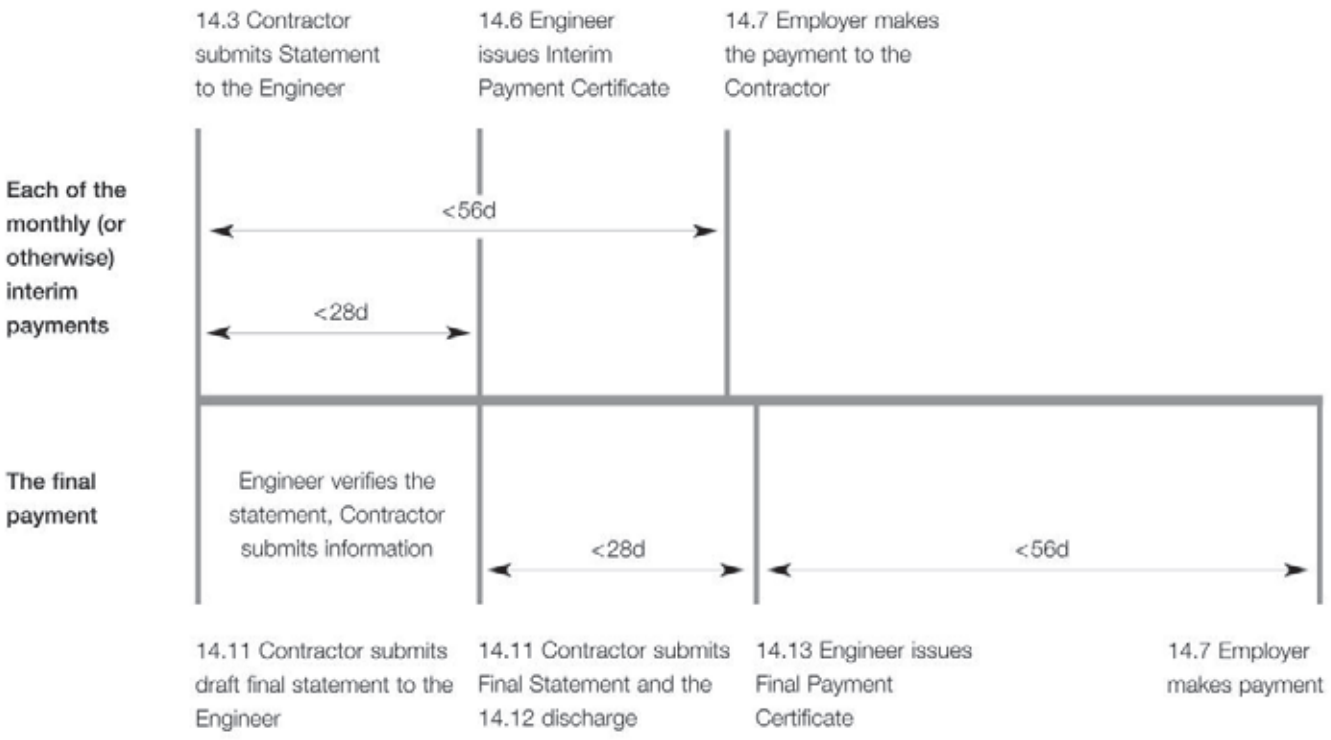
Attachment – 9 1999 Edition Red Book Chart from Introduction, Showing Line Diagram of Clause 20 Sequence

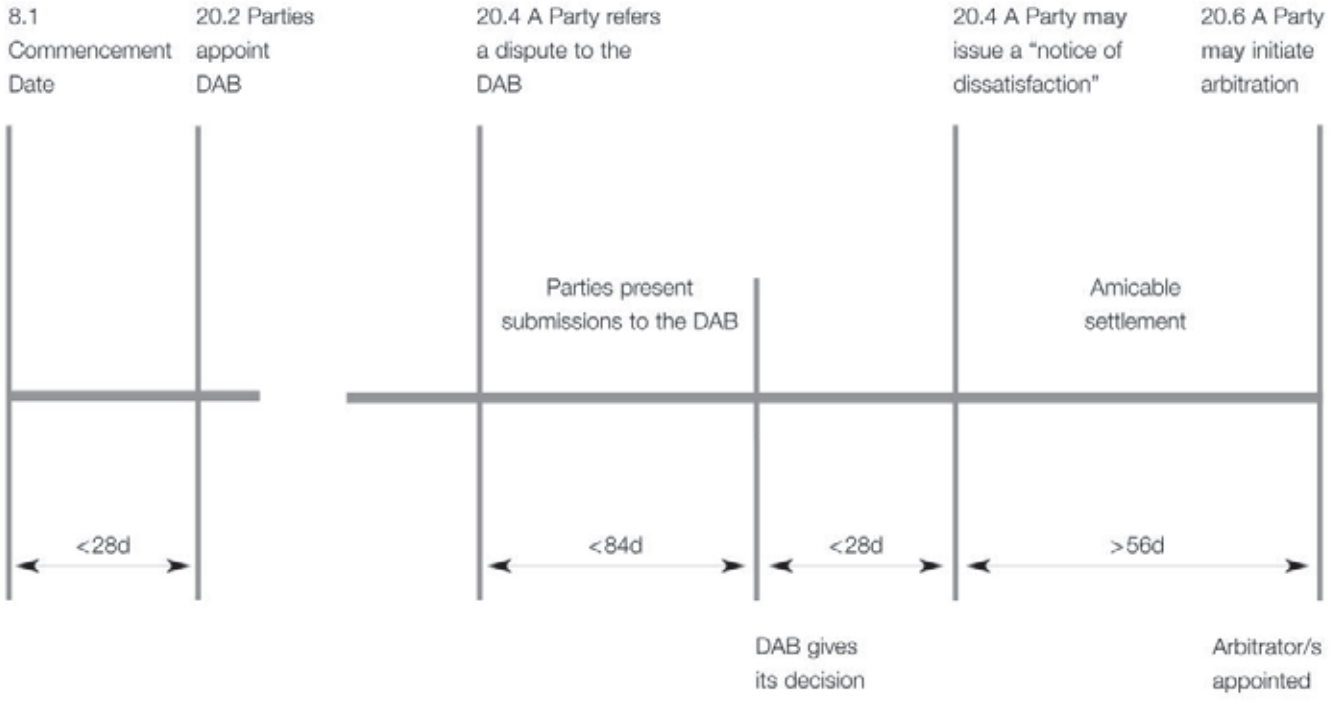


Typical sequence of Principal Events during Contracts for Construction

1. The Time for Completion is to be stated (in the Appendix to Tender) as a number of days, to which is added any extensions of time under Sub-Clause 8.4.
2. In order to indicate the sequence of events, the above diagram is based upon the example of the Contractor failing to comply with Sub-Clause 8.2.
3. The Defects Notification Period is to be stated (in the Appendix to Tender) as a number of days, to which is added any extensions under Sub-Clause 11.3



Typical sequence of Payment Events envisaged in Clause 14



Typical sequence of Dispute Events envisaged in Clause 20

Attachment – 10 ICC Dispute Board Rules

Dispute Board Rules

in force as from 1 September 2004

with

- *Standard ICC Dispute Board Clauses*
- *Model Dispute Board Member Agreement*

International Chamber of Commerce
38 cours Albert 1er
75008 Paris - France

Of the various languages in which the ICC Dispute Board Rules may be published, the English and French versions are the only official texts.

ICC No.: publication 829

Date of this online publication: October 2004

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FOREWORD

ICC has always aimed to provide the international business community with dispute resolution services adapted to its various needs. These include arbitration, ADR, expertise and, most recently, a service for establishing and using Dispute Boards. Each of these services has its own characteristics and utility. It is up to the parties to determine which of them – or which combination of them – is best suited to their particular needs.

Arbitration is the only one which results in an award by a tribunal that is enforceable at law. Determinations made by Dispute Boards are not enforceable at law as such, although they may become contractually binding on the parties as described below. Hence, Dispute Board members do not act as arbitrators.

ADR is primarily intended to help parties arrive at a settlement agreement in relation to a particular dispute. Unlike Dispute Boards, which are standing bodies set up to deal with disputes as they arise, ADR is designed to deal with disputes on a one-off basis. ADR proceedings are administered by ICC under its ADR Rules.

The purpose of expertise proceedings is to provide parties with an expert's report on a particular issue. These proceedings are administered by ICC pursuant to its Rules for Expertise.

WHAT ARE DISPUTE BOARDS?

Dispute Boards (DBs) are normally set up at the outset of a contract and remain in place and are remunerated throughout its duration. Comprising one or three members thoroughly acquainted with the contract and its performance, the DB informally assists the parties, if they so desire, in resolving disagreements arising in the course of the contract and it makes recommendations or decisions regarding disputes referred to it by any of the parties. DBs have become a standard dispute resolution mechanism for contractual disputes arising in the course of mid- or long-term contracts.

ICC DISPUTE BOARD DOCUMENTS

ICC offers the international businesses community a set of documents providing a comprehensive and flexible

framework for establishing and operating DBs in a wide range of contracts in different industries. These documents comprise the ICC Dispute Board Rules, the ICC Model Dispute Board Member Agreement and the Standard ICC Dispute Board Clauses.

The Rules are designed to govern the Dispute Board proceedings.

The Dispute Board Member Agreement covers such matters as the DB member's undertaking, the remuneration to be paid to the DB member and the duration of the agreement. The parties and the DB members are, of course, free to add to or modify the model as they may all agree. They should verify the enforceability of the agreement under applicable law and should also ensure compliance with any requirements necessary for the enforceability of the agreement.

The Standard ICC Dispute Board Clauses consist of three alternatives, each providing for a different type of Dispute Board, followed by arbitration as the ultimate recourse if a dispute is not resolved through the Dispute Board. The parties may choose whichever kind of Dispute Board is most appropriate, given the nature of their contract and their relationship. ICC does not favour any one type of DB over the others. When incorporating one of the clauses in their contract, parties are advised to verify its enforceability under applicable law.

TYPES OF DISPUTE BOARDS

The three alternative types of Dispute Board available to parties under the ICC DB Rules are as follows:

- **Dispute Review Board ('DRB')**

The DRB issues 'Recommendations' with respect to any dispute referred to it and constitutes a relatively consensual approach to dispute resolution. If no party expresses dissatisfaction with a Recommendation within a stated time period, the parties contractually agree to comply with the Recommendation. If a party does express dissatisfaction with the Recommendation within such time period, that party may submit the entire dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties may voluntarily comply with the Recommendation but are not bound to do so.

- **Dispute Adjudication Board ('DAB')**

The DAB issues 'Decisions' with respect to any dispute referred to it and constitutes a less consensual approach to dispute resolution. By contractual agreement, the parties must comply with a Decision without delay as soon as they receive it. If a party expresses dissatisfaction with a Decision within a stated time period, it may submit the dispute to final resolution by arbitration, if the parties have so agreed, or the courts, but the parties meanwhile remain contractually bound to comply with the Decision unless and until the arbitral tribunal or court rules otherwise. If no party expresses dissatisfaction with a Decision within the stated time period, the parties contractually agree to remain bound by it.

- **Combined Dispute Board ('CDB')**

The CDB normally issues Recommendations with respect to any dispute referred to it but may issue a Decision if a party so requests and no other party objects. In the event of an objection, the CDB will decide whether to issue a Recommendation or a Decision on the basis of the criteria set forth in the Rules. The CDB thus offers an intermediate approach between the DRB and the DAB.

The essential difference between a Decision and a Recommendation is that the parties are required to comply with the former without delay as soon as they receive it, whereas a Recommendation must be complied with only if no party expresses dissatisfaction within a stated time limit. In either case, if a party is dissatisfied with a DB's determination of a given dispute, it may refer the dispute to arbitration, if the parties have so agreed, or the courts, in order to obtain an enforceable award or judgement. The DB's determination is admissible in any such further proceedings.

ICC DISPUTE BOARD CENTRE

Under the ICC DB Rules, ICC does not administer Dispute Board proceedings, but plays a subsidiary role that may cover appointing DB Members and reviewing DB decisions as to form at the parties' request. These functions are performed by the ICC Dispute Board Centre, which is separate from the ICC International Court of Arbitration, the ICC International Centre for Expertise and the ICC ADR Secretariat.

STANDARD ICC DISPUTE BOARD CLAUSES

ICC offers parties three different kinds of Dispute Board under its Dispute Board Rules. Parties should select the clause that corresponds to the type of Dispute Board they wish to use. ICC does not favour any one of these three types of Dispute Board over the others.

While ICC recommends the use of the standard clauses, the parties should verify their enforceability under applicable law.

ICC DISPUTE REVIEW BOARD FOLLOWED BY ICC ARBITRATION IF REQUIRED

The Parties hereby agree to establish a Dispute Review Board ('DRB') in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules'), which are incorporated herein by reference. The DRB shall have [one/three] member[s] appointed in this Contract or appointed pursuant to the Rules.

All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the DRB in accordance with the Rules. For any given dispute, the DRB shall issue a Recommendation in accordance with the Rules.

If any Party fails to comply with a Recommendation when required to do so pursuant to the Rules, the other Party may refer the failure itself to arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

If any Party sends a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation, as provided in the Rules, or if the DRB does not issue the Recommendation within the time limit provided in the Rules, or if the DRB is disbanded pursuant to the Rules, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

ICC DISPUTE ADJUDICATION BOARD FOLLOWED BY ICC ARBITRATION IF REQUIRED

The Parties hereby agree to establish a Dispute Adjudication Board ('DAB') in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules'), which are incorporated herein by reference. The DAB shall have [one/three] member[s] appointed in this Contract or appointed pursuant to the Rules.

All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the DAB in accordance with the Rules. For any given dispute, the DAB shall issue a Decision in accordance with the Rules. *

If any Party fails to comply with a Decision when required to do so pursuant to the Rules, the other Party may refer the failure itself to arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

If any Party sends a written notice to the other Party and the DAB expressing its dissatisfaction with a Decision, as provided in the Rules, or if the DAB does not issue the Decision within the time limit provided for in the Rules, or if the DAB is disbanded pursuant to the Rules, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

[Parties may, if they wish, provide for review by ICC of a DAB's Decisions by inserting the following text in place of the asterisk above: The DAB shall submit each Decision to ICC for review in accordance with Article 21 of the Rules.]*

ICC COMBINED DISPUTE BOARD FOLLOWED BY ICC ARBITRATION IF REQUIRED

The Parties hereby agree to establish a Combined Dispute Board ('CDB') in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules'), which are incorporated herein by reference. The CDB

shall have [one/three] member[s] appointed in this Contract or appointed pursuant to the Rules.

All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the CDB in accordance with the Rules. For any given dispute, the CDB shall issue a Recommendation unless the Parties agree that it shall render a Decision or it decides to do so upon the request of a Party and in accordance with the Rules. *

If any Party fails to comply with a Recommendation or a Decision when required to do so pursuant to the Rules, the other Party may refer the failure itself to arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

If any Party sends a written notice to the other Party and the CDB expressing its dissatisfaction with a Recommendation or a Decision as provided for in the Rules, or if the CDB does not issue the Recommendation or Decision within the time limit provided for in the Rules, or if the CDB is disbanded pursuant to the Rules, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

*[*Parties may, if they wish, provide for review by ICC of a CDB's Decisions by inserting the following text in place of the asterisk above: The CDB shall submit each Decision to ICC for review in accordance with Article 21 of the Rules.]*

DISPUTE BOARD RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE

INTRODUCTORY PROVISIONS

Article 1
Scope of the Rules

Dispute Boards established in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules') aid the Parties in resolving their business disagreements and disputes. They may provide informal assistance or issue Determinations. Dispute Boards are not arbitral tribunals and their Determinations are not enforceable like arbitral awards. Rather, the Parties contractually agree to be bound by the Determinations under certain specific conditions set forth herein. In application of the Rules, the International Chamber of Commerce ('ICC'), through the ICC Dispute Board Centre ('the Centre'), can provide administrative services to the Parties, which include appointing Dispute Board Members, deciding upon challenges to Dispute Board Members, and reviewing Decisions.

Article 2
Definitions

In the Rules:

(i) 'Contract' means the agreement of the Parties that contains or is subject to provisions for establishing a Dispute Board under the Rules.

(ii) 'Determination' means either a Recommendation or a Decision, issued in writing by the Dispute Board, as described in the Rules.

(iii) 'Dispute' means any disagreement arising out of or in connection with the Contract which is referred to a Dispute Board for a Determination under the terms of the Contract and pursuant to the Rules.

(iv) 'Dispute Board ('DB') means a Dispute Review Board ('DRB'), a Dispute Adjudication Board ('DAB') or a Combined Dispute Board ('CDB'), composed of one or three Dispute Board members ('DB Members').

(v) 'Party' means a party to the Contract and includes one or more parties, as appropriate.

Article 3
Agreement to Submit to the Rules

Unless otherwise agreed, the Parties shall establish the DB at the time of entering into the Contract. The Parties shall specify whether the DB shall be a DRB, a DAB or a CDB.

TYPES OF DISPUTE BOARDS

Article 4
Dispute Review Boards (DRBs)

1

DRBs issue Recommendations with respect to Disputes.

2

Upon receipt of a Recommendation, the Parties may comply with it voluntarily but are not required to do so.

3

If no Party has sent a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation within 30 days of receiving it, the Recommendation shall become binding on the Parties. The Parties shall thereafter comply with such Recommendation without delay, and they agree not to contest it insofar as such agreement can validly be made.

4

If any Party fails to comply with a Recommendation when required to do so pursuant to this Article 4, the other Party may refer the failure itself to arbitration, if the Parties have so agreed, or, if not, to any court of competent jurisdiction.

5

Any Party that is dissatisfied with a Recommendation shall, within 30 days of receiving it, send a written notice expressing its dissatisfaction to the other Party and the

DRB. For information purposes, such notice may specify the reasons for such Party's dissatisfaction.

6

If any Party submits such a written notice expressing its dissatisfaction with a Recommendation, or if the DRB does not issue its Recommendation within the time limit prescribed in Article 20, or if the DRB is disbanded pursuant to the Rules before a Recommendation regarding a Dispute has been issued, the Dispute in question shall be finally settled by arbitration, if the parties have so agreed, or, if not, by any court of competent jurisdiction.

Article 5
Dispute Adjudication Boards (DABs)

1

DABs issue Decisions with respect to Disputes.

2

A Decision is binding on the Parties upon its receipt. The Parties shall comply with it without delay, notwithstanding any expression of dissatisfaction pursuant to this Article 5.

3

If no Party has sent a written notice to the other Party and the DAB expressing its dissatisfaction with the Decision within 30 days of receiving it, the Decision shall remain binding on the Parties. The Parties shall continue to comply with the Decision, and they agree not to contest it insofar as such agreement can validly be made.

4

If any Party fails to comply with a Decision when required to do so pursuant to this Article 5, the other Party may refer the failure itself to arbitration, if the Parties have so agreed, or, if not, to any court of competent jurisdiction.

5

Any Party that is dissatisfied with a Decision shall, within 30 days of receiving it, send a written notice expressing its dissatisfaction to the other Party and the DAB. For information purposes, such notice may specify the reasons for such Party's dissatisfaction.

6

If any Party submits such a written notice expressing its dissatisfaction with a Decision, or if the DAB does not issue its Decision within the time limit prescribed in Article 20, or if the DAB is disbanded pursuant to the Rules before a Decision regarding a Dispute has been issued, the Dispute in question shall be finally settled by arbitration, if the Parties have so agreed, or, if not, by any court of competent jurisdiction. Until the Dispute is finally settled by arbitration or otherwise, or unless the arbitral tribunal or the court decides otherwise, the Parties remain bound to comply with the Decision.

Article 6
Combined Dispute Boards (CDBs)

1

CDBs issue Recommendations with respect to Disputes, pursuant to Article 4, but they may issue Decisions, pursuant to Article 5, as provided in paragraphs 2 and 3 of this Article 6.

2

If any Party requests a Decision with respect to a given Dispute and no other Party objects thereto, the CDB shall issue a Decision.

3

If any Party requests a Decision and another Party objects thereto, the CDB shall make a final decision as to whether it will issue a Recommendation or a Decision. In so deciding, the CDB shall consider, without being limited to, the following factors:

- whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party;
- whether a Decision would prevent disruption of the Contract; and
- whether a Decision is necessary to preserve evidence.

4

Any request for a Decision by the Party referring a Dispute to the CDB shall be made in the Statement of Case under Article 17. Any such request by another Party should be made in writing no later than in its Response under Article 18.

ESTABLISHMENT OF THE DISPUTE BOARD

Article 7
Appointment of the DB Members

1

The DB shall be established in accordance with the provisions of the Contract or, where the Contract is silent, in accordance with the Rules.

2

Where the Parties have agreed to establish a DB in accordance with the Rules but have not agreed on the number of DB Members, the DB shall be composed of three members.

3

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

4

When the DB is composed of three DB Members, the Parties shall jointly appoint the first two DB Members. If the Parties fail to appoint one or both DB Members within 30 days after signing the Contract or within 30 days after the commencement of any performance

under the Contract, whichever occurs earlier, or within any other time period agreed upon by the Parties, both DB Members shall be appointed by the Centre upon the request of any Party.

5

The third DB Member shall be proposed to the Parties by the two DB Members within 30 days following the appointment of the second DB Member. If the Parties do not appoint the proposed third DB Member within 15 days from their receipt of the proposal, or if the two DB Members fail to propose the third DB Member, the third DB Member shall be appointed by the Centre upon the request of any Party. The third DB Member shall act as chairman of the DB unless all DB Members agree upon another chairman with the consent of the Parties.

6

When a DB Member has to be replaced due to death, resignation or termination, the new DB Member shall be appointed in the same manner as the DB Member being replaced, unless otherwise agreed by the Parties. All actions taken by the DB prior to the replacement of a DB Member shall remain valid. When the DB is composed of three DB Members and one of the DB Members is to be replaced, the other two shall continue to be DB Members. Prior to the replacement of the DB Member, the two remaining DB Members shall not hold hearings or issue Determinations without the agreement of all of the Parties.

7

The appointment of any DB Member shall be made by the Centre upon the request of any Party in the event that the Centre is satisfied that there is a sufficient basis for doing so.

8

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

OBLIGATIONS OF THE DISPUTE BOARD MEMBERS

Article 8
Independence

1

Every DB Member must be and remain independent of the Parties.

2

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

3

A DB Member shall immediately disclose in writing to the Parties and the other DB Members any facts or circumstances of a similar nature which may arise in the course of such DB Member's tenure.

4

Should any Party wish to challenge a DB Member on the basis of an alleged lack of independence or otherwise, it may, within 15 days of learning of the facts upon which the challenge is based, submit to the Centre a request for a decision upon the challenge including a written statement of such facts. The Centre will finally decide the challenge after having given the challenged DB Member as well as any other DB Members and the other Party an opportunity to comment on the challenge.

5

If a DB Member is successfully challenged, that DB Member's Agreement with the Parties shall be terminated forthwith. The resulting vacancy shall be filled following the procedure used to appoint the challenged DB Member, unless otherwise agreed by the Parties.

Article 9
Work of the DB and Confidentiality

1

By accepting to serve, DB Members undertake to carry out their responsibilities in accordance with the Rules.

2

Unless otherwise agreed by the Parties or otherwise required by applicable law, any information obtained by a DB Member during the course of the DB's activities shall be used by the DB Member only for the purposes of the DB's activities and shall be treated by the DB Member as confidential.

3

Unless otherwise agreed by the Parties, a DB Member shall not act in any judicial, arbitration or similar proceedings relating to any Dispute, whether as a judge, as an arbitrator, as an expert, or as a representative or advisor of a Party.

Article 10
DB Member Agreement

1

Before commencing DB activities, every DB Member shall sign with all of the Parties a DB Member Agreement. If there are three DB Members, each DB Member Agreement shall have substantive terms that are identical to the other DB Member Agreements, unless otherwise agreed by the Parties and the DB Member concerned.

2

The Parties may at any time, without cause and with immediate effect, jointly terminate the DB Member Agreement of any DB Member but shall pay the Monthly Retainer Fee to such DB Member for a minimum of three months following the termination, unless otherwise agreed by the Parties and the DB Member concerned.

3

Every DB Member may terminate the DB Member Agreement at any time by giving a minimum of three

months' written notice to the Parties, unless otherwise agreed by the Parties and the DB Member concerned.

OBLIGATION TO COOPERATE

Article 11
Providing of Information

1

The Parties shall fully cooperate with the DB and communicate information to it in a timely manner. In particular, the Parties and the DB shall cooperate to ensure that, as soon as possible after the DB is constituted, the DB becomes fully informed about the Contract and its performance by the Parties.

2

The Parties shall ensure that the DB is kept informed of the performance of the Contract and of any disagreements arising in the course thereof by such means as progress reports, meetings and, if relevant to the Contract, site visits.

3

The DB shall, after consultation with the Parties, inform the Parties in writing of the nature, format and frequency of any progress reports that the Parties shall send to the DB.

4

If requested by the DB, the Parties, during meetings and site visits, shall provide the DB with adequate working space, accommodation, means of communication, typing facilities and all necessary office and information technology equipment allowing the DB to fulfil its functions.

Article 12
Meetings and Site Visits

1

At the beginning of its activities the DB shall, in consultation with the Parties, establish a schedule of meetings and, if relevant to the Contract, site visits. The

frequency of scheduled meetings and site visits shall be sufficient to keep the DB informed of the performance of the Contract and of any disagreements. Unless otherwise agreed by the Parties and the DB, when site visits are relevant to the Contract, there shall be a minimum of three such visits per year. The Parties and the DB shall attend all such meetings and site visits. In the event that a Party fails to attend, the DB may nevertheless decide to proceed. In the event that a DB Member fails to attend, the DB may proceed if the Parties so agree or if the DB so decides.

2

Site visits occur at the site or sites where the Contract is being performed. Meetings can be held at any location agreed by the Parties and the DB. If they do not agree on where to hold a meeting, the location shall be decided by the DB after consultation with the Parties.

3

During scheduled meetings and site visits the DB shall review the performance of the Contract with the Parties and may provide informal assistance, pursuant to Article 16, with respect to any disagreements.

4

Any Party may request an urgent meeting or site visit outside the scheduled meetings and site visits. The DB Members shall accommodate such a request at the earliest possible time and shall make best efforts to make themselves available for such urgent meetings or site visits within 30 days of the request.

5

After every meeting and site visit, the DB shall prepare a written summary of such meeting or site visit including a list of those present.

Article 13
Written Notifications or Communications; Time Limits

1

All written notifications or communications, including any enclosures or attachments, from a Party to the DB or

from the DB to the Parties shall be communicated simultaneously to all Parties and DB Members at the address on record for each DB Member and Party.

2

Written notifications or communications shall be sent in the manner agreed between the Parties and the DB or in any manner that provides the sender with proof of the sending thereof.

3

A notification or communication shall be deemed to have been made on the date that it was received by the intended recipient or by its representative or would have been received if made in accordance with this Article 13.

4

Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with the preceding paragraph. When the day next following such date is an official holiday or non-business day in the country in which the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays or non-business days are included in the calculation of the period of time. If the last day of the relevant period of the time granted is an official holiday or non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

OPERATION OF THE DISPUTE BOARD

Article 14
Beginning and End of the DB's Activities

1

The DB shall begin its activities after every DB Member and the Parties have signed the DB Member Agreement(s).

2

Unless otherwise agreed by the Parties, the DB shall end its activities upon receiving notice from the Parties of their joint decision to disband the DB.

3

Any dispute which may arise after the DB has been disbanded shall be finally settled by arbitration, if the Parties have so agreed, or, if not, by any court of competent jurisdiction.

Article 15
Powers of the DB

1

The proceedings before the DB shall be governed by the Rules and, where the Rules are silent, by any rules which the Parties or, failing them, the DB may settle on. In particular, in the absence of an agreement of the Parties with respect thereto, the DB shall have the power, *inter alia*, to:

- determine the language or languages of the proceedings before the DB, due regard being given to all relevant circumstances, including the language of the Contract;
- require the Parties to produce any documents that the DB deems necessary in order to issue a Determination;
- call meetings, site visits and hearings;
- decide on all procedural matters arising during any meeting, site visit or hearing;
- question the Parties, their representatives and any witnesses they may call, in the sequence it chooses;
- issue a Determination even if a Party fails to comply with a request of the DB;
- take any measures necessary for it to fulfil its function as a DB.

2

Decisions of the DB regarding the rules governing the proceedings shall be taken by the sole DB Member or, when there are three DB Members, by majority vote. If there is no majority, the Decision shall be made by the chairman of the DB alone.

3

The DB may take measures for protecting trade secrets and confidential information.

4

If the Contract has more than two Parties, the application of the Rules may be adapted, as appropriate, to apply to the multiparty situation, by agreement of all of the Parties or, failing such agreement, by the DB.

PROCEDURES BEFORE THE DISPUTE BOARD

Article 16
Informal Assistance with Disagreements

1

On its own initiative or upon the request of any Party and in either case with the agreement of all of the Parties, the DB may informally assist the Parties in resolving any disagreements that may arise during the performance of the Contract. Such informal assistance may occur during any meeting or site visit. A Party proposing the informal assistance of the DB shall endeavour to inform the DB and the other Party thereof well in advance of the meeting or site visit during which such informal assistance would occur.

2

The informal assistance of the DB may take the form of a conversation among the DB and the Parties; separate meetings between the DB and any Party with the prior agreement of the Parties; informal views given by the DB to the Parties; a written note from the DB to the Parties; or any other form of assistance which may help the Parties resolve the disagreement.

3

The DB, if called upon to make a Determination concerning a disagreement with respect to which it has provided informal assistance, shall not be bound by any views, either oral or in writing, which it may have given in the course of its informal assistance.

Article 17
Formal Referral of Disputes for a Determination; Statement of Case

1

Any Party shall refer a Dispute to the DB by submitting a written statement of its case (the 'Statement of Case') to the other Party and the DB. The Statement of Case shall include:

- a clear and concise description of the nature and circumstances of the Dispute;
- a list of the issues submitted to the DB for a Determination and a presentation of the referring Party's position thereon;
- any support for the referring Party's position such as documents, drawings, schedules and correspondence;
- a statement of what the referring Party requests the DB to determine; and
- in the case of a CDB, if the referring Party wishes the CDB to issue a Decision, its request for a Decision and the reasons why it believes that the CDB should issue a Decision rather than a Recommendation.

2

The date on which the Statement of Case is received by the sole DB Member or the chairman of the DB, as the case may be, shall, for all purposes, be deemed to be the date of the commencement of the referral (the 'Date of Commencement').

3

The Parties remain free to settle the Dispute, with or without the assistance of the DB, at any time.

Article 18
Response and Additional Documentation

1

Unless the Parties agree otherwise or the DB orders otherwise, the responding Party shall respond to the Statement of Case in writing (the 'Response') within

30 days of receiving the Statement of Case. The Response shall include:

- a clear and concise presentation of the responding Party's position with respect to the Dispute;
- any support for its position such as documents, drawings, schedules and correspondence;
- a statement of what the responding Party requests the DB to determine;
- in the case of a CDB, a response to any request for a Decision made by the referring Party, or if the referring Party has not made such a request, any request for a Decision by the responding Party, including the reasons why it believes that the CDB should issue the type of Determination it desires.

2

The DB may at any time request a Party to submit additional written statements or documentation to assist the DB in preparing its Determination. Each such request shall be communicated in writing by the DB to the Parties.

Article 19
Organization and Conduct of Hearings

1

A hearing regarding a Dispute shall be held unless the Parties and the DB agree otherwise.

2

Unless the DB orders otherwise, hearings shall be held within 15 days of the date on which the sole DB Member or the chairman of the DB, as the case may be, receives the Response.

3

Hearings shall be held in the presence of all DB Members unless the DB decides, in the circumstances and after consultation with the Parties, that it is appropriate to hold the hearing in the absence of a DB Member; provided,

however, that prior to the replacement of a DB member a hearing may be held with the two remaining DB members only with the agreement of all of the Parties pursuant to Article 7(6).

4

If any of the Parties refuses or fails to take part in the DB procedure or any stage thereof, the DB shall proceed notwithstanding such refusal or failure.

5

The DB shall be in full charge of the hearings.

6

The DB shall act fairly and impartially and ensure that each Party has a reasonable opportunity to present its case.

7

The Parties shall appear in person or through duly authorized representatives who are in charge of the performance of the Contract. In addition, they may be assisted by advisors.

8

Unless the DB decides otherwise, the hearing shall proceed as follows:

- presentation of the case, first by the referring Party and then by the responding Party;
- identification by the DB to the Parties of any matters that need further clarification;
- clarification by the Parties concerning the matters identified by the DB;
- responses by each Party to clarifications made by the other Party, to the extent that new issues have been raised in such clarifications.

9

The DB may request the Parties to provide written summaries of their presentations.

10

The DB may deliberate at any location it considers appropriate before issuing its Determination.

DETERMINATIONS OF THE DISPUTE BOARD

Article 20
Time Limit for Rendering a Determination

1

The DB shall issue its Determination promptly and, in any event, within 90 days of the Date of Commencement as defined in Article 17(2). However, the Parties may agree to extend the time limit. In deciding whether to do so, the Parties shall consult with the DB and shall take into account the nature and complexity of the Dispute and other relevant circumstances.

2

When the Parties have agreed to submit Decisions to ICC for review, the time limit for issuing a Decision shall be extended by the time required for the Centre to review the Decision. The Centre shall complete its review within 30 days of its receipt of the Decision or of the payment of the administrative fee referred to in Article 3 of the Appendix, whichever occurs later. However, if additional time for such review is required, the Centre shall notify the DB and the Parties thereof in writing before the expiration of the 30 days, specifying the new date by which the Centre's review shall be completed.

Article 21
Review of Decisions by the Centre

Where the Parties have provided for review by ICC of the Decisions of a DAB or CDB, the DB shall submit the Decision in draft form to the Centre before it is signed. Each Decision must be accompanied by the registration fee referred to in Article 3 of the Appendix. The Centre may lay down modifications only as to the form of the Decision. No such Decision shall be signed by the DB Members or communicated to the Parties prior to the Centre's approval of such Decision.

Article 22
Contents of a Determination

Determinations shall indicate the date on which they are issued and shall state the findings of the DB as well as the

reasons upon which they are based. Determinations may also include, without limitation and not necessarily in the following order:

- a summary of the Dispute, the respective positions of the Parties and the Determination requested;
- a summary of the relevant provisions of the Contract;
- a chronology of relevant events;
- a summary of the procedure followed by the DB; and
- a listing of the submissions and documents provided by the Parties in the course of the procedure.

Article 23
Making of the Determination

When the DB is composed of three DB Members, the DB shall make every effort to achieve unanimity. If this cannot be achieved, a Determination is given by a majority decision. If there is no majority, the Determination shall be made by the chairman of the DB alone. Any DB Member who disagrees with the Determination shall give the reasons for such disagreement in a separate written report that shall not form part of the Determination but shall be communicated to the Parties. Any failure of a DB Member to give such reasons shall not prevent the issuance or the effectiveness of the Determination.

Article 24
Correction and Interpretation of Determinations

1

On its own initiative, the DB may correct a clerical, computational or typographical error, or any errors of a similar nature, contained in a Determination, provided such correction is submitted to the Parties within 30 days of the date of such Determination.

2

Any Party may apply to the DB for the correction of an error of the kind referred to in Article 24(1), or for the interpretation of a Determination. Such application must be made to the DB within 30 days of the receipt of the Determination by such Party. After receipt of the application by the sole DB Member or the chairman of

the DB, as the case may be, the DB shall grant the other Party a short time limit from the receipt of the application by that Party, to submit any comments thereon. Any correction or interpretation of the DB shall be issued within 30 days following the expiration of the time limit for the receipt of any comments from the other Party. However, the Parties may agree to extend the time limit for the issuance of any correction or interpretation.

3

Should the DB issue a correction or interpretation of the Determination, all time limits associated with the Determination shall recommence to run upon receipt by the Parties of the correction or interpretation of the Determination.

Article 25
Admissibility of Determinations in Subsequent Proceedings

Unless otherwise agreed by the Parties, any Determination shall be admissible in any judicial or arbitral proceedings in which all of the parties thereto were Parties to the DB proceedings in which the Determination was issued.

COMPENSATION OF THE DISPUTE BOARD MEMBERS AND ICC

Article 26
General Considerations

1

All fees and expenses of the DB Members shall be shared equally by the Parties.

2

Unless otherwise agreed by the Parties, when there are three DB members all DB Members shall be treated equally and shall receive the same Monthly Retainer Fee and the same Daily Fee for work performed as a DB Member.

3

Unless otherwise provided in the DB Member Agreement(s), the fees shall be fixed for the first 24 months following the signature of the DB Member Agreement(s) and thereafter shall be adjusted on each anniversary of the DB Member Agreement(s) in accordance with the terms thereof.

Article 27
Monthly Retainer Fee

1

Unless otherwise provided in the DB Member Agreement(s), each DB Member shall receive a Monthly Retainer Fee as set out in the DB Member Agreement(s) covering the following:

- being available to attend all DB meetings with the Parties and site visits;
- being available to attend internal DB meetings;
- becoming and remaining conversant with the Contract and the progress of its performance;
- the study of progress reports and correspondence submitted by the Parties in the course of the DB's functions; and
- office overhead expenses in the DB Member's place of residence.

2

Unless otherwise agreed in the DB Member Agreement(s), the Monthly Retainer Fee shall be equal to three times the Daily Fee set out in the DB Member Agreement(s) and shall be payable from the date of signature of the DB Member Agreement(s) until termination of the DB Member Agreement(s).

Article 28
Daily Fee

Unless otherwise agreed in the DB Member Agreement(s), each DB Member shall receive a Daily Fee as set out in the DB Member Agreement(s) covering the time spent for the following activities:

- meetings and site visits;
- hearings;
- travel time;
- internal meetings of the DB;
- study of documents submitted by Parties during procedures before the DB;
- preparation of a DB Determination; and
- activities in coordinating and organizing the operation of the DB.

Article 29
Travel Costs and other Expenses

1

Unless otherwise provided in the DB Member Agreement(s), air travel expenses shall be reimbursed at unrestricted business class rates between a DB Member's home and the travel destination.

2

Unless otherwise provided in the DB Member Agreement(s), expenses, wherever incurred in DB work, for local transportation, hotels and meals, long distance phone, fax, courier charges, photocopying, postage, visa charges, etc., shall be reimbursed at cost.

Article 30
Taxes and Charges

1

No taxes and charges, except for value added tax (VAT), levied in connection with the services rendered by a DB Member by the country of the residence or nationality of the DB Member shall be reimbursed by the Parties.

2

All taxes and charges levied in connection with such services by any country other than the DB Member's country of residence or nationality, as well as VAT wherever levied, shall be reimbursed by the Parties.

Article 31
Payment Arrangements

1

Unless otherwise agreed, invoices shall be submitted by each DB Member to each Party for payment as follows:

- Monthly Retainer Fees shall be invoiced and paid on a quarterly basis in advance for the next three-month period.
- Daily Fees and travel expenses shall be invoiced and paid after each meeting, site visit, hearing or Determination.

2

DB Member invoices shall be paid within 30 days after receipt.

3

Failure of any Party to pay its share of fees and expenses within 30 days of receiving a DB Member's invoice shall entitle the DB Member, in addition to any other rights, to suspend work 15 days after providing a notice of suspension to the Parties and any other DB Members, such suspension to remain in effect until receipt of full payment of all outstanding amounts plus simple interest at one-year LIBOR plus two per cent, or the twelve-month prime interest rate in the currency agreed between the Parties and the DB Members.

4

In the event that a Party fails to pay its share of the fees and expenses of a DB Member when due, any other Party, without waiving its rights, may pay the outstanding amount. The Party making such payment, in addition to any other rights, shall be entitled to reimbursement from the non-paying Party of all such sums paid, plus simple interest at one-year LIBOR plus two per cent, or the twelve-month prime interest rate in the currency agreed between the Parties and the DB Members.

5

Upon signing the DB Member Agreement, the Parties shall provide the DB Member with the form of the invoice to be sent by DB Members, including the invoicing

address, number of copies of invoices required and VAT number, if applicable.

Article 32
Administrative Expenses of ICC

1

ICC's administrative expenses include an amount for each appointment of a DB Member, an amount for each decision upon a challenge of a DB Member and, when the Parties have agreed to submit Decisions of a DAB or a CDB to ICC for review, an amount for each such review.

2

For each request for appointment of a DB Member, ICC shall receive the non-refundable amount specified in Article 1 of the Appendix. This amount shall represent the total cost for the appointment of one DB Member by the Centre. The Centre shall not proceed with the appointment unless the requisite payment has been received. The cost of each appointment by the Centre shall be shared equally by the Parties.

3

For each decision upon a challenge of a DB Member, the Centre shall fix administrative expenses in an amount not exceeding the maximum sum specified in Article 2 of the Appendix. This amount shall represent the total cost for the decision upon one challenge of a DB Member. The Centre shall not proceed with the rendering of its decision and the making of the challenge shall have no effect unless the said amount has been received. The cost of each decision by the Centre shall be borne by the Party making the challenge.

4

Where the Parties have provided for the review by ICC of a DAB's or a CDB's Decisions, the Centre shall fix administrative expenses for the review of each Decision in an amount not exceeding the maximum sum specified in Article 3 of the Appendix. This amount shall represent the total cost for the review of one Decision by ICC. The Centre shall not approve a Decision unless the said amount has been received. The cost of reviewing each Decision shall be shared equally by the Parties.

5

If a Party fails to pay its share of the administrative expenses of ICC, the other Party shall be free to pay the entire amount of such administrative expenses.

GENERAL RULES

Article 33
Exclusion of Liability

Neither the DB Members, nor the Centre, nor ICC and its employees, nor the ICC national committees shall be liable to any person for any act or omission in connection with the DB proceedings.

Article 34
Application of the Rules

In all matters not expressly provided for in the Rules, the DB shall act in the spirit of the Rules and shall make every effort to make sure that Determinations are issued in accordance with the Rules.

APPENDIX
SCHEDULE OF COSTS

Article 1

The non-refundable amount for the request for appointment of a DB Member referred to in Article 32(2) of the Rules is US$ 2 500. No request for appointment of a DB Member shall be processed unless accompanied by the requisite payment.

Article 2

Each request for a decision upon a challenge of a DB Member must be accompanied by a registration fee of US$ 2 500. No request for a decision upon a challenge of a DB Member shall be processed unless accompanied by the registration fee. Such payment is non-refundable and shall be credited to the administrative expenses for a decision upon a challenge. The Centre shall fix said administrative expenses in an amount not exceeding the maximum sum of US$ 10 000.

Article 3

Each Decision of a DAB or a CDB submitted to ICC for review must be accompanied by a registration fee of US$ 2 500. No Decision shall be reviewed unless accompanied by the registration fee. Such payment is non-refundable and shall be credited to the administrative expenses for the review of each Decision. The Centre shall fix said administrative expenses in an amount not exceeding the maximum sum of US$ 10 000.

MODEL DISPUTE BOARD MEMBER AGREEMENT

This Agreement is entered into between:

DB Member [*full name, title and address*],
hereinafter the 'Dispute Board Member' or 'DB Member'

and

Party 1: [*full name and address*]

Party 2: [*full name and address*],
hereinafter collectively referred to as the Parties.

Whereas:

The Parties have entered into a contract dated ..... (the 'Contract') for [*scope of work and/or name of project*], which is to be performed in [*city and country of performance*];

The Contract provides that the parties must refer their disputes to a [*DRB/DAB/CDB*] under the ICC Dispute Board Rules (the 'Rules'); and

The undersigned individual has been appointed to serve as a DB Member.

The DB Member and the Parties therefore agree as follows:

1. Undertaking

The DB Member shall act as [*sole DB Member/chairman of the DB/DB Member*] and hereby accepts to perform these duties in accordance with the terms of the Contract, the Rules and the terms of this Agreement. The DB Member confirms that he/she is and shall remain independent of the Parties

2. Composition of the DB and Contact Details

● First alternative: The sole DB Member can be contacted as follows: [*name, address, telephone, fax and e-mail details*]

● Second alternative: The Members of the DB are those listed below and can be contacted as follows:

Chairman: [*name, address, telephone, fax and e-mail details*]

DB Member: [*name, address, telephone, fax and e-mail details*]

DB Member: [*name, address, telephone, fax and e-mail details*]

The Parties to the Contract are those indicated above with the following contact details:

Party 1: [*name, person responsible for the Contract, address, telephone, fax and e-mail details*]

Party 2: [*name, person responsible for the Contract, address, telephone, fax and e-mail details*]

Any changes in these contact details shall be immediately communicated to all concerned.

3. Qualifications

With respect to any DB Member appointed by the Parties, the undersigned Parties recognize that such DB Member has the necessary professional qualifications and language ability to undertake the duties of a DB Member.

4. Fees

The Monthly Retainer Fee shall be [*specify currency and full amount*], i.e. [*specify multiple*] times the Daily Fee.

The Daily Fee shall be [*specify currency and full amount*] based upon a [*specify number of hours*]-hour day.

These fees shall be fixed for the first 24 months after the signing of the DB Member Agreement and thereafter shall be adjusted automatically on each anniversary of the DB Member Agreement using the following index: .....

Expenses of the DB Member, as described in Article 29(2) of the Rules, shall be reimbursed [*at cost/on the basis of a fixed per diem of .....*].

5. Payment of Fees and Expenses

● First alternative: All fees and expenses shall be invoiced to [*Party X*] with a copy to [*Party Y*] and shall be paid to the DB Member by [*Party X*]. [*Party Y*] shall reimburse half of the fees and expenses to [*Party X*] so that they are borne equally by the Parties.

● Second alternative: All fees and expenses shall be invoiced to and paid by each of the Parties in equal shares.

All payments to the DB Member shall be made without deductions or restrictions to the following account: [*name of bank, account no., SWIFT code, etc.*]. The transfer charges shall be borne by the Party making the transfer.

All payments shall be made within 30 days of receipt by a Party of the invoice from the DB Member.

6. Duration and Termination of the Agreement

Subject to the provisions of this Article 6, the DB Members agree to serve for the duration of the DB.

The Parties may jointly terminate this Agreement or terminate the whole DB at any time by giving [*specify number*] months' written notice to the DB Member or the whole DB.

The DB Member may resign from the Dispute Board at any time by giving [*specify number*] months' written notice to the Parties.

7. Indemnity

The Parties will jointly and severally indemnify and hold harmless every DB Member from any claims of third parties for anything done or omitted in the discharge or purported discharge of the DB Member's activities, unless the act or omission is shown to have been in bad faith.

8. Disputes and Applicable Law

All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with the said Rules of Arbitration. This Agreement shall be governed by [*specify applicable law*]. The place of arbitration shall be [*name of city/country*]. The language of the arbitration shall be [*specify language*].

This Agreement is entered into on [*specify date*] at [*specify place*].

DB Member	Party 1	Party 2
[*signature*]	[*signature*]	[*signature*]

Attachment – 11 Article of Chris Seppala

WHITE & CASE

An Engineer's / Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award

December 2009

Contrary to widespread belief, a "binding" but not "final" decision of an Engineer under the FIDIC Conditions is enforceable by an arbitral award, in appropriate circumstances. This has been established for the first time by the interim award in ICC Case No. 10619 commented upon in this article. By analogy, a "binding" but not "final" decision of a FIDIC Dispute Adjudication Board should also be enforceable by an arbitral award in such circumstances. (There should be no issue that a "final and binding" decision of an Engineer or Dispute Adjudication Board is enforceable by an arbitral award.)

I. Introduction

One of the most important legal issues in relation to international construction contracts in recent years has been how to enforce decisions of the Engineer made under Clause 67 of the FIDIC Conditions of Contract for Works of Civil Engineering Construction (the "FIDIC Conditions" or "Red Book"), fourth edition, 1987, and, since the Engineer's decision procedure was replaced by the Dispute Adjudication Board ("DAB") in the 1999 edition of the FIDIC Conditions (the "1999 Red Book"), how to enforce decisions of a DAB made under Clause 20 of the 1999 Red Book. The interim award in Case No. 10619 under the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce ("ICC"), an award made in Paris, France in 2001 but an extract of which has only just been published by the ICC[1], expressly addresses the question of how to enforce decisions of the Engineer made under Clause 67 of the FIDIC Conditions, fourth edition, and, by analogy, how to enforce decisions made by a DAB under Clause 20 of the 1999 Red Book.

By that award, a tribunal of three arbitrators held unanimously that decisions of the Engineer under Clause 67 of the FIDIC Conditions, fourth edition, could be enforced by a partial or interim award under the Rules of Arbitration of the ICC (the "ICC Rules"),[2] even though a party — in fact, in that case, the same party who was seeking to enforce the decisions – had given a formal notice of dissatisfaction[3] with respect to the decisions within the time limit (70 days) provided by that Clause. The Engineer's decisions can be — and should be — given effect to by such an award because the FIDIC Conditions expressly provide that a decision of the Engineer under Clause 67 is binding on the parties notwithstanding that one or both parties have given a notice of dissatisfaction with it. Accordingly, the arbitrators held that an arbitral tribunal should enforce it by an interim or partial award under the ICC Rules, ordering the other party immediately to pay the amount of the Engineer's decisions.

The effect of this interim award, when it becomes more widely known, should be to enhance respect for decisions of the Engineer under a disputes clause such as Clause 67 as well as decisions of a DAB under Clause 20 of both the 1999 Red Book and the 1999 editions of the other FIDIC contracts for major works, namely, the Conditions of Contract for Plant and Design-Build (the "Yellow Book") and Conditions of Contract for EPC/Turnkey Projects (the "Silver Book") (the three Books together being the "1999 FIDIC Books").

Accordingly, this award merits careful examination.

Christopher R. Seppälä
Partner, Paris

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1 ICC International Court of Arbitration Bulletin, Volume 19, No. 2 – 2008, pp. 85 to 90.

2 The ICC Rules do not distinguish between a partial and an interim award. See Article 2(iii) of the ICC Rules. They mean the same thing and any such award is final as to the issues or matters which it decides.

3 While the award refers to the notice to be given by a party who disagrees with an Engineer's decision as a "notice of dissatisfaction" (e.g. interim award, para. 21), Clause 67.1 of the FIDIC Conditions, fourth edition, in fact describes it as a "notice of [a Party's] intention to commence arbitration… as to the matter in dispute". This paper will generally use the terminology used in the award in this respect.

II. The facts of the case

In 1994, the Contractor/Claimant had entered on the same day (November 16, 1994) into two construction contracts with the Respondent/Employer for the construction of two roads, respectively, in the State of the Employer. The General Conditions of these contracts were based upon the FIDIC Conditions, fourth edition, 1987. The law governing the contracts appears to have been that of a civil law country.[4] During the course of the works, the Contractor asserted numerous claims against the Employer, including claims for time extension and additional payment for work done up to May 31, 1997.

On October 18, 1998, the Contractor had formally requested decisions from the Engineer under Clause 67 in relation to two claims – one apparently under each contract – for time extension and additional payment up to May 31, 1997. On November 17, 1998, the Engineer gave decisions on these requests granting to the Contractor a sum of money under each of the two contracts.[5]

On January 25, 1999, the Contractor had given formal notice of dissatisfaction with such decisions under Clause 67.[6] The Respondent/Employer did not give such notice.[7]

In the meantime, the Contractor had presented two further claims for time extension and additional payment under the two contracts effectively updating the previous ones for work done up to June 30, 1998. On January 29, 1999, the Contractor formally requested decisions from the Engineer under Clause 67 in relation to these claims. On May 5, 1999, the Engineer made decisions on these claims granting to the Contractor further sums in local currency under each of the two contracts in addition to the sums granted by the Engineer in his decisions on November 17, 1998.[8]

None of the decisions of the Engineer was complied with by the Employer which the Contractor considered to be a breach of the contracts. For this and other reasons, on August 11, 1999, the Contractor/Claimant began arbitration against the Employer/Respondent by filing a Request for Arbitration with the ICC International Court of Arbitration, pursuant to Clause 67. By the Request, the Contractor referred numerous claims to arbitration, one of which was for:

> "Respondent's failure to give effect to Engineer's decision pursuant to sub-clause 67.1 of the contracts".[9]

After the filing of the Request for Arbitration and the Employer's/Respondent's Answer thereto, the Contractor/Claimant declared its:

> "intention to request the Arbitral Tribunal to render an interim Award… to the effect of (i) declaring that the Respondent must give effect to the Engineer's Decisions pursuant to Sub Clause 67.1 [of the FIDIC conditions] regardless of the pending arbitration, and (ii) ordering the Respondent to immediately pay the amounts determined by the Engineer as an advance payment in respect of any further payment which would result [*sic*] due by the Respondent pursuant to the final award."[10]

4 For reasons of confidentiality, the governing law is not identified in the published extracts of the interim or final awards.

5 Interim award, para. 15.

6 Interim award, para. 21.

7 This is clear from the final award in the case, para. 17 (the Respondent/Employer "has not objected within the prescribed time limit to the Engineer's decisions and has not stated his intention to commence arbitration to have the same reviewed and revised"), ICC International Court of Arbitration Bulletin, Volume 19, No. 2-2008, p. 90. But *see* footnote 24 below.

8 Interim award, para. 15. The interim award does not state whether the Contractor had given formal notice of dissatisfaction with these decisions but presumably it had done so as otherwise the underlying disputes could not have been referred to arbitration. In any case, the matter is irrelevant as the Tribunal finds that the decisions were rendered out of time, as discussed further below.

9 Interim award, para. 4. The full description of the Request for Arbitration in the interim award is as follows:

> "On 11 August 1999, pursuant to Article 67 of the FIDIC conditions, the Claimant filed a Request for Arbitration with the International Court of Arbitration of the International Chamber of Commerce in which it raised a number of complaints based upon alleged
>
> a) Delay and disruption arising from the design and other associated causes,
> b) Respondent's failure to grant the Claimant with possession of site,
> c) Exceptionally adverse weather conditions,
> d) Other delaying and disruptive events,
> e) Respondent's failure to give effect to Engineer's decision pursuant to sub-clause 67.1 of the contracts,
> f) Respondent's failure to provide funding for the contracts,
> g) Breaches of Contract and law.
>
> …"

10 Interim award, para. 6.

An Engineer's / Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award

The Claimant's case was said to be grounded on Sub-Clause 67.1 which empowers the Engineer to decide on a provisional basis disputes which are referred to him by one party. The Claimant argued that:

> "[s]uch decisions [of the Engineer] are binding… on both parties and shall have effect as soon as they are made notwithstanding any notice of dissatisfaction and/or application or Request for Arbitration, and they must remain effective for as long as that they are not reviewed or cancelled by an out of court settlement or by an arbitral award."[11]

As discussed above, there were four decisions of the Engineer. Two had been made in 1998 in relation to applications of the Claimant for a time extension and payment of additional time-related costs. The other two which were made in 1999 had updated and encompassed the sums granted by the earlier decisions.

None had been complied with by the Employer which, the Claimant argued, was a breach of the contracts. As the decisions were stated in Clause 67 to be binding on both parties at least on a provisional basis, the Claimant maintained that the Tribunal:

> "should give them immediate effect by the means of an interim award, without waiting until the time when after a complete review of the factual and legal evidence the Tribunal could adjudicate in full on the merits of the dispute."[12]

In addition to the wording of Clause 67, the Claimant relied on Article 23 of the ICC Rules relating to the power of an arbitral tribunal to order conservatory and interim measures[13] and, as the place of arbitration was Paris, France, on the provisions of the French Code of Civil Procedure relating to the subject of "*référé provision*"[14]. Accordingly, the Claimant requested the Tribunal to order the Respondent:

> "to provisionally pay the sums recognized due by the Engineer, plus accrued interest at the annual rate of 7% pending the final judgment of the Tribunal on the merit [*sic*] of the respective arguments of the parties on the whole of the dispute."

The Claimant maintained that the amounts awarded by the Engineer, which were in the local currency of the Employer,[15] should be converted into U.S. dollars at the contractual exchange rate, together with interest on such sums until the date of complete payment.

In response, the Respondent argued essentially as follows:

> (1). The Claimant's claim for interim relief was unjustified as there was no evidence of urgency or of a risk of irreparable harm for the Claimant, which is a necessary condition for an interim or conservatory measure. In particular, if the Tribunal were finally to adjudicate in favor of the Claimant, it would be adequately compensated by an allocation of interest in addition to the principal amounts granted to it in a final award and, in the meantime, there was no evidence that the Claimant would suffer from any financial inconvenience as a result of the Employer's failure to pay at this stage. Furthermore, the Respondent maintained that the Claimant had not *prima facie* established its case.[16]
>
> (2). The provisions of Sub-Clause 67.1 relating to the binding character of the decisions of the Engineer:
>
> "aim only at preventing disruption of the works pending the final resolution of disputes between the parties so that they cannot apply in the instant case because the relevant decisions were made after the completion of the works".[17]

11 Interim award, para. 14.

12 Interim award, para. 16

13 Article 23(1) of the ICC Rules, which appears to be the provision relied upon, provides as follows:

> "Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate." [Emphasis added]

14 The *référé provision* refers to a type of summary action before a French court which has been described as:

> "a peculiarity of French and Dutch law. It enables a creditor to benefit from emergency procedures, not so as to obtain measures required as a matter of urgency, but to rapidly have its rights enforced, fully or in part, where those rights are "not seriously disputable"". [Emphasis added]
>
> *Fouchard Gaillard Goldman On International Commercial Arbitration* (Edited by Emmanuel Gaillard and John Savage), Kluwer Law International (The Hague, 1999), pp. 728-729.
>
> Such "rights" can include the full payment of a debt, *see* V.S.K. Electronics v. Sainrapt et Brice International S.B.I., 1990 Rev. Arb. 651, cited in footnote 93 on page 728 of Fouchard Gaillard Goldman referred to above.

15 It is unclear from the award why the decisions were exclusively in the local currency of the Employer. Possibly, this was because this was the "currency of account" under the contracts.

16 Interim award, para. 17.

17 *Idem*.

(3). Moreover, if any of the parties had "expressed its disagreement with the Engineer's decisions" (by giving a formal notice of dissatisfaction), which the Respondent maintained both parties had done:

> "… the decisions are deprived of their binding character."[18]

The Respondent also relied for its defense on the following points:

- The decisions made on May 5, 1999 were made after the 84-day period allowed to the Engineer under Sub-Clause 67.1,
- The sums granted by the Engineer were expressed in local currency and, consequently, the Claimant could not claim for them in U.S. dollars, and
- The decisions could not be held to be "self executory" because, in the Engineer's decisions, the Engineer had stated that they were "subject to the Employer's prior approval" inasmuch as:

> "no payment could be made in the absence of certificates of payment for which prior approval of the Employer was also required". [19]

Therefore, the Respondent asked the Tribunal to dismiss the Claimant's application for an interim award.

III. The Tribunal's reasoning

The Tribunal began its analysis by recalling the "system" of Sub-Clause 67.1 of the FIDIC Conditions, fourth edition. In brief, this provides that:

> (1). if a dispute should arise between the Employer and the Contractor in connection with the Contract, it must be referred in writing to the Engineer who is required to notify the parties of his decision within 84 days;
>
> (2). if the Engineer should fail to notify his decision within that time period, then within a further period of 70 days either party may notify its intention to commence arbitration as to the matter in dispute; and
>
> (3). if, as is ordinarily the case, the Engineer notifies his decision within 84 days, then either party may, also within a time limit of 70 days, address a notice of its intention to challenge the decision by way of arbitration to the Engineer and the other party, failing which the decision will become "final and binding" on both parties and "cannot be revoked in arbitration". [20]

The Tribunal further noted, correctly, that if either party had given a notice of dissatisfaction with the decision within 70 days, then while such decision is not "final", nevertheless it is "binding" on both parties who are required to comply with it forthwith, as stated in the second paragraph of Sub-Clause 67.1 whereby:

> "… the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award." [21]

After reviewing the facts relating to the Engineer's decisions, the Tribunal determined that the two decisions made on May 5, 1999 were made more than 84 days after the Claimant had requested them pursuant to Sub-Clause 67.1 and, consequently, "they cannot bind the parties". [22] Therefore, the Tribunal denied the Claimant's request for an interim award with respect to those decisions.

However, the Tribunal found that "[s]ince… the 5 May decisions are held ineffective…, those of 17 November 1998 survive."[23] They had, in fact, been made timeously, that is, within 84 days of the Claimant's request therefor. As stated above, the

18 *Idem.*

19 Sub-Clause 2.1 of Part II of the FIDIC Conditions included in the relevant contract here expressly provided – as many construction contracts based on the FIDIC Conditions do – that if the Engineer carried out certain duties under the contract, including apparently the certification of payments, it would need the Employer's prior approval.

20 Interim award, para. 18. For a commentary on Clause 67 of the FIDIC Conditions, third and fourth editions, see the author's two articles entitled "*The Pre Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contracts*" [1986] The International Construction Law Review ("ICLR") 315 and "*The Principal Changes in The Procedure for the Settlement of Disputes (Clause 67)*" [1989] ICLR 177, respectively.

21 Interim award, para. 18 (quoting Sub-Clause 67.1 of the FIDIC Conditions, fourth edition, 1987).

22 Interim award, para. 20. According to the award:

> "… the Engineer took the position that because the parties were at that time in negotiation for a tentative settlement of their difference, it could defer its decisions until 5 May 1999 [that is, until more than 84 days after the Claimant had requested the decisions on 29 January 1999]. But in the absence of any evidence at this stage that both parties had, whether in express terms or impliedly, agreed for the Engineer not to stick to the time condition of Article 67.1, it is this Tribunal's opinion that the Engineer had no authority to depart from a rule which remained binding on the parties." [Emphasis added]

23 Interim award, para. 21.

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Contractor/ Claimant had filed its formal notice of dissatisfaction within the required 70 days (January 25, 1999).[24] Consequently, the Tribunal found that the decisions made on November 17, 1998:

> "… must be considered as capable of producing immediate legal effect on the parties for as long they are not revised or set aside by the parties in an out of court settlement or by an arbitral award. It does not matter whether they were notified after or before completion of the works: in both cases, Article 67.1 states that its provision shall apply."[25]

The Tribunal then considered the issue of "whether and on what legal basis this Tribunal may adjudicate the present dispute by an interim award".[26] The Tribunal justified its decision by reference to the contract (Clause 67), after carefully distinguishing this basis for its decision from Article 23 of the ICC Rules and French law relating to *référé provision* (the place of arbitration being Paris), also relied upon by the Claimant. The Tribunal stated as follows:

> "… If the above Engineer's decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the Arbitral Tribunal should refrain from an immediate judgment giving the Engineer's decisions their full force and effect. This simply is the law of the contract.
>
> In this respect, this Tribunal wishes to emphasize that neither the provisions of Article 23 of the ICC Rules, nor the rules of the French NCPC relating to the *référé provision* are relevant. For one thing, the judgement to be hereby made is not one of a conservatory or interim measure, *stricto sensu*, but rather one giving full immediate effect to a right that a party enjoys without discussion on the basis of the Contract and which the parties have agreed shall extend at least until the end of the arbitration. For the second thing, the will of the parties shall prevail over any consideration of urgency or irreparable harm or *fumus boni juris* which are among the basics of the French *référé provision*."[27] [Emphasis added]

The Tribunal could have held merely that the Employer was in breach of contract and required the Employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But, instead, the Tribunal ordered the Employer to pay the amount of the Engineer's decisions on the ground that "[t]his is simply the law of the Contract".

In the author's view, this is the right approach. It reflects the intention of the FIDIC Conditions which is that Engineer's decisions are to be respected even if they have been the subject of a timely notice of dissatisfaction from a party and might later be proved to have been wrong. If they specify that an amount is to be paid to the Contractor, then the amount is to be paid even though the decision could later be reversed and the amount paid be required to be returned. How better to promote respect for Engineer's decisions, in keeping with the intention of the FIDIC Conditions, than to enforce them directly by an arbitral award?

Moreover, by relying on the "law of the contract", instead of Article 23(1) of the ICC Rules or French law on *référé provision*, the Tribunal avoided having to make findings of urgency or irreparable harm, as might have been necessary to justify resort to those procedures. The Tribunal also refrains from describing the payment as an "advance payment" as the Claimant had argued. Rather, the payment is to be made like any other sum due under the contracts (although, if the decision were reversed by an arbitral tribunal, it could be subject to ultimate repayment).

The Tribunal then dealt with the fact that, at the end of each of the Engineer's decisions of November 17, 1998, after stating the amounts that were due to the Claimant, the Engineer had stated as follows:

> "By copy of this letter the Employer is requested to give his specific approval (in terms of Sub-Clause 2.1(b) of the Conditions of Contract, Part II) for the Engineer to certify such additional cost for payment."[28]

On the basis of this particular wording, the Respondent had argued that the Engineer's decisions were conditional upon the Employer's approval and that they were therefore not binding since such approval was not obtained.

24 *Ibid.* While the Tribunal finds that the Respondent/Employer had not filed a formal notice of dissatisfaction within the required 70 days (*see* footnote 7 above), it does note that:

> "the Employer even if not in the formal terms prescribed by Article 67.1 expressed its disagreement by its so called "Stand" of January 1999."

It is unclear from the interim award what "Stand" is referring to. In any event, the Tribunal does not find the Employer's action to have contractual significance.

25 Interim award, para. 21.

26 Interim award, para. 22.

27 Interim award, para. 22. The term "*fumus boni juris*", which may not be familiar to all readers, is defined as "*prima facie* case" or "probability of the alleged claim" by Webster's Online Dictionary, www.websters-dictionary.online.org.

28 Interim award, para. 23.

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The Tribunal rejected this argument for "at least two reasons", as follows:

> "… First, the Engineer wrongly believed that decisions of that sort were subject to the particular conditions of Sub-Clause 2.1(b) of Part II of the FIDIC Conditions of Contract. In reality decisions taken pursuant to Article 67.1 are not among those for which the Engineer must obtain specific prior approval of the Employer.[29] Moreover, even if issuance of certificates of payment by the Engineer may require approval of the Employer, this condition affects only the validity of such certificates but certainly not that of the relevant decision itself; and, in the case where the Employer although bound to give immediate effect to that decision refrains to do so simply by refusing to approve a certificate of payment, this will obviously result in a breach of its contractual duties justifying a claim from the Contractor. Finally, one could not give any positive effect to a phrase which is inconsistent with the meaning of the decision which is clear and unequivocal."[30] [Emphasis added]

The Tribunal correctly construed the Employer's obligation to pay binding decisions of the Engineer under Clause 67 as not being subject to the condition that the Engineer issue a certificate of payment for them under Clause 60 (and, as a certificate of payment, be subject to the prior approval of the Employer under Sub-Clause 2.1(b) of Part II of the FIDIC Conditions). While certificates of payment of the Engineer are the means by which the Contractor normally becomes entitled to payments under the FIDIC Conditions and, to be valid, might (if so provided by Sub-Clause 2.1(b)) require the prior approval of the Employer, the Tribunal noted that:

> "this condition [the prior approval of the Employer] affects only the validity of such certificates but certainly not that of the relevant decision [under Clause 67] itself."

If binding decisions of the Engineer under Clause 67 were subject to the conditions that applied to payment certificates, the Employer could effectively circumvent the Clause 67 procedure by not approving payment certificates, thereby depriving such procedure of effect, which is unlikely to have been the parties' intention.

However, the Tribunal denied the Claimant's request that the amounts of the Engineer's decisions, which were denominated in local currency, be converted into U.S. dollars and be awarded in that currency together with interest. In response to this request, the Tribunal stated that it:

> "cannot do any more than to give legal force and effect to the relevant decisions as they are."[31]

The Tribunal noted the total sum of the two decisions of 17 November 1998 in local currency and stated:

> "There is no reason here to depart from the parties' agreement concerning the currency of payment pursuant to [the relevant contracts]. Failing any other indication in the decisions, the payment of the above amount shall be ordered 17.6% in [local] currency and 82.4% in US$, at the contractual fixed rate of…".[32]

29 Sub-Clause 2.1 of Part I of the FIDIC Conditions, fourth edition, deals with the Engineer's duties and authorities. Among other things, it states that the:

> "Engineer may exercise the authority specified in or necessarily to be implied from the Contract, provided, however, that if the Engineer is required, under the terms of his appointment by the Employer, to obtain the specific approval of the Employer before exercising any such authority, particulars of such requirements shall be set out in Part II of the Conditions."

The interim award does not quote or describe Sub-Clause 2.1(b) of Part II of the conditions of the contracts at issue, so it is not possible to know its contents. However, usually such restrictions of authority, which may derive from the requirements of legislation or regulations (governmental or other), require approval by the Employer of variations leading to increases in costs or extensions of time. In effect, they limit the Engineer's authority in various cases where, under the FIDIC Conditions, the Engineer is acting as the Employer's agent. However, the FIDIC Conditions, properly construed, should not allow any restriction on the authority of the Engineer when he is acting under Clause 67 as, under that Clause, he is required, implicitly, to decide disputes fairly and impartially between the parties and not act merely as the agent of the Employer (whose authority, in that capacity, is naturally subject to possible restriction). Accordingly, the Tribunal correctly decides that restrictions on the Engineer's authority pursuant to Sub-Clause 2.1(b) in relation to the giving of payment certificates cannot relieve the Employer from having to pay decisions of the Engineer under Clause 67.

30 Interim award, para. 23.

31 Interim award, para. 24.

32 Interim award, para. 24. The Tribunal's position in this respect is in striking contrast to the position of another ICC tribunal, also in relation to the FIDIC Conditions, fourth edition, 1987, and this time sitting in London and not Paris, which stated:

> "The respondent [the Employer] contended that the matter of currencies was dealt with under the contract. While this may provide for the currencies in which payment under the contract is to be made, the contract is silent as to the currency in which any arbitral award is to be given." [Emphasis added]

As the Tribunal in that case found that the contract "was silent as to the currency in which any arbitral award is to be given", the tribunal found, for purposes of Section 48(4) of the English Arbitration Act 1996, that the parties had not "otherwise agreed" on a currency of payment for the award and that, therefore, the Tribunal had the power to order payment of any sum of money found to be due in any currency and ordered payment of the award to be made in the European currencies of the claimant (the Contractor), instead of in the currency of Lesotho (Maloti), the currency of the respondent (the Employer) and also largely the currency of payment in the contract. *See* the description of the ICC award in the decision of the House of Lords in Lesotho Highlands Development Authority v. Impregilo SpA [2005] B.L.R. 351, 354 5. While there may have been other compelling reasons for the Tribunal's decision (as suggested by Antonio Crivellaro, All's Well That Ends Well: London Remains a Suitable Venue for International Arbitration – But Only Thanks to the House of Lords [2005] ICLR 480, 489 91), the Tribunal's stated reason is surprising as contracts rarely, if ever, provide in addition to, and in place of, a currency of payment, a "currency in which any arbitral award is to be given" – certainly the FIDIC Conditions never have. While the arbitrators' award was successfully challenged on the ground of "serious irregularity" before the English Commercial Court (Queen's Bench Division) and Court of Appeal, the House of Lords (Lord Phillips dissenting) set aside the lower court decisions and, effectively, reinstated the award.

The Tribunal also stated that it was not prepared "at this early stage of the arbitration" to grant interest on the amount awarded, both because "the Engineer said nothing in this regard" (the award does not state whether the Contractor had claimed interest when requesting the Engineer's decisions) and because the Tribunal thought that "more information would be needed in the context of this dispute before deciding the issue".[33]

Finally, the Tribunal noted that, as Sub-Clause 67.1 provides that the Engineer's decisions shall have "an immediate binding effect" that "provisional enforcement" of the award (as permitted under the law of the place of arbitration, France) must be ordered. As the seat of arbitration was Paris, the effect of this under French law was that the award could be immediately enforced, notwithstanding the institution of a judicial procedure to set the award aside.[34]

IV. The Tribunal's award

The exact manner in which the Tribunal ordered enforcement of the Engineer's decisions is also of interest. The dispositive part of their award provided as follows:

> "Therefore, on the basis of the foregoing, the Arbitral Tribunal decides as follows:
>
> The Respondent [____] shall pay to the Claimant [_____], immediately upon notification of the present award the sums of
>
> [Local currency] …
>
> US dollars ...
>
> The issue of interest and that of a compensation for the parties' legal expenses as well as the decision on the costs and fees of this part of the arbitration are reserved.
>
> Provisional enforcement of this award is ordered.
>
> The rights of the parties as to the merits of their case, including but not limited to the final and binding effect [35] of the Engineer's decisions are reserved until the final Award of this Tribunal." [Emphasis added]

The above emphasized words make it very clear that the Tribunal's decision to enforce the Engineer's decisions made on November 17, 1998, by ordering their payment, would not prejudice the Employer's right to argue later in the arbitration that they were wrong and that the corresponding amounts should be repaid to the Employer.[36]

In the final award, the Tribunal confirmed that, even though the Respondent/Employer "had not objected within the prescribed time limit to the Engineer's decisions", the Respondent/Employer "may take advantage of the notice made by the [Claimant/Contractor objecting to the Engineer's decisions] and request the Arbitral Tribunal to reverse the Engineer's decisions". The Respondent/Employer could do so since "the Claimant has declared his dissatisfaction with the entire content of the Engineer's decisions".[37]

V. Implications for FIDIC contracts

In the author's view, the Arbitral Tribunal in ICC Case No. 10619 has perfectly understood the way Clause 67 of the FIDIC Conditions is to function and its decision to order payment of the Engineer's decisions by way of an interim award, notwithstanding the Contractor's earlier notice of dissatisfaction, accords fully with the intention of Clause 67.

The notable points in the award are, in summary, as follows:

(1). an Engineer's decision made under Clause 67 may be enforced by means of an arbitral award notwithstanding that it had been the subject of a notice of dissatisfaction within the time limit provided for by that Clause and regardless of the fact that the works had been completed;

(2). an Engineer's decision must be made within the designated 84-day time limit if it is to be binding on the parties (and the fact that the parties may have been negotiating a settlement of the dispute did not entitle or authorize the Engineer to defer the making of such decision);

33 Interim award, para. 25. The Arbitral Tribunal also noted that no question was raised in the application for an interim award about the Engineer's decisions as to an extension of time, interim award, para. 26.

34 *See* Article 1479 of the French Code of Civil Procedure.

35 The reference to the "final and binding effect" of the Engineer's decisions appears to be excessive as there were no "final and binding" decisions (that is, decisions which had not been the subject of a notice of dissatisfaction from either party) but only "binding" decisions (that is, decisions which had been the subject of a notice of dissatisfaction from one or both parties). Perhaps the Tribunal meant that, if it confirmed them, they would have "final and binding effect" in the sense that they could no longer be reversed or, alternatively, merely used these words out of an abundance of caution.

36 As it happened, the Respondent did not comply with the interim award and the Tribunal later confirmed the amounts awarded by the interim award in its final award in April 2002.

37 ICC International Court of Arbitration Bulletin, Volume 19, No. 2-2008, p. 90, paras. 17 and 18.

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(3). if an Engineer's decision has been made within the required 84-day period and has not been the subject of a notice of dissatisfaction within 70 days, it "cannot be revoked in arbitration"; [38]

(4). the Employer's obligation to pay a binding decision of the Engineer under Clause 67 is not subject to a restriction under Sub-Clause 2.1 of the FIDIC Conditions on the Engineer's power to certify payment under Clause 60 of the FIDIC Conditions;

(5). the refusal to denominate the amounts awarded in other currencies than the currencies for payment specified in the contract; [39]

(6). the denial of interest on the sums awarded by the Engineer as the Engineer had said nothing about the subject in his decisions but also because "more information would be needed… before deciding this issue"; and

(7). as confirmed in the final award, that even though the Employer had not formally expressed dissatisfaction with the Engineer's decisions in time, it was entitled to take advantage of the Contractor's formal notice of dissatisfaction and, thus, to request the Tribunal to reverse those decisions in their entirety.

In an earlier award, only a summary of which has been published,[40] an ICC arbitral tribunal had, by an interim award, ordered payment of final and binding decisions of the Engineer under Clause 67 of the FIDIC Conditions, second edition, 1969. However, the interim award in ICC Case No. 10619 is the first example of a published award of which the author is aware where an arbitral tribunal has ordered payment by an award of the amount of an Engineer's decision which is "binding" but not "final", that is, which had been formally challenged within the required time limit (70 days of the decision under the FIDIC Conditions, fourth edition), by one or both of the parties.

The practical effect of enforcing by an interim award an Engineer's decision ordering a payment to be made to the Contractor – and assuming the payment were made – is to reverse the parties' roles in the arbitration in relation to the dispute which was the subject of the decision in that the contractor will now hold the corresponding money. The Contractor whose claim has been satisfied, albeit temporarily, no longer has necessarily to claim for it in the merits phase of the arbitration, and is therefore no longer exposed to the risk of the Employer's insolvency in the interim. Instead, the Employer is exposed to the risk of the Contractor's insolvency in the interim should the Employer later prevail on that claim in the merits phase and seek to recover the money.[41]

The author submits that the same result should obtain in the case of a decision of a DAB under Clause 20 of the 1999 FIDIC Books as applies in the case of a decision of the Engineer under Clause 67 of the FIDIC Conditions, fourth edition. This is because the relevant language of Clause 67 of the fourth edition and of Clause 20 of the 1999 FIDIC Books is essentially the same.

Sub-Clause 67.1 of the FIDIC Conditions, fourth edition, provides that, with respect to each decision of the Engineer:

> "… the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award."

This was the key language relied upon by the Tribunal in their interim award in ICC Case No. 10619 to justify the giving of their award.

The language in Sub-Clause 20.4 is at least as strong. It provides as follows:

> "The decision [of a Dispute Adjudication Board] shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below."

38 Interim award, para. 18.

39 While the works had apparently been completed (*see* the interim award, para. 17) and, therefore, the Contractor may no longer have need of local currency to pay expenses in the local country concerned, absent a provision in the relevant contract or French arbitration law (there is none), the Tribunal would have no clear authority to depart from the parties' agreement concerning the currency of payment provided for in their contract.

40 ICC Case Nos. 3790/3902/4050/4051/4054 (joined cases), also referred to simply as ICC Case No. 3790, *ICCA Yearbook Commercial Arbitration*, Volume XI – 1986, pp. 119 to 127; also summarized in Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, Kluwer, Deventer, 1990, pp. 889 to 891.

41 It is beyond the scope of this paper to consider whether, as a policy matter, this is necessarily a desirable result. The risk for the Employer can be mitigated if the Engineer (or a DAB, now that it has replaced the Engineer as a decider of disputes under the 1999 FIDIC Red Book) conditions any payment to the Contractor on the provision of appropriate security, such as a bank guarantee in "first demand" form.

An Engineer's / Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award

Accordingly, the interim award in ICC Case No. 10619 is directly applicable to a decision of a DAB under the 1999 FIDIC Books.[42] Even if one or both parties have given a notice of dissatisfaction with respect to a decision of a DAB pursuant to Sub-Clause 20.4, each party is bound to give effect to that decision and, if that decision calls for a payment to be made by one party to the other, then that decision should be enforceable directly by an interim or partial award pursuant to the ICC Rules. This is the consequence, this author submits, of the interim award in ICC Case No. 10619.[43]

42 *See* the author's "*The Arbitration Clause in FIDIC Contracts for Major Works*" [2005] ICLR 4.

43 Interestingly, the interim award in ICC Case No. 10619 – or at least its publication in 2009 – has been anticipated in the ICC Model Turnkey Contract for Major Works (2007), as this provides in Article 67.1:

> "No arbitral tribunal can open up review or revise any decision of the CDB [Combined Dispute Board] which has become final and binding in accordance with the Rules, but an arbitral tribunal may, if considered appropriate by the arbitral tribunal and permitted under applicable law, as provided hereafter, make interim awards for the purpose of enforcement of the CDB decision." [Emphasis added]

While in an article dealing with "final and binding " decisions, the provision relating to interim awards is not necessarily limited to them and could include merely "binding" decisions.

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Attachment – 12 Article of Nicholas Gould, Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members

ESTABLISHING DISPUTE BOARDS – SELECTING, NOMINATING AND APPOINTING BOARD MEMBERS

A paper given at the
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Nicholas Gould

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ESTABLISHING DISPUTE BOARDS – SELECTING, NOMINATING AND APPOINTING BOARD MEMBERS

Nicholas Gould

Introduction

This paper focuses on selecting, nominating, appointing and establishing dispute boards (DBs). Consideration is given not just to the legal issues and standard form provisions available, but also to the practical issues and difficulties of identifying and appointing board members for international projects.[1] The topics are discussed by reference to the published rules and guidance from the Fédération Internationale des Ingénieurs-Conseils (FIDIC), the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and the Institution of Civil Engineers (ICE), as well as those contained within World Bank procurement procedures. These provisions are compared and contrasted, with a summary in table form as the Appendix at the end of the paper.

From a practical perspective, the challenge for the parties is to establish a DB at the outset of the project, rather than waiting for a dispute to arise. There is a need to identify, consider and agree the appropriate individuals for the project, as well as to consider independence and impartiality, and establish, and be seen to establish, a level playing-field for the contractor and employer or owner.[2] The identification of individuals with appropriate skills, experience and qualifications, especially in relation to the DB chair, can be difficult and time-consuming. However, the parties must overcome these issues in order to appoint a DB.[3]

Those who do not appoint their DB at the outset, or at the early stages of the project, find that it is far more difficult to identify, agree upon and appoint a board once a dispute has arisen. Nonetheless, many DBs are appointed at this later stage, but often too late for the board to be effective in the management and resolution of disputes during the course of the project.

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1 Much gratitude must be recorded to Charlene Linneman, Assistant at Fenwick Elliott LLP, for her research and help in producing this paper.

2 In this paper the term ‘employer’ is used to refer to the employer, owner or purchaser of the works (thus adopting FIDIC terminology).

3 In this paper the term ‘DB’ is used to refer collectively to dispute boards, dispute adjudication boards, combined dispute boards or dispute resolution boards.

Dispute boards: a brief overview

The terms 'dispute review board' (DRB) or 'dispute adjudication board' (DAB) – collectively 'dispute boards' (DBs) – are relatively new. They describe a dispute resolution procedure that is normally established at the outset of a project and remains in place throughout the project's duration. The board may comprise one or three members, who become acquainted with the contract, the project and the individuals involved with the project in order to provide informal assistance, provide recommendations about how disputes should be resolved, and in some cases binding decisions.

The members of a DB (whether one or three persons) are remunerated throughout the project, usually by way of a monthly retainer, which is then supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents, attending hearings and producing written recommendations or decisions, if and as appropriate.

DABs have more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of DRBs, which originally developed in the domestic US major projects market. According to the Dispute Review Board Foundation (DRBF),[4] the first documented use of an informal DRB process was on the Boundary Dam and Underground Powerhouse project north of Spokane, Washington, during the 1960s. Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four member 'Joint Consulting Board' (JCB), in order that that board could provide non-binding suggestions. The DRBF reported that as a result the recommendations of the JCB were followed, including several administrative procedural changes and the settlement of a variety of claims and also an improvement in relationships between the parties. The project was also completed without litigation.

Subsequently in 1972 the Standing Sub-committee No 4 of the US National Committee on Tunnelling Technology conducted a study and made recommendations for improving contractual methods in the US. Further studies were carried out, with the first official use of a DRB made by the Colorado Department of Highways on the second bore tunnel of the Eisenhower Tunnel Project. This was as a result of the financial disaster encountered in respect of the first tunnel between 1968 and 1974.

The DRB was required to make non-binding recommendations about disputes that arose during the project. The Board was constituted at the commencement of the project and followed the duration of the project. The project was extremely successful and as a result the use of DRBs began to spread for large civil engineering projects in the US, but they have also been used internationally. However, DRBs predominantly remain the province of domestic US construction projects.

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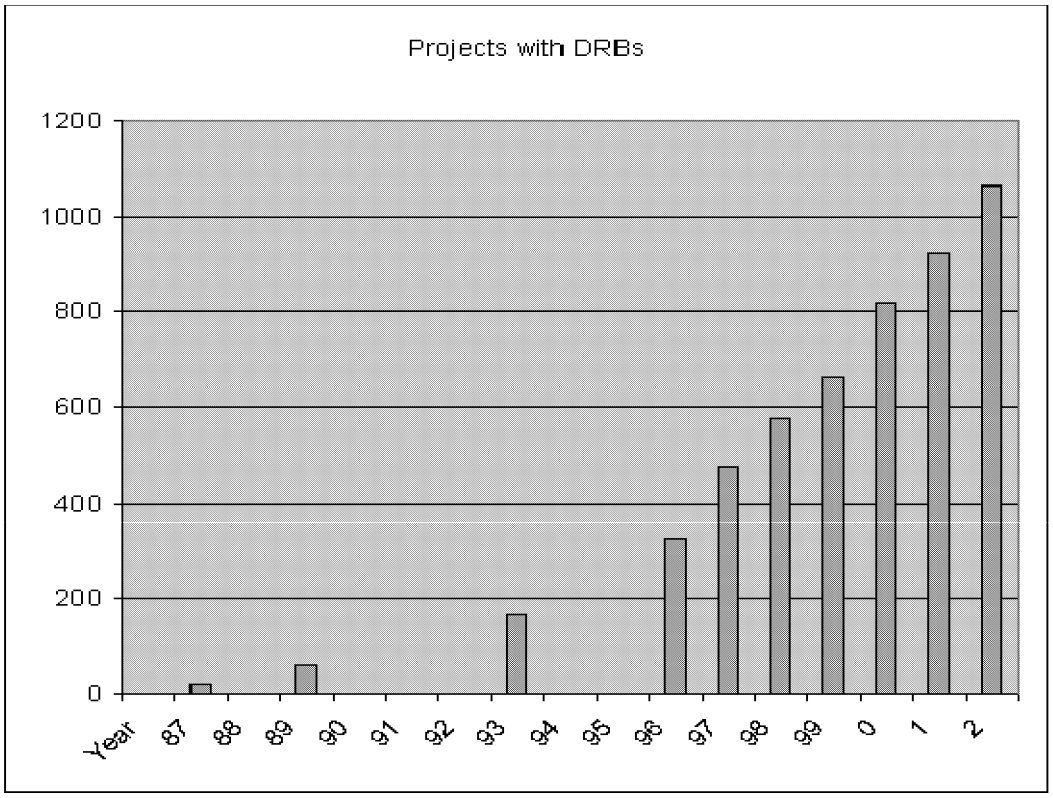
4 For the DRBF, see www.drb.org.

As adjudication developed, the World Bank and FIDIC opted for a *binding* dispute resolution process during the course of projects, so the DAB was born. The important distinction, then, between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions during the course of the project: these bind the parties and must be implemented immediately.

Growth in US projects with DRBs[5]



The DRBF has catalogued 1,062 projects, representing more than US$77.7bn worth of project work. The table below shows that in 2003 there were 340 contracts using DRBs. On those projects the boards made 1,261 recommendations and only 28 matters went beyond the DRB process. In other words, only 2.2% of those disputes referred to the DRB progressed to arbitration or litigation. A more positive way of looking at this is that DRBs have a success rate of more than 97.8%. The DRBF has reported a considerable rise in the number of projects using DRBs, as the figure above and table below both show.

DRBs are now widely used on a range of substantial civil engineering projects in the US. Their use is no longer limited to the mega-projects, so three- man, or indeed one-man, DRBs are being used on smaller projects.

5 Source: DRBF, see note 4.

US contracts (complete and under construction) with DRBs[6]

	projects with DRBs (totals)	contract value (US$ bn)	disputes settled (totals)
1988	19	1.4	16
1989			
1991	63	3.2	78
1992			
1994	166	9.7	211
1995			
1996			
1997	326	22.1	424
1998	477	28.8	596
1999	576	32.6	758
2000	666	35.4	869
2001	818	41.0	1021
2002	922	46.2	1108
2003	1062	50.3	1261

From DRB to DAB and beyond

The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation. Pierre Genton, adopting the ICC's terminology, suggests that 'the DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions.'[7]

Building on this distinction, the ICC has developed three alternative approaches:

1 *DRB*: the DRB issues recommendations, so an apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period, the parties agree to comply with the recommendation, which therefore becomes binding if the parties do not reject it.

2 *DAB*: its decisions are to be implemented immediately.

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6 Source: DRBF, see note 4.

7 Pierre Genton, Chapter 7: *Dispute Boards*, Bernsteins Handbook of Arbitration and Dispute Resolution, edited by J Tackaberry QC and A Marriot, QC, Sweet & Maxwell, London, 2003, paragraph 7-029.

3 *Combined Dispute Board*: the CDB attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests and if the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

Genton suggests that the third stage of a CDB would be the referral of a dispute leading to a binding decision, which would need to be implemented immediately. The ICC's approach is that the CDB decides (if either party requests a decision) whether to issue a recommendation or immediately binding decision at the second stage of the process.

According to the ICC, the essential feature of the CDB model is that the parties are required to comply with a decision immediately, whereas the parties must comply with a recommendation – but only if the employer and contractor express no dissatisfaction within the time limit. The CDB procedure seems at first glance to be a somewhat cumbersome hybrid between the DRB and DAB, without a clear pathway. Nonetheless, it may prove useful for those parties that cannot decide whether they need a DRB or a DAB.

At the other end of the spectrum, a DB could be considered a flexible and informal advisory panel. In other words, before issuing a recommendation, the DB might be asked for general advice on any particular matter. The DB would then look at documents and/or visit the site as appropriate and, most usually, provide an informal oral recommendation, which the parties may then choose to adopt. If the parties were not satisfied, the DB would follow the formal procedure of exchange of documents and a hearing and afterwards issue a formal (albeit non-binding) written recommendation.

The development of international dispute boards

A limited number of standard form contracts are available, which set out an almost uniform approach to the appointment of DB members. These provisions have arisen primarily from the step-by-step development of adjudication:

1970	A contractual adjudication process is introduced into the domestic subcontractor standard forms in the UK, primarily to resolve set-off issues between subcontractor and main contractor
1994	Sir Michael Latham issues his final report, reviewing procurement, contractual and dispute arrangements in the UK construction industry[8]
1995	FIDIC introduces a DAB in its Orange Book
1996	FIDIC introduces a DAB as an option in its Red Book
	Housing Grants, Construction and Regeneration Act 1996 (HGCRA) introduced in the UK; its Part II includes mandatory adjudication provisions in section 108

8 Sir Michael Latham, *Constructing the* Team, London, HMSO, 1994.

1998	Part II of the HGCRA comes into force on 1 May, together with the Exclusion Order[9] and the Scheme for Construction Contracts[10]
1999	FIDIC adopts a DAB/Dispute Review Expert (DRE) procedure, relying upon the engineer to act as quasi-arbitrator as well as agent of the employer or owner. The DAB procedure becomes mandatory, rather than an option. Three major new model forms include DABs/DREs:[11] • *New Red Book*: Conditions for Construction (a standing DAB comprising one or three members) • *New Yellow Book*: Plant and Design Build (ad hoc DAB) • *Silver Book*: Engineer Procure and Construct (Turnkey) (also ad hoc DAB)
2000	AAA publishes its *DRB Guide Specifications*[12]
	The World Bank introduces a new edition of its *Procurement of Works* procedure, making the 'recommendations' of a DRB or DRE mandatory unless or until superseded by an arbitrator's award[13]
2004	ICC adopts its *DB Rules*, *Model DB Member Agreement* and *Standard ICC DB Clauses*[14]
	The World Bank, together with other development banks and FIDIC, start work towards a harmonised set of conditions for DABs
2005	World Bank issues May 2005 Edition of 'Procurement of Works & Users Guide'. The most significant change is the adoption of FIDIC and DABs.
2005	ICE publishes its *DRB Procedure*, including an HGCRA-compliant version[15]

The introduction in the 1970s of the limited contractual adjudication procedure is perhaps now only of historical interest. In the UK, the HGCRA was clearly the major turning-point domestically, but also had significant influence internationally in the area of construction dispute resolution.

In the international arena, FIDIC led the way by the introduction of DABs in its 1999 suite of contracts.[16] In respect of the DAB, the relevant FIDIC standard forms include:

- Clauses 20.2-20.8: functions and constitution of the DAB
- Appendix: *General Conditions of Dispute Adjudication Agreement*
- Annex 1: Procedural Rules

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9 The Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648: excludes PFI contracts between a public sector authority and a Project Company (amongst others) from Part II of the HGCRA..

10 The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.

11 FIDIC forms and other publications are obtainable via www1.fidic.org/bookshop.

12 AAA, *DRB Guide Specifications*, December 2000, downloadable from www.adr.org.

13 World Bank, *Guidelines: Procurement under IBRD Loans and IDA Credits*, revised August 2006, downloadable from http://web.worldbank.org.

14 ICC DB documents downloadable from www.iccwbo.org.

15 ICE, *DRB Procedure* (2005), obtainable via www.thomastelford.com.

16 See note 11 and linked main text.

- *Dispute Adjudication Agreement* (one- or three-person DAB).

FIDIC DAB (Clause 20)

Clause 20 of the FIDIC form deals with claims, disputes and arbitration. Emphasis is placed upon the contractor making its claims during the course of the works and for disputes to be resolved during the course of the works also. Clause 20.1 requires a contractor seeking an extension of time and/or any additional payment to give notice to the engineer 'as soon as practicable, and not later than 28 days after the event or circumstance giving rise to the claim'.

Some have suggested that the contractor will lose its right to bring a claim for time and/or money if the claim is not brought within the timescale.[17] Under UK law, timescales in construction contracts are generally directory rather than mandatory.[18] However, Clause 20.1 does go on to state that the contractor will lose its right in the event of a failure to notify within a strict timescale.[19] A contractor would therefore be well advised to notify in writing any requests for extensions of time or money claims during the course of the works, within a period of 28 days from the event or circumstances giving rise to the claim.

The real benefit of the DAB comes from it being constituted at the commencement of the contract, so that its members will visit the site regularly and be familiar not just with the project but with the individual personalities involved. They should, therefore, be in the position to issue binding decisions within the period of 84 days from the written notification of a dispute, as required by Clause 20.4.

The DAB is appointed in accordance with Clause 20.2. It could comprise individuals who have been named in the contract. However, if the members of the DAB have not been identified in the contract then the parties are jointly to appoint a DAB 'by the date stated in the Appendix to Tender'. The DAB may comprise either one or three suitably qualified individuals, the parties' choice being specified in the Appendix to the FIDIC contract.

The FIDIC Appendix does not provide a default number, but Clause 20.2 states that the parties are to agree if the Appendix does not deal with the matter. If the parties cannot agree, then the appointing body named in the Appendix will decide whether the panel is to comprise one or three members.[20] The default appointing authority is the President of FIDIC or a person appointed by the President of FIDIC. The appointing authority is

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17 Christopher Seppälä, 'Claims of the Contractor', paper given at the ICC conference, *The Resolution of Disputes under International Construction Contracts*, Paris, 6-7 February 2003.

18 *Temloc Ltd v Errill Properties Ltd* 39 BLR 30, 12 Con LR 109, 4 Const LJ 63, CA.

19 *Bremer Handels GmbH* v *Vanden Avenne-Izegem PVBA* (1978) 2 Lloyd's Rep 109, CA. Cf *City Inn Ltd* v *Shepherd Construction Ltd* (2003) SLT 885, Ct Sess (Second Division).

20 Clause 20.3.

obliged to consult with both parties before making its final and conclusive determination.

On most major projects a DAB will comprise three persons. If so, then each party nominates one member for approval by the other. The parties may then agree upon a third, who becomes the chairperson. In practice, parties may propose a member for approval, or more commonly propose three potential members, allowing the other party to select one.

Once two members have been selected, it is then more common for those members to identify and agree upon (with the agreement of the parties) a third member. That third person might become the chairman, although, once again with the agreement of all concerned, one of the initially proposed members could be the chairman.

The terms of FIDIC's *General Conditions of the Dispute Adjudication Agreement* are incorporated by reference by Clause 4 of the *Dispute Adjudication Agreement*, which also determines the retainer and daily fees of each member. The employer and contractor bind themselves jointly and severally to pay the DAB member in accordance with these *General Conditions*. Details of the specific FIDIC contract between the employer and contractor also need to be recorded, as it is from this document that (a) the DAB obtains its jurisdiction in respect of the project; and (b) the employer and contractor agree to be bound by the DAB's decisions.

World Bank DB (Clause 20)

Clause 20 of the World Bank procurement procedures[21] deals with claims, disputes and arbitration. Clause 20.2 provides that a party shall refer a dispute to adjudication in accordance with Clause 20.4 and that the parties shall appoint a DB by the date in the Contract Data. The DB comprises either one or three people (with three as the default).[22] If three, then each party appoints one member and these two then recommend (and the parties agree on) the third, who chairs the DB.[23]

Procedural rules

International Chamber of Commerce

The ICC issued its *DB Rules* on 1 September 2004, together with *Standard ICC DB Clauses* and a *Model DB Member Agreement*.[24] The three alternatives for operation of a DB within the ICC *Rules* are set out above.

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21 See note 13.
22 Clause 20.2.
23 Clause 20.2.
24 See note 14.

Institution of Civil Engineers

The ICE *DRB Procedure* was issued in February 2005.[25] The rules offer two choices: Alternative One for use on international projects and UK contracts not subject to the HGCRA; and Alternative Two, which is HGCRA-compliant.

The *Procedure* also contains a model tripartite agreement to be entered by the contractor, employer and DRB member. Each DRB member will enter into a separate agreement. The parties can agree the identity of the DRB member if there is to be only one. If there are to be three, each party may nominate one member for approval by the other party. The parties shall then consult both members and agree upon the third member, who shall be the chairperson. This leaves the traditional arbitration procedures in the contract intact (in the case of Alternative One).

Whether the DRB has one or three members depends on the contract data. If the parties do not state the number, nor agree it later, the DRB will consist of three members.

American Arbitration Association

The AAA *DRB Guide Specifications*[26] provide for an independent DRB to 'assist in and facilitate the timely resolution of disputes …'[27] The focus of the AAA procedure is on party autonomy: the AAA will help the parties to identify potential members for a DRB but will not appoint them in default. The DRB will carry out its task by issuing written non-binding recommendations, without the power to make binding decisions. Three-part agreements are once again used to bind the parties and each member of the DRB to the Rules and to identify remuneration for each of the members.

The ICC, ICE and World Bank procurement procedures are similar, although there are some variations. Distinctions in respect of selecting, appointing and establishing are considered below.

Appointing a dispute board: contractual procedures compared

The provisions requiring the establishment of a DB must be contained in the contract between the employer and the contractor. The usual provisions require the parties to agree the identity of the board within a limited time, then providing a default appointing mechanism where the parties cannot agree upon the identity of a member, or indeed the entire DB. The contract should also contain a mechanism for replacing board members, as well as a default procedure for replacing those who cannot be replaced by agreement. For example, Clause 20.2 of FIDIC provides:

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25 See note 15.
26 See note 12.
27 Rule 1.01 General, D Purpose 1.

> 'Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4. … The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.
>
> The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ('the members'). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.
>
> If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.
>
> If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.
>
> If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.
>
> If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as agreed in this Sub-Clause.
>
> The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 … shall have become effective.'

The approach of FIDIC, therefore, is to allow the DB to be constituted and named in the contract, or alternatively to be identified by the date stated in the Appendix to Tender.

The ICE *DRB Procedure* provides that the DRB shall be appointed by the date stated in the contract. If no date is stated, then the DRB shall be appointed within 56 days after the contract is formed.[28]

The World Bank *Procurement Rules* require that if the DB has not been jointly appointed 21 days before the date stated in the contract, then each party shall nominate one member and the two members then nominate the third.[29]

Article 7 of the ICC *DB Rules* deals with the appointment of DB members. Article 7.1 provides that the DB is to be established in accordance with the provisions of the contract, or if the contract is signed then in accordance with

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28 ICE *DRB Procedure*, Clause 2.
29 World Bank *Procurement Rules*, Clause 20.2.

the Rules, which provide a default appointment procedure. The ICC Rules are therefore subordinate to, but complement, the contract between the parties.

Clause 20.4 of FIDIC deals with referring a dispute to the DAB. Its first paragraph provides:

> 'If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer to the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this sub-clause.'[30]

The parties may therefore refer any dispute whatsoever that arises in connection with or out of the contract, including the opening up and reviewing of notices and certificates. If the DAB comprises three members, then the DAB is deemed to have received the notice of dispute when it is received by the chairperson alone. This means that the parties can simply direct all of their correspondence to the chairperson, but with copies to the other members, as well as providing a copy to the other party and engineer.[31]

Both the employer and the contractor are obliged to provide additional information and further access to the site and its facilities as the DAB may require in order for the DAB to make its decision. The contractor, notwithstanding that a dispute has been referred to the DAB, is to continue to proceed with the works in accordance with the contract (unless abandoned, repudiated or terminated). Both parties are contractually obliged to properly comply with every decision of the DAB. DAB decisions are therefore immediately mandatory, unless or until revised by an arbitral award, litigation or settlement.

The DAB is obliged to provide its written decision within 84 days after receipt of the reference, which must be reasoned and issued under Clause 20.4 of the contract.

Ideally, therefore, the DB members should therefore be selected, and the DB established, before work commences on site. This is not at all easy in practice, and many DBs are established after the work has commenced, some being established late in the construction cycle, even after the work has been completed. Those DBs that are constituted after the work has been completed are usually only established because a dispute has arisen, the parties feeling compelled to establish a DB in order to resolve the disputes that have been left over until after completion of the project, simply because the contracts require

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30 Compare the 1995 FIDIC formulation, where Clause 20 of the Red Book required that all disputes 'shall be referred in writing to the DAB for its decision', thus making the DAB a mandatory dispute resolution procedure as a condition precedent to arbitration.

31 FIDIC Clause 20.4 and Procedural Rule 4.

it.[32] Whether it is worth constituting a three-person DB to resolve disputes in this sort of context is questionable.

The main benefit of the DB is that the members become familiar with the project during its course. Once the work is completed, the DB members will be no more familiar with the project or the individuals involved within it than an arbitration tribunal. Further, the disputes that arise at the end of or after completion of the project are usually more complicated or substantial and would perhaps more appropriately be referred to a final dispute resolution process such as arbitration.

Selecting dispute board members

The Appendix to the FIDIC *General Conditions of Dispute Adjudication Agreement* provides a *Dispute Adjudication Agreement* which is tripartite – in the sense that it is entered into by the employer, contractor and the sole member (or each of the three individual members) of the DAB. The establishment of the DAB takes effect on the latest of:

- The Commencement Date defined in the contract
- The date when all parties have signed the tripartite Dispute Adjudication Agreement
- The date when all parties have entered into a dispute adjudication agreement.

The last two points reflect the fact that parties are not required to use FIDIC's own *Dispute Adjudication Agreement*, but may instead enter into an effective dispute adjudication agreement of their own drafting.

The obligations and qualities of dispute board members

The engagement of a member for the DAB is a personal appointment. The focus, therefore, is on the individual rather than the organisation that any particular DB member might be employed by. The DRBF *User Guide* takes the view that in order to be eligible for election, a board member must not:

1 Have any financial ties to any party either directly or indirectly involved in the contract;

2 Be currently employed by any party directly or indirectly in respect of the contract;

3 Have been a full-time employee of any party directly involved in the contract (unless the other party consents);

4 Have 'a close professional or personal relationship with a key member of any party *directly or indirectly* involved in the contract that could give rise to the perception of bias';

32 See note 30.

5 Have any financial interest in the project or contract (except of course in respect of the DRB services); or

6 Have 'any prior substantial involvement in the project, in the judgment of either party.'[33]

'Directly involved' means the employer, contractor or joint venture partners in respect of the project. 'Indirectly involved' includes subcontractors, suppliers, designers, architects or other professional service firm or consultant or any party on the project – a relatively wide category. Finally, 'financial ties' include, but are not limited to, any ownership interest, loans, receivables and/or payment.

The DRBF *User Guide* then goes on to provide guidelines for DB members during the course of their service on the DB. They must not:

'a. Be employed, either full-time or as a consultant, by any party that is *directly* involved in the contract, except for service as a DRB member on other contracts.

b. Be employed, either full-time or as a consultant, by any party that is *indirectly* involved in the contract, unless specific written permission from the other party is obtained.

c. Participate in any discussion regarding future business or employment, either full-time or as a consultant, with any party that is *directly or indirectly* involved in the contract, except for services as a DRB member on other contracts, unless specific written permission from the other party is obtained.'[34]

A FIDIC DAB member warrants that he or she is and shall remain impartial and independent of the employer, contractor and engineer. A member is required to promptly disclose anything that might impact upon their impartiality or independence.[35]

The general obligations of a member of a DAB under the FIDIC *General Conditions* are set out quite extensively. Clause 4 requires that a member shall:

- Have no financial interest or otherwise in the employer, the contractor or the engineer
- Not previously have been employed as a consultant by the employer, contractor or engineer (unless disclosed)
- Have disclosed in writing any professional or personal relationships
- Not during the duration of the DAB be employed by the employer, contractor or engineer

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33 DRBF, *Practices and Procedures*, *User Guide*, chapter 2, section 2 (2004), downloadable from www.drb.org.

34 See note 33.

35 FIDIC *General Conditions of the Dispute Adjudication Agreement*, Clause 3 (Warranty).

- Comply with the Procedural Rules (see below)
- Not give advice to either party concerning the conduct of the contract
- Not whilst acting as a DAB member entertain any discussions with either party about potential employment with them
- Ensure availability for a site visit and hearings
- Become conversant with the contract and the progress of the works
- Keep all details of the contract and the DAB's activities and hearings private and confidential
- Be available to give advice and opinions on any matter relevant to the contract if and when required by the employer and contractor.

Under Clause 5, the employer and contractor are obliged not to request a member to breach any of the obligations set out above. Nor is the employer or the contractor able to appoint a member as arbitrator under the contract or call a member as a witness to give evidence concerning any dispute arising under the contract. Further, the employer and contractor jointly and severally grant immunity to the DAB member against any claims for anything done or omitted to be done in the purported discharge of the member's functions, unless carried out by the member in bad faith.

The AAA *DRB Guide Specifications*[36] require DRB members:

- To be neutral
- To be free from any conflict of interest
- To be impartial
- Not to be previously employed or have any financial ties including fee based consultancy within a period of 10 years prior to the award of the contract
- Not to have a prior involvement that might suggest lack of impartiality.

The ICC *DB Rules*[37] require independence, and expressly oblige disclosure in writing of any facts or circumstances which might be of such a nature as to call into question the dispute board member's independence in the eyes of the Parties.

Eight key aspects of the obligations of a DB member can be distilled from the rules of FIDIC, ICC, AAA and ICE. These are:

1 Neutrality

2 Impartiality

3 Independence

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36 See note 12.

37 See note 14 and linked main text.

4 Disclosure

5 Qualifications

6 Experience

7 Availability and

8 Confidentiality.

1 Neutrality

If a DB is to be effective, then its neutrality is fundamental. One might expect that the parties would want to be certain that their DB was neutral. In reality this means impartial, perhaps neutral, and without any conflicts of interest.

In practice, a party nominating a member or identifying a list from which a nomination might be made, might indeed hope that the final selection might favour that party, not because they have been proposed by the party or are in fact biased, but because of cultural similarities, professional respect and/or outlook in terms of the type of organisation or their perspective in the marketplace. In this light, one might assume that contractors seek DB members who have been directors of contracting organisations or are engineers who predominantly have worked for contractors, whereas employers might seek engineers from professional practices that tend to advise employers in terms of procurement and provide independent engineers. This view is only based on anecdotes. Research into the actual selection, from a neutrality perspective, would need to be carried out internationally in respect of DBs.

2 Impartiality

Undoubtedly, when a contractor and an employer put forward potential DB members they will already know, and perhaps have some form of relationship with, those candidates. The question then of whether those candidates are neutral, or to be more precise, impartial, can be reduced to a question of a perception of bias.

The leading case in English law is the House of Lords decision in *Porter v Magill*.[38] Here a local government auditor found two councillors guilty of wilful misconduct by devising or implementing a policy of targeting designated sales of council property. These sales were in marginal wards, in order to increase the Conservative Party vote in the 1990 local authority elections. As a result the auditor imposed a surcharge on the councillors personally related to the sales. The Court of Appeal allowed the appeal on liability, but the House of Lords restored the auditor's original decision.

The key question, according to the House of Lords, was not whether the councillors were in fact biased, but whether the decision, at the time the decision-maker in question gives it, is such that a fair-minded and independent observer, having considered the facts, might conclude that there was a real possibility that the decision-maker was biased. The test is a useful one in that

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38 *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

it draws a distinction between the need to prove actual bias and the appearance of a potential bias based upon the circumstances at the time when the decision was made. In practice, this means that the judge or judges considering the issue of impartiality have to decide whether an independent and fair-minded observer would consider the decision-maker biased, but of course this assessment will be based upon the judge's (or judges') perceptions.

Porter v Magill related to council members, but is equally applicable to tribunals. In respect of judges, the test for apparent bias is whether the circumstances would lead a fair-minded and informed observer to come to the conclusion that there was a real possibility that the tribunal was biased.[39] If this principle of judicial impartiality has been, or would be, breached, then a judge would be automatically disqualified from hearing a case or dealing further with the case.

More recently, the Court of Appeal has made it clear that this is not a discretionary case management decision reached by balancing the various factors applicable to the case. If there are any doubts, then the judge must excuse him or herself from further dealings with the case.[40]

In the notorious case involving General Augusto Pinochet, the House of Lords ruled that the links between Lord Hoffmann – who sat on the original panel that ruled to allow General Pinochet's extradition – and the human rights group, Amnesty International, were too close to allow the original panel's verdict to stand.[41] Lord Hoffmann had failed to declare his links with Amnesty International before ruling in the original hearing: he was chairman and a director of Amnesty International Charity Ltd. Lord Hope stated that in view of Lord Hoffmann's links, 'he could not be seen to be impartial'. Although it was not suggested that Lord Hoffmann was actually biased, his relationship with Amnesty International was seen to be such that, he was, in effect, acting as a judge 'in his own cause'. This is then a natural justice point: a central limb of natural justice is that a person cannot be a judge in his or her own cause.

In respect of adjudication, this approach has been applied in *Amec Capital Products Ltd* v *Whitefriars City Estates Ltd.*[42] Here Amec applied under Part 8 of the Civil Procedure Rules to enforce an adjudicator's decision. The JCT98 With Contractor's Design form provided for the appointment of a named adjudicator. Clause 30A.3 stated:

> 'If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unavailable to adjudicate on a dispute or difference *referred to him* then ….' [*emphasis added*]

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39 *Taylor* v *Lawrence* [2002] EWCA Civ 90, [2003] QB 528, applying *Porter v Magill* (see note 38) and *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, HL. .

40 *AWG Group Ltd (formerly Anglian Water Plc) v Morrison* [2006] EWCA Civ 6, [2006] 1 WLR 1163.

41 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*: see note 39.

42 *Amec Capital Products Ltd* v *Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, [2005] 1 All ER 723, [2005] BLR 1, 96 Con LR 142, (2005) 21 Const LJ 249.

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

The issues that arose at the Court of Appeal were:

1 The scope of the appointment clause in the contract;

2 Whether there was a breach of natural justice by the adjudicator deciding something that he had already decided;

3 Whether there was an appearance of apparent bias carrying forward legal advice from the first decision to the second;

4 Whether the adjudicator had failed to deal with an issue in respect of Clause 27 in his decision;

5 Whether a telephone conversation amounted to an appearance of bias;

6 Whether advice in respect of his jurisdiction amounted to an appearance of apparent bias; and

7 Whether the possibility of a claim against the adjudicator could amount to the appearance of bias on behalf of the adjudicator.

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

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

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

43 See note 10 and linked main text.

> regardless of the evidence and arguments that might be adduced.'[44] [*emphasis added*]

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

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

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

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

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

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

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

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44 See note 42 at paragraph [19].
45 See note 42 at paragraph [20].

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

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

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

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

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

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46 See note 42 at paragraph [41].
47 See note 10 and linked main text.
48 IBA, *Guidelines on Conflicts of Interest in International Arbitration* (2004); downloadable from www.ibanet.org.
49 See note 33 and linked main text.