



The Dispute Resolution Board Foundation (DRBF) is a non-profit organization dedicated to promoting the avoidance and resolution of disputes worldwide using the unique and proven Dispute Board (DB) method.

## DISPUTE BOARDS

*The authors and the DRBF would like to thank and acknowledge Routledge Taylor & Francis for allowing free access to this paper which was a Chapter as submitted in Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes (edited by Renato Nazzini) Dec 2017*

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September 2020

Paper number: DRBF 001

<https://www.drb.org/>

**Keywords:** Common-law, Civil law, Adjudication, Channel Tunnel, FIDIC, English law, Technology & Construction Court, World Bank, Chartered Institute of Arbitrators, CI Arb DB Rules, International Chamber of Commerce, ICC Rules, Impartiality, Independence, Disclosure, Conflicts, IBA, Remuneration, Jurisdiction, Time limits, Enforcement, Arbitration, Time bar, Governing law

## 1 Introduction

### 1.1 What is a dispute board?

A dispute board is an independent and impartial person or panel of three or more persons appointed by the parties to a contract to avoid and resolve disagreements that may arise in the course of the contract as quickly and sensibly as possible.

Dispute boards ideally are set up at the commencement of a project, and remain in existence for its duration. In contrast to other forms of dispute resolution (such as arbitration, adjudication or litigation in court), dispute boards become part of the project team and act in ‘real time’, rather than dealing with events that happened in the distant past. Dispute boards are different from the other forms of dispute resolution because they provide a continuing forum for discussion of any issues that might become contentious, and thus avoid disputes or resolve them as soon as they arise.

### 1.2 Legal basis for dispute boards

Dispute boards (DBs) are created by contract. The basis for the DB’s decisions is grounded in the law of the country in which the contract is executed, or the country agreed on by the parties. The law of the relevant country ultimately governs the execution of the DB’s decision. For example, the FIDIC contracts state: ‘The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender.’ The common law and the civil law are the world’s major legal systems that govern contracts — and dispute boards.

### 1.3 Common law

The common law constitutes the basis of most English-speaking and/or British Commonwealth countries, including: England and Wales, the Republic of Ireland, Northern Ireland, India, Hong Kong, Canada (except Quebec), the USA (except Louisiana), Australia, New Zealand, Sri Lanka, Malaysia, Pakistan, Singapore, Malta, Israel and South Africa.<sup>1</sup>

Common law has developed by custom and practice before there were any written laws. In 1154, during the reign of Henry II, a unified system of law was introduced which was ‘common’ to England. The king’s central court sent judges all over the country to hear and resolve disputes on an ad hoc basis, in accordance with their interpretation of the local customs. The judges returned to London and discussed their cases and decisions with the other judges, and then recorded their decisions. This is how the system of precedent developed in England: the idea that like cases should be treated alike — a system of ‘common law’ where judges make consistent decisions.<sup>2</sup> A judge is bound to follow the decision of an earlier judge and to adopt the earlier judge’s interpretation of the law and apply the same legal principles if the two cases have similar facts. The use of precedent provides predictability, fairness and efficiency in the law.

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<sup>1</sup> T H Van Dervort, *American Law and the Legal System: Equal Justice under the Law* (2nd edn, Cengage Learning, Inc 2000), 37–42.

<sup>2</sup> P Brand and J Getzler, *Judges and Judging in the History of the Common Law and Civil Law from Antiquity to Modern Times* (3rd edn, Cambridge University Press 2013), 3–36.

In most common law countries, in addition to court decisions, there are statutes that modify the common law. In other words, the various court decisions form the basis of contract law, but are further ‘codified’ by the legislature of the particular (common law) country.

## 1.4 Civil law

The world today is divided into some 185 countries that make up the United Nations organisation of sovereign nation states. The overwhelming majority of these countries consider themselves code law countries and pattern their legal systems after those of western Europe. The civil law developed out of the Roman law of Justinian’s *Corpus Juris Civilis* and is based on written codes and statutes. The civil law is the predominant legal system in the world today in force in various forms in about 150 countries. Local compilations of legal principles and customary law were codified over time in order to achieve certainty of law and uniformity. The ‘civil codes’ started with the Napoleonic Code in 1804. Countries with comprehensive codes that are regarded as typical of civil law systems are France, Spain, Italy, Germany, Austria, Greece and Latin America.<sup>3</sup> Even Japan and China have adopted modern Western-style codes and in the Middle East there is a mixture of code law concepts and Islamic law.

In civil law countries legislation is the primary source of law, and judgments are based on the provisions of codes and statutes. Courts have to reason on the basis of the rules and principles of the code, often drawing analogies from statutory provisions to fill any gaps in the understanding of the statute and to achieve coherence.

## 2 Adjudication and dispute boards in England

### 2.1 Demand for amicable dispute resolution

The first case in England to legitimise dispute boards was *The Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd and Others*,<sup>4</sup> when the House of Lords held that the contractual dispute resolution mechanisms chosen by competent commercial parties should not be interfered with. The House of Lords held that the whole dispute resolution clause was binding on the parties ‘unless it broke down’. The Channel Tunnel contract (a modified version of the FIDIC Red Book, third edition) used a version of the contemporary dispute board ‘panel’. This panel was governed by contractual language very similar to current dispute adjudication boards under FIDIC contracts.

The House of Lords’ decision in the case of *The Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd and Others*<sup>5</sup> makes clear that dispute adjudication boards’ decisions should be given effect until revised in arbitration, and that the courts should not involve themselves in the dispute board process. The intent of such contractual clauses is to make the dispute adjudication board’s decision binding without further ado, and allow the project as a whole to proceed as quickly as possible and without the delay of lengthy arbitration or other proceedings.<sup>6</sup>

Since the Channel Tunnel case, dispute boards have become an increasingly common method of resolving contractual disputes during the lifetime of a contract. In the past 25 years, there has been an increasing demand for less adversarial dispute resolution methods such as mediation and dispute

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<sup>3</sup> T R Van Dervort, *American Law and the Legal System: Equal Justice under the Law* (2nd edn, Cengage Learning, Inc 2000), 37–42.

<sup>4</sup> [1993] AC 334; see also (1992) QB 656.

<sup>5</sup> [1993] 2 W.L.R. 262.

<sup>6</sup> Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (3rd edn, Informa Law 2015), 72–74.

boards. Conflict is an inevitable part of life. It cannot be eliminated, but the way we deal with conflict can be transformed.

Dispute boards have deep roots in arbitration. However, dispute board members are not arbitrators. Arbitrators listen to the evidence presented to them, whereas dispute board members have a broader-based function: that of inquisitor and dispute avoider. Dispute board members do listen to evidence presented to them, but also work with the parties in order to avoid disputes and to find out the relevant facts about an emerging dispute.

Much like arbitration, dispute boards may benefit from pre-existing procedural rules or frameworks, which can be easily referenced and incorporated into a contract.<sup>7</sup>

Dispute boards are now an internationally recognised concept and are frequently included by default, for example by the use of standard FIDIC contracts, or by imposition of the development banks by virtue of their procurement procedure.<sup>8</sup>

The dispute board can positively influence the contracting parties and avoid disputes by keeping the communication between the parties alive and productive.

## 2.2 English adjudication enforcement

In the case of *Macob Civil Engineering v Morrison Construction Limited*<sup>9</sup> the High Court of Justice of England and Wales held that an adjudicator's decision remained binding and could therefore be enforced, notwithstanding that one party challenged its validity. The court provided that summary judgment would be the normal way to enforce an adjudicator's decision. Macob Civil Engineering (the claimant) applied to enforce an adjudicator's decision and Morrison Construction Limited (the defendant) contended that the decision was in breach of the rules of natural justice and served an arbitration notice. The defendant applied for a stay under section 59 of the Arbitration Act 1996 on the basis that the dispute had to be determined by arbitration before the court could enforce the decision.

Dyson J confirmed that the decision of an adjudicator was enforceable summarily regardless of any procedural irregularity, error or breach of natural justice. The judge adopted a purposive approach to the construction of the word 'decision', refusing to accept that the word should be qualified: a decision whose validity was challenged was still a decision within the meaning of the Housing, Grants, Construction and Regeneration Act 1996. Therefore, the decision was enforceable and binding until the challenge was finally determined.

The case of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*<sup>10</sup> shows that even when an adjudicator gets things wrong, his/her decision can still be upheld by the courts. Bouygues (UK) Ltd (the claimant) and Dahl-Jensen (UK) Ltd (the defendant) both issued notices to adjudicate that were referred to the same adjudicator and it was agreed that Bouygues's claim should be treated as a counterclaim to that of the defendant.

The adjudicator decided that the defendant was entitled to a further £208,000.00, which the claimant disputed. Dyson J had to consider whether the adjudicator's error in not allowing for the retention in his calculations was sufficient to allow Bouygues to resist enforcement of the adjudicator's decision.

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<sup>7</sup> Rachel Buchanan, 'What do you think of the CI Arb draft Dispute Board Rules?' (24 April 2014). <http://blogs.lexisnexis.co.uk/dr/what-do-you-think-of-the-ci-arb-draft-dispute-board-rules/> accessed 3 May 2017.

<sup>8</sup> FIDIC is the acronym for its French name Fédération Internationale Des Ingénieurs-Conseils. The International Federation of Consulting Engineers was founded in 1915 by Belgium, France and Switzerland.

<sup>9</sup> [1999] EWHC Technology 254.

<sup>10</sup> [2000] EWCA Civ 507.

Dyson J had previously decided in *Macob Civil Engineering v Morrison Construction* that: ‘Decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.’

Dyson J held that the adjudicator had the jurisdiction to answer the question put forward and that the adjudicator’s decision was binding on the parties and subject to summary judgment. The claimant launched an appeal against this judgment, but the Court of Appeal held that when an adjudicator makes an error in calculating an amount payable to a party, the effect of which is to pay monies which are not due under the contract, that decision would not be void, provided the adjudicator had answered the issue that has been asked of him, in which case a mistake in answering that issue did not prevent the decision being enforceable.

Both judgments were given when adjudication was still a relatively new process. Interestingly, for statutory adjudication the ‘doctrine of unreviewable error of an adjudicator within jurisdiction’ is now known in the Technology and Construction Court (TCC). In the case of *Urang Commercial Ltd v Century Investments Ltd*,<sup>11</sup> Edwards-Stuart J referred to *Bouygues v Dahl-Jensen* and *Macob Civil Engineering Ltd v Morrison Construction Ltd* when stating that ‘it is now firmly established that an error of law or fact made by an adjudicator when deciding an issue referred to him is no defence to an application to enforce the award’.<sup>12</sup>

### 3 Types of dispute boards

There are several established types of DBs and within those types the powers granted to the dispute board can vary widely. The main types of dispute board are dispute review boards (DRBs) and dispute adjudication boards (DABs), collectively referred to as dispute boards or DBs. DBs comprise one or three (sometimes five) independent and impartial members who assist the parties of substantial projects in resolving disagreements arising in the course of the contract.<sup>13</sup>

#### 3.1 DRBs

Dispute review boards originate in the construction industry in the USA, and are still found predominantly in the USA. DRBs make non-binding recommendations about disputes arising during a project. The board takes in all the facts of a dispute and makes recommendations on the basis of those facts and its own expertise. A DRB could also be considered a flexible and informal advisory panel, who might be asked for general advice on any particular matter before issuing a recommendation.

#### 3.2 DABs

As adjudication developed in the 1990s, the World Bank and FIDIC opted for a binding dispute resolution process, and so the dispute adjudication board was born. DABs issue decisions which must be implemented immediately and are binding on the parties unless revised by an amicable settlement or arbitration.

The World Bank and a number of other multilateral development banks (MDBs) have for many years adopted the FIDIC Conditions of Contract for Construction, first edition 1999, as part of their standard bidding documents, which their borrowers or aid recipients had to follow, but they included additional clauses which were specific to and varied between the MDBs. This created inefficiencies

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<sup>11</sup> [2011] EWHC 1561 (TCC).

<sup>12</sup> [2011] EWHC 1561 (TCC), per Mr Justice Edwards-Stuart at 19.

<sup>13</sup> For an overview on dispute boards, see N Gould, ‘Establishing Dispute Boards: Selecting, Nominating and Appointing Board Members’ (A paper given at the Society of Construction Law International Conference in Singapore, 16–17 October 2006), <[www.scl.org.uk](http://www.scl.org.uk)>, 1–36.

and uncertainties amongst the users of the documents. The MDBs recognised this and together with FIDIC harmonised their tender documents, including their DB provisions, on an international basis.

A special MDB harmonised edition of the FIDIC 1999 Conditions of Contract for Construction for MDB-financed contracts was released in May 2005 ('the MDB Harmonised Construction Contract'). The third amended version of the MDB Harmonised Construction Contract was published by FIDIC in June 2010, which is the standard set of contract conditions adopted by the leading development banks.<sup>14</sup>

The MDB Harmonised Construction Contract was not intended to replace the standard FIDIC Conditions of Contract for Construction, first edition 1999, which is still available to all users.

### 3.3 DRB or DAB

The dispute board rules of the Chartered Institute of Arbitrators ('the CI Arb Rules') are based on two types of dispute board: dispute review boards (DRBs), and dispute adjudication boards (DABs).<sup>15</sup> It is up to the parties to elect which alternative they favour and incorporate the corresponding dispute board clause into their contract. The parties should then adapt the chosen clause to suit their needs and verify that it is enforceable under applicable law. The only difference arising from the parties' choice of a DRB or a DAB under the CI Arb Rules is that DRBs issue non-binding recommendations, whereas DABs issue binding decisions.

### 3.4 Combined Dispute Board

The International Chamber of Commerce (the ICC) gives parties a choice between three alternative types of dispute board, each distinguished by the type of conclusion it issues upon a formal referral: DRBs, DABs and combined dispute boards (CDBs).<sup>16</sup> The CDB procedure is a hybrid between the DRB and DAB. CDBs may prove useful for those parties who cannot decide if they need a DRB or a DAB, but the combination of DRBs and DABs into a CDB could make the dispute board procedure somewhat cumbersome.

CDBs issue recommendations with respect to disputes, but they may instead issue a (temporarily binding) decision if one party requests this and no other party objects thereto. Such a decision must be implemented immediately. If one party objects to the CDB issuing a binding decision, the CDB shall decide whether to issue a recommendation or decision. This leads to a period of uncertainty as to what type of determination (binding decision or non-binding recommendation) the CDB will issue.

## 4 Pro et contra

### 4.1 Benefits of dispute boards

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<sup>14</sup> <[http://fidic.org/MDB\\_Harmonised\\_Construction\\_Contract](http://fidic.org/MDB_Harmonised_Construction_Contract)> accessed 21 February 2017.

<<http://fidic.org/books/construction-contract-mdb-harmonised-ed-version-3-june-2010-harmonised-red-book>> accessed 21 February 2017.

The participating banks that currently have a licence from FIDIC to use the MDB Harmonised Construction Contract General Conditions are: the World Bank, African Development Bank (AfDB), Asian Development Bank (AsDB), Black Sea Trade and Development Bank (BSDB), Caribbean Development Bank (CDB), Council of Europe Development Bank (CEB), European Bank for Reconstruction and Development (EBRD), Inter-American Development Bank (IADB). See also M Entwistle, 'Dispute Boards Lay Strong Foundations: Infrastructure Projects' (CI Arb, August 2013), *The Resolver*, 12.

<sup>15</sup> Dispute Board Rules of the Chartered Institute of Arbitrators, in force as from August 2014.

<sup>16</sup> Dispute Board Rules of the International Chamber of Commerce, in force as from 1 October 2015 (the 'ICC Rules'). Article 6 of the ICC Rules defines a combination of DRBs and DABs as Combined Dispute Boards (CDBs).

Claim avoidance is clearly one of the positive attributes of dispute boards. Disputes are costly in time, money and reputation. The key characteristic that sets DBs apart from other non-court dispute procedures is that its establishment at the start of a project enables the board members to monitor the project's progress and be available as soon as the seeds of a dispute are sown. The early intervention of the DB before parties become entrenched in their positions may avoid the dispute altogether or lead to an early resolution while the project continues.

The revised Dispute Board Rules of the International Chamber of Commerce in force as from 1 October 2015 (the 'ICC Rules') emphasise the importance of dispute avoidance and spell out the three basic functions of dispute boards: (1) If the DB perceives a potential disagreement, the DB may encourage the parties to overcome it on their own;<sup>17</sup> (2) If the parties are unable to avoid a disagreement, the DB may provide informal assistance in order to resolve it, by having a conversation with the parties or by giving any other form of assistance;<sup>18</sup> (3) If a party formally refers a disagreement to the DB for a conclusion, the disagreement becomes a formal dispute and the DB shall issue a recommendation or decision, as the case may be.<sup>19</sup>

The CIArb Rules spell out the importance of dispute avoidance and informal advice in Article 12:

**Article 12**  
**Informal Advice**

*1 The true mission of a Dispute Board is not judicial; rather it is to prevent formal Disputes. The Parties may at any time jointly refer a matter or Dispute to the DB for it to give an informal advisory opinion as a means of Dispute avoidance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. The DB may provide the requested advisory opinion during a conversation with the Parties, during any meeting or site visit in the presence of both Parties or in a written note to the Parties, or, with the prior agreement of the Parties, provide informal assistance to resolve a disagreement in any other form. The Parties are not bound to act upon any advice given during the informal assistance process.*

*2 The DB may on its own initiative raise an issue with the Parties in order to establish a dialogue between them and to clarify matters in the presence of the DB. The Parties have the right to stop the DB's initiative if they regard it as unnecessary, provided that they notify the DB promptly, jointly and in writing.*

*3 If the DB is later called upon to make a Determination concerning a matter with respect to which it has provided an informal advisory opinion, the DB shall not be bound by any views expressed in such verbal or written advisory opinion.*

Parties are less likely to adopt extreme positions in order to keep credibility with the DB members, and also in view of the possibility that the dispute board's determinations are admissible as evidence in case of arbitration or court proceedings. This reduces legal fees.

The resolution of disputes in 'real time' provides the DB with the benefit of seeing the project work as it progresses and hearing from those involved in the works while matters are fresh in their memory. Another benefit of a DB is the resolution of disputes in manageable packages. It is unlikely (albeit not impossible) that a referral to a dispute board contains the entirety of the issues arising between the parties during a project. The ongoing dispute resolution by a DB usually minimises the aggregation of claims.

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<sup>17</sup> See Article 16 of the ICC Rules.

<sup>18</sup> See Article 17 of the ICC Rules.

<sup>19</sup> See Article 18 of the ICC Rules.

It also saves goodwill: the early resolution of disagreements or disputes by a readily available DB is much more cost-effective and less acrimonious than arbitration or litigation and helps to maintain the parties' relationships.

The great benefit of using a standing dispute board is that its members may be called upon as soon as a problem arises and help the parties resolve their differences before they become polarised in their views. The dispute board encourages the parties to solve their own problems, creating an atmosphere where the parties communicate and have recourse to the advisory role of the board. Resolving conflicts at an early stage, or even before they arise, is an obvious benefit that greatly reduces costs and loss of productive time.

This benefit may well be lost if the DB is only established because a dispute has arisen after the work has commenced or has even been completed. Once the work is completed, the DB will be no more familiar with the project or the individuals involved than an arbitration tribunal. It might then be more appropriate to refer the dispute to a final dispute resolution process such as arbitration.

## 4.2 Disadvantages of dispute boards

The cost of a DB is an understandable concern. DB members are remunerated throughout the project, usually by way of a monthly retainer which is supplemented with a daily fee covering the time spent for activities such as travel, attending hearings, meetings and site visits, and producing written recommendations or decisions. The monthly retainer is paid to secure the availability and independence of the DB members, but may give the impression to parties that they are paying considerable amounts, while the DB members may have comparatively little work for part or even the entire project.

It requires time and effort early on to establish a dispute board. Finding and jointly appointing the right board for the project requires that the parties work together and want a dispute board.

An example of why it is *claimed* that DB's do not work is the following typical development bank scenario. The World Bank awards a loan of US\$ 100 million to a country to rebuild its infrastructure. The contract requires that a DB be appointed by the parties at the start of the project and before construction begins. The employer fails to comply. The lenders do not enforce the terms of their contract because the employer told them that a dispute board would be costly. The contractor does not insist on a DB until a dispute gets out of control. If the contractor then goes to the appointing body because the employer refuses to participate in establishing a dispute board, this delays the process considerably.

The use of monthly retainers has been a major deterrent to the adoption and use of dispute boards, especially in developing countries. The principal objection of borrowers from multilateral development banks (MDBs) is the cost of boards, regardless of the size of the project.

There seems to be reluctance in many countries to accept a technique which results in a binding decision, subject only to arbitration (or in some cases, litigation). A consultative and advisory procedure similar to the rules of the Dispute Resolution Board Foundation (DRBF),<sup>20</sup> where the board is not required to give legally binding decisions, might be more suitable in such cases.

Surprising as it may seem, DRBs issuing non-binding recommendations have been extremely successful in the USA since they were created about 25 years ago to ease the construction of projects involving international parties from different jurisdictions and differing standards of practice. People

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<sup>20</sup> Formerly known as Dispute Review Board Foundation.

who are used to working with FIDIC contracts, which require binding decisions from adjudicators, might however be less inclined to use a set of rules based solely on non-binding recommendations. A set of dispute board rules that gives parties the choice between dispute review boards and dispute adjudication boards should be more suitable in such cases.

## 5 The use of dispute boards

It is not surprising that disputes arise in the construction and engineering industry. The size and complexity of projects, the number of participants, environmental regulations, lower profit margins, the use of detailed standard and non-standard contracts, and a confrontational approach of parties with different objectives all contribute to generate disagreements. The use of dispute boards in the construction industry has, over many years, significantly contributed to the avoidance and early resolution of disputes.

The need for prompt, cost-effective and impartial dispute resolution exists in many contractual relationships in several industries and on a wide range of commercial projects. Dispute boards have their origins in the construction industry, but the scope for DBs is far wider. DBs have been used in the following industries:

- The financial services industry (and project finance)
- Concession contracts<sup>21</sup>
- Operational and maintenance contracts
- Information technology (IT) projects
- Manufacturing: clothing
- Intellectual property agreements
- Process plant: brewing
- PPP projects: roads, hospitals, railways
- Aerospace procurement
- Insurance contracts
- The maritime industry (particularly shipbuilding)
- Telecommunications
- Film and TV production.

The ICC Rules and the CIArb Rules are not industry specific and can be adapted for any type of project. The ICC Rules and the CIArb Rules respectively are each one set of stand-alone dispute board rules that can be used in any commercial or construction contract by the incorporation of a short

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<sup>21</sup> In a typical concession contract, the concession-granting authority is a government, the concession is awarded for a limited but potentially renewable period, during which the concessionaire (private partner) enjoys the exclusive right to use the (public) asset. The concessionaire is responsible for all investments in the asset and developing new facilities, under supervision of the state or regulator. The concessionaire is remunerated in accordance with agreed tariffs collected directly from users.

precedent dispute board clause. If the parties incorporate one clause into their contract then, by reference, the entire dispute board conditions, procedure and dispute board members are incorporated. The purpose of this approach is to allow a party to drive the dispute board procedure forward to a hopefully enforceable conclusion.

By contrast, the FIDIC dispute board rules are included in the FIDIC Conditions of Contract for Construction, first edition 1999, which is widely used by the construction industry globally, including the World Bank and MDBs in the form of the harmonised edition of FIDIC 1999 Conditions of Contract for Construction for MDB-financed contracts.<sup>22</sup>

The FIDIC dispute board rules allow parties to use either standing or ad hoc DABs, which are empowered to make binding decisions. The parties are required jointly to appoint either one or three DAB members by the date stated in the contract. However, there is no provision for what is to happen where the contract is silent on the date for appointment of the DAB.

If dispute boards are set up at the outset of a contract and remain in place throughout its duration (standing dispute boards), the dispute board members will be familiar with the contract and its performance, and also be acquainted with the parties, making the board an effective dispute resolution mechanism with ‘real-time’ value. Ideally, the dispute board members become part of the project team and are trusted to be fair and impartial, so that their advice will be readily accepted by all parties. Dispute boards generally succeed without the parties requiring recourse to arbitration or litigation. With a dispute board in place, it appears that parties are less inclined to adopt an adversarial attitude and will make an effort to resolve potential disputes.

## **6 Differences between FIDIC contracts**

### **6.1 FIDIC dispute adjudication boards**

The dispute adjudication boards (DABs) appointed under FIDIC contracts have jurisdiction for all disputes arising out of the contract or in connection with the contract. DABs may typically open up, review and revise any certificate, determination, instruction, opinion or valuation of the engineer (the Red and Yellow Books) or Employer’s Representative (the Silver and Gold Books).

### **6.2 FIDIC Conditions of Contracts for Construction (‘the Red Book’)**

The Red Book provides a permanent DAB, which is appointed at the start of a project. The main feature of the permanent DAB is that it maintains familiarity with the project. This includes periodic site visits throughout the project and making provisionally binding decisions if any disputes arise. Sub-clause 20.2 of the Red Book says that the DAB shall be jointly appointed by the date stated in the Appendix to Tender and if at any time the parties agree, they may jointly refer a matter to the DAB ‘for it to give its opinion’.

### **6.3 Yellow Book and Silver Book**

FIDIC Conditions of Contract for Plant and Design Build (‘the Yellow Book’) and FIDIC Conditions of Contract for EPC/Turnkey Projects (‘the Silver Book’) provide an ad hoc DAB. The difference between them is that the Yellow Book refers to the engineer, whereas the Silver Book refers only to the Employer’s Representative, and not to an engineer.

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<sup>22</sup> <[http://fidic.org/MDB\\_Harmonised\\_Construction\\_Contract](http://fidic.org/MDB_Harmonised_Construction_Contract)> accessed 21 February 2017.

Sub-clause 20.2 of the Yellow Book says that the DAB shall be jointly appointed no later than 28 days after a party gives notice of its intention to refer a dispute to the DAB in accordance with sub-clause 20.4; the appointment expires when the DAB has given its decision, unless other disputes have been referred to the DAB before that decision is given. The Silver Book also provides that the DAB is appointed only after a dispute has arisen.

In 1999 the ad hoc concept was preferred because the Contracts Committee and the Task Group believed at the time that under a design and build contract the parties would prefer having separate and individual experts for civil works, mechanical or electrical works or for the design on a case-by-case basis. However, this concept implies the risk of contradicting decisions and fails to use dispute avoidance techniques. FIDIC is now more inclined to suggest permanent DABs for design and build projects as the advantages of dispute avoidance practices and services provided by permanent DABs have become more apparent.<sup>23</sup>

Interestingly, the Guidance for the Preparation of Particular Conditions for both the Red and the Yellow Books says that, as an alternative, the engineer may act in place of the DAB, and offers suggested wording for such a clause. If the engineer is empowered in this way, the Particular Conditions make it clear that the engineer must act impartially, notwithstanding that the engineer generally acts for the employer.

The Yellow and Silver Books incorporate similar provisions, modified to provide for an ad hoc DAB which is appointed after a dispute has been notified. However, FIDIC has emphasised that the inclusion of the full-term DB in the Red Book and the ad hoc in the Yellow and Silver Books does not mean that they are suitable for these contracts. The decision for a full-term or ad hoc DAB must be made in relation to the needs of the particular project and it can be argued that a design and build project may require a standing DAB during the design phase.<sup>24</sup>

## 6.4 The Gold Book

FIDIC Conditions of Contract for Design, Build and Operate Projects ('the Gold Book') is used less often than the more popular Red, Yellow and Silver Books. The Gold Book was published by FIDIC in 2008 and gave the FIDIC drafting team an opportunity for revision and improvement of the Red, Yellow and Silver 1999 forms. The Gold Book is intended for use where the employer plans on employing a single contractor to design, build and subsequently operate a construction project for a considerable period of time (usually 20 years), and where the contractor has no responsibility for the financing or ultimate financial success of the project.

The Gold Book shows a new trend in providing a standing DAB. The Gold Book envisions the DAB to be appointed for the duration of the design and build period. The allowance made by this provision creates a situation similar to what may already take place under other contract forms where a standing DAB is appointed, for example in situations where non-binding advice is sought from the DAB members during DAB site visits or discussions.

FIDIC Gold Book sub-clause 20.5 brings into the contract the concept of what can be compared to a non-binding recommendation by a dispute review board that may or may not be adopted by the parties. The Gold Book differs from other contracts in that it has a new sub-clause 20.1(a) which gives the dispute board an element of discretion:

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<sup>23</sup> Dr Götz Sebastian Hök, 'FIDIC/ MDB Approach in Respect of Dispute Adjudication Boards' <<http://fidic.org/sites/default/files/FIDIC%20MDB%20Approach%20in%20respect%20of%20Dispute%20Adjudication%20Boards.pdf>> accessed 1 April 2017.

<sup>24</sup> G Owen and B Totterdill, *Dispute Boards: Procedures and Practice* (Thomas Telford Ltd 2008), 18.

*However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both parties accordingly.*

Sub-clause 20.1(a) of the Gold Book enables a contractor to submit to the DAB the details of any circumstances which may justify the late submission of a claim. The clause provides that if the DAB considers that the circumstances are such that the late submission was ‘acceptable’, then the DB may override the condition precedent. However, as no definition of ‘acceptable’ has been given, a contractor is still advised to operate as if the 28-day limit strictly applies.

## 7 Dispute board members

### 7.1 Selection and appointment procedure

The provisions requiring the establishment of a DB must be contained in the contract between the parties. The process of establishing a DB is challenging. Identifying, agreeing upon and appointing individuals with the appropriate skills and experience can be difficult and time-consuming. In an ideal world, the parties would agree upon all three DB members. This rarely happens in practice.

There are three recognised ways to select the final board members:

- **The parties jointly select all three members of the DB.** The parties will most likely exchange lists and CVs and then agree which of the nominations will be selected for appointment. There are advantages in allowing the panel of three to decide who is to be the chair. If the DB is unable easily to agree upon its chair, then it is highly unlikely that the board will be able to resolve difficult disputes during the course of the project.
- **Each party nominates a member for approval by the other parties.** The two appointed members will then nominate the third member, who requires the approval of the parties and will usually serve as chairperson. This method appears to be the most frequently used (see FIDIC clause 20.2 and Article 6 (3) CI Arb Rules).
- **Each party proposes a list of prospective board members,** containing a minimum of three prospective board members, and then selects from the other party’s list. The two selected board members will nominate the third board member, who will usually be the chair, subject to the approval of both parties.

In view of the importance of establishing a DB at the start of a contract, it is advisable that the dispute board rules include a default appointment mechanism if the parties cannot agree on some or all of the board members.<sup>25</sup>

FIDIC’s 1999 edition of the Red, Yellow and Silver Book contracts provides at sub-clause 20.3 for the appointment of a DAB member as follows:

*If any of the following conditions apply, namely:*

- *the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,*

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<sup>25</sup> FIDIC, ICC and ICE Rules all specify default procedures if the parties fail to appoint the DB by a certain date. The AAA Rules set out a default procedure for single-member boards in limited circumstances only. In contrast, the DRBF Rules do *not* include rules for the default appointment of DB members.

- *either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,*
- *the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or*
- *the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,*

*then the appointing entity or official named ... shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.*

Dr Nael Bunni in the FIDIC Forms of Contract refers to commentators having expressed the view that those words should be interpreted as a consultation appropriate to the circumstances. Similarly, in relation to the appointment of a DAB member by an appointing entity or official under the 1999 editions of the Red, Yellow and Silver Books, Dr Bunni opines that it means ‘consultation with both parties to the extent required by the nature of the difficulty encountered’.<sup>26</sup>

In ICC Case 16262, the contractor alleged that the appointment of a sole DAB member was void as (among other reasons) the appointing authority had not informed the parties of the person it was considering appointing, nor invited comments before deciding whether to confirm the appointment. The arbitral tribunal found that the appointing authority was not expected to discuss with the parties the identity of possible appointees and concluded that there had been sufficient consultation with the parties prior to the appointment without such identification.<sup>27</sup>

Another issue that arises quite frequently is whether a DAB can be validly constituted and render valid decisions even though one of the parties has not participated in the constitution of the DAB or signed the dispute adjudication agreement (DAA). In ICC Case 15956, relating to a Red Book contract, the tribunal found that the DAB had been validly constituted and could render valid decisions even though the employer never signed the DAA.

The same issue also arose in ICC Case 165705 relating to a Yellow Book contract. Here, the tribunal seemed to accept that a DAB could be constituted by the contractor alone. However, the issue was not finally resolved by the tribunal as it found that an ad hoc DAB had been constituted erroneously instead of the permanent DAB foreseen in the contract and, consequently, it had no jurisdiction to decide the disputes referred to it.<sup>28</sup>

Another question as to whether a DAB is ‘in place’ arises within the meaning of FIDIC sub-clause 20.8. In ICC Case 16262 the tribunal found that these words mean ‘validly appointed’ and that they do not mean that it is necessary for a dispute adjudication agreement between the parties and the DAB to have been executed. Consequently, the arbitration tribunal found that it had no jurisdiction since the contractor had failed to refer its disputes to the DAB before commencing arbitration. On the other hand, in ICC Case 18505 the sole arbitrator found that a DAB could not be ‘in place’ where the DAA

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<sup>26</sup> Dr Nael Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing 2005), 616–617.

<sup>27</sup> Christopher R Seppälä, ‘Commentary on Recent ICC Arbitral Awards Dealing with Dispute Adjudication Boards under FIDIC Contracts’, p.11, *The International Construction Law Review* [2016].

<sup>28</sup> Christopher R Seppälä, ‘Commentary on Recent ICC Arbitral Awards Dealing with Dispute Adjudication Boards under FIDIC Contracts’, 12, *The International Construction Law Review* [2016].

had not been signed and, consequently, the contractor was allowed to go directly to arbitration pursuant to sub-clause 20.8.<sup>29</sup>

By way of another example of a default appointment mechanism, Article 6 of the CIArb Rules states that the dispute board must be established by the date stated in the contract or, where the contract is silent, within 28 days of the effective date of the contract. If the parties fail to establish a DB in accordance with Article 6, then the CIArb shall, after due consultation with the parties, appoint the DB member(s) within 28 days of the written request of one or both parties. The CIArb's appointment is final and conclusive, and subject to payment of an appropriate fee.

Parties may include an explanation as to why they propose an individual as dispute board member. Rather than just giving a name, a party may give a summary of the person's expertise and explain why he/she would be suitable as board member for this project.

The usual provisions require the parties to agree the identity of the DB within a limited time, and also contain a procedure for replacing board members. The replacing procedure is the same as the original appointment of board members under the rules of AAA, DRBF, FIDIC, ICC, CIArb and ICE.

## 7.2 Qualifications and obligations

The key qualifications any DB member should have are:

- Impartiality and independence
- Good people skills
- Qualifications and experience relevant to the circumstances.

### 7.2.1 Impartiality and independence

The question of whether a DB candidate is 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*.<sup>30</sup> The key question was not whether two councillors were in fact biased, but whether the decision, at the time the decision-maker gave it, was 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.

In practice this means that the decision-maker must be seen to be impartial at the time when the decision is made. Impartiality and the perception of bias are subjective in nature. Whether an individual is or is not biased is something that only that individual can truly know. An outside observer (such as the parties or a judge) attempts to measure if the person is or is not biased, not by the actions of the person but by reference to the fictitious neutral observer.

Therefore, a DB must maintain impartiality and must also be seen to be acting impartially.

In contrast to the aspect of impartiality, the obligation of independence is objective. If there is a financial or personal tie between one of the parties and the DB member, then the DB member is clearly not independent of the project.

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<sup>29</sup> Christopher R Seppälä, 'Commentary on Recent ICC Arbitral Awards Dealing with Dispute Adjudication Boards under FIFIC Contracts', 12, *The International Construction Law Review* [2016].

<sup>30</sup> *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

## 7.2.2 People skills

Good interpersonal skills are essential for any board member and should include management, language and communication skills. It is helpful if the parties coordinate their selection of DB members and chair in such a way as to provide the maximum of appropriate skills for the project.

## 7.2.3 Qualifications and experience relevant to the circumstances

Having expertise in the particular type of work or services to be performed under the contract is certainly very helpful. However, the parties might agree that general background knowledge in the field of the project is sufficient because a DB candidate is known for his/her excellent people skills, which the parties may value above the other qualifications.

Experience in dispute resolution, particularly experience in making decisions, and experience in adjudication and arbitration and knowledge of the difference between those procedures and litigation would also be most useful.

Although the dispute board process is less formal than litigation and possibly arbitration, it is important for the DB member to have knowledge of the basic legal principles, particularly of natural justice, contract law, contract interpretation and the ability to write an enforceable decision. In a three-person dispute board it is useful to have at least one member with legal knowledge.

The DB member's key obligations include:

- Disclosure of conflicts
- Availability
- Confidentiality.

**Disclosure of conflicts:** DB members must remain without any conflicts of interest and disclose any facts or circumstances which in the eyes of the parties may give rise to justifiable doubts as to the member's impartiality or independence.

Disclosure of any relationship, no matter how minor, may give one party the opportunity to deny the other party their choice of DB member, even when there is no conflict of interest. The IBA Working Group developed the IBA Guidelines on Conflicts of Interest in International Arbitration ('the IBA Guidelines') and believes that greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that do or do not warrant disclosure or disqualification of an arbitrator.<sup>31</sup> Part II of the IBA Guidelines contains comprehensive lists of many situations and circumstances which, depending on the facts of a given case, can give rise to justifiable doubts as to the arbitrator's impartiality and independence.<sup>32</sup>

The IBA Guidelines emphasise that disclosure is not an admission of a conflict of interest:

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<sup>31</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004 by the Council of the International Bar Association, page 4.

<sup>32</sup> Part I of the IBA Guidelines sets out the General Standards regarding impartiality, independence and disclosure. Part II of the IBA Guidelines provides a guide on the practical application of the General Standards in the form of four types of lists: the Non-Waivable Red List, the Waivable Red List, the Orange List and the Green List.

*An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination or resigned.*<sup>33</sup>

The IBA Working Group believes that:

*non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.*<sup>34</sup>

The obligations of dispute board members and arbitrators with regard to neutrality, impartiality and disclosure are so similar that the IBA Guidelines should be considered in this context.

**Availability:** The DB members should be sufficiently available for the duration of the project. Many like the idea of being a DB member, but just how practical will it be for you to fit appointments in and around your normal work? Appointments arise in an ad hoc fashion, and may require a quick response.

**Confidentiality:** DB members are usually required to treat the details of the contracts as confidential and to keep the information obtained during the process confidential, and use such information only for the purposes of the DB's activities.

### 7.3 Remuneration of DB members

Payment of DB members is shared equally between the parties under all the existing dispute board rules, usually providing that all DB members receive the same monthly retainer and the same daily fee for work performed. The fees that are payable to the DB are to be agreed between the parties and the DB members and are usually set out in the tripartite agreement between the parties and the DB members.

Under the ICC Rules, the retainer is called 'monthly management fee' and covers the following:

- being available to attend DB meetings and site visits;
- 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.<sup>35</sup>

Unless otherwise agreed, the monthly management fee under Article 29(2) of the ICC Rules shall be equal to three times the daily fee set out in the DB member agreements.

The use of monthly retainers has been a major deterrent to the adoption and use of dispute boards, especially in developing countries. Parties frequently object to the cost of retainers, stating that the dispute board should be paid for actual work carried out, regardless of the size of the project.

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<sup>33</sup> IBA Guidelines, Part I, Explanation to General Standard 3, paragraph (b).

<sup>34</sup> IBA Guidelines, Part II, paragraph 5.

<sup>35</sup> Article 29, ICC Rules.

The CI Arb Rules and tripartite agreement take this into account and give users the choice between two alternatives of remuneration (Alternative 1 and Alternative 2): the dispute board member will be paid a monthly retainer fee plus a daily fee as per Alternative 1, whereas Alternative 2 provides that payment to the dispute board member shall only be for actual work carried out plus expenses (system of billing for time spent).

## **7.4 Removal or replacement of DB members**

### **7.4.1 Removal of a board member**

The contract between the parties and the three-party agreement should contain provisions on how to remove a board member if that becomes necessary. Occasionally there is a dysfunctional board with one or more DB members not performing their job properly or causing trouble, concealing bias, or lacking the required expertise. The removal of a board member is never easy. The situation is particularly difficult if there is no appointing body and only one party seeks removal of a DB member. A DB member cannot be removed unilaterally unless the parties have added provisions to that effect in the underlying contract and in the dispute board member agreement.

The DB rules and tripartite agreements of FIDIC, ICC, CI Arb, American Arbitration Association and ICE all provide that the contract with a dispute board member can only be terminated by mutual agreement of the parties.

### **7.4.2 Replacement of a board member**

A DB member might need to be replaced as a result of death, disability, termination or resignation. The parties should replace the board member by agreement. If the parties cannot agree, a new DB member should be nominated by the appointing entity, if existent. The new DB member shall be appointed in the same manner as the board member being replaced, unless otherwise agreed by the parties. All actions taken by the dispute board prior to the replacement of a board member remain valid.

## **8 Referral of disputes to a dispute board**

### **8.1 Preconditions for referral**

The preconditions for referral to a DB vary. Under the AAA Rules either party may refer a dispute to the DB if it believes negotiations are unlikely to succeed and if any contractual pre-review requirements have been met.<sup>36</sup> Preconditions for referral to a DB under the DRBF Rules are: (1) prior good-faith negotiations between the owner and the contractor to settle the dispute; (2) compliance with prior dispute resolution process as per contract; and (3) passage of a reasonable period of time without progress toward a negotiated settlement.<sup>37</sup> The ICC Rules do not stipulate preconditions for referral, but allow either party to refer a dispute to the DB, or settle it with or without the assistance of the DB, at any time.<sup>38</sup>

FIDIC clause 20.4 deals with the referral of a dispute to the DAB and the binding nature of the DAB's decision.<sup>39</sup> Under the FIDIC Rules, the mechanics of the project's contract have to be exhausted before a matter is referred to the DAB. For example, under the FIDIC contract there are many possible claims that could be made, but if a claim has been made but not rejected, there is no dispute.

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<sup>36</sup> AAA Dispute Resolution Board Guide Specifications, clause 1.04.B.

<sup>37</sup> Articles 6.A, 6.B.2 and 6.B.3, Appendix 2, Guide Specifications.

<sup>38</sup> Article 17, ICC Rules.

<sup>39</sup> FIDIC clauses referred to herein are clauses of the FIDIC Red Book: *FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer* (1st edn, Thomas Telford 1999).

Under the FIDIC Rules the existence of a dispute is a precondition for referral to the DAB if either party seeks a binding decision. However, the parties may at any time agree jointly to refer a matter to the DAB for an opinion, even if the issue has not matured into a dispute.<sup>40</sup>

The definition of ‘dispute’ in the CI Arb Rules is wide and means ‘a disagreement (of any kind whatsoever) between the Parties arising out of, under or in connection with the Contract’. The parties remain free to settle the dispute at any time, with or without the DB’s assistance, as per Article 13(5) CI Arb Rules. Referral to a dispute board under the CI Arb Rules happens as follows:

### **Article 13**

#### ***Referral to a Dispute Board***

*1 The Parties shall comply with any contractual pre-review requirements or prior dispute resolution process as provided for by the Contract, as applicable.*

*2 If a Dispute arises, either Party may at any time give notice of its intention to refer the Dispute to the DB by submitting a Position Statement to the other Party or Parties and simultaneously to the DB. The Position Statement shall include a summary of the Dispute, a list of the issues submitted to the DB for a Recommendation or Decision, depending on whether the Parties have chosen a DRB or DAB, and the referring Party’s position thereon together with the redress sought, and any evidence supporting the referring Party’s position.*

*3 The other Party shall submit a Response to the referring Party and the DB within 28 days of receiving the Position Statement. The Response shall include a summary of the responding Party’s position with respect to the Dispute, any evidence supporting the responding Party’s position, and a statement of what the responding Party requests the DB to determine.*

*4 Subject to the DB granting permission, the referring Party may reply to the Response in writing within 14 days of receiving the Response by submitting such reply to the other Party or Parties and simultaneously to the DB.*

*5 The Parties remain free to settle the Dispute at any time, with or without the DB’s assistance.*

## **8.2 Jurisdiction of a dispute board**

The jurisdiction of the DB arises under the contract and in respect of the dispute. The referral establishes the matters in dispute. The DB must consider all of the matters in dispute as set out in the referral and issue a reasoned decision addressing all such matters (and nothing further).

## **8.3 Time limits**

The dispute board must issue its decision within the period agreed between the parties. Under the FIDIC Rules the binding decision is due within 84 days of the referral being received by the DAB.<sup>41</sup> The ICE Rules stipulate the same due date.<sup>42</sup> The CI Arb Rules also adopted the 84-day time limit.<sup>43</sup> Article 15(2) of the CI Arb Rules reads:

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<sup>40</sup> FIDIC, *General Conditions of Contract for Construction* (1999), clauses 20.2 and 20.4.

<sup>41</sup> FIDIC Rules, clause 20.4.

<sup>42</sup> ICE Rule 4.5, Procedure One: Reasoned and binding decision due within 84 days of referral being received by DB/chairman. Time may be extended if parties agree.

<sup>43</sup> CI Arb Dispute Board Rules (August 2014) <<http://www.ciarb.org/docs/default-source/ciarbdocuments/das/ciarb-dispute-board-rules-practice-amp-standards-committee-august-2014.pdf?sfvrsn=2>>

*Within 84 days of the DB receiving the Position Statement, the DB shall issue its Determination, which shall state the DB's findings and the reasons upon which they are based.*

Under the ICC Rules, the reasoned determination is due within 90 days of the statement of case being received by the chairman.<sup>44</sup> Under the AAA Rules, the DB's recommendation is due within 14 days of hearings.<sup>45</sup> The DRBF Rules do not specify a due date, but state that the DB recommendations shall be issued as soon as possible after the hearing.<sup>46</sup>

The effect of an adjudicator's decision given outside the agreed time frame has been the subject of a number of different judgments of the English and Scottish courts. In *Ritchie Brothers plc v David Phillip Commercials Ltd*,<sup>47</sup> it was held that the 28-day limit meant what it said. The Scottish court held that an adjudicator's decision that was provided one day after the expiry of the 28-day time period was a nullity.

The judgments in *Epping Electrical Co v Briggs & Forrester* and *Aveat Heating Ltd v Jerran Faulkus Construction Ltd* confirmed that adjudication decisions given outside the 28-day time limit are not valid.<sup>48</sup> The arbitral tribunal in ICC Case 10619 adopted the same mandatory approach with regard to time limits for the service of an engineer's decision under the FIDIC Red Book.

All the dispute board rules referred to in this chapter allow for the respective time limits to be extended if the parties agree. However, there does not appear to be a mechanism under any of the rules that allows the parties to shorten the time limit to suit their business needs. In some cases, 84 days or 90 days might be too long.

## 9 Enforcement of DAB decisions

The enforcement of DAB decisions is not necessarily a simple matter under FIDIC contracts.<sup>49</sup> Under clause 20.4 of the FIDIC Red Book, a DAB decision is *temporarily binding* on both parties if a valid notice of dissatisfaction ('NOD') has been given by either party, and it is *final and binding* in the absence of a valid NOD. The parties must give effect to the DAB's decision promptly. The timely service of a NOD is a condition precedent to arbitration under clause 20.6.<sup>50</sup>

The interpretations of FIDIC clauses 20.4, 20.6 and 20.7, and in particular the implications of a NOD, lead to jurisdictional pitfalls and enforcement difficulties, which may prevent a winning party from obtaining in arbitration the amounts awarded by the DAB.<sup>51</sup> A separate chapter in this book addresses the enforcement of dispute board decisions in further detail.

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<sup>44</sup> ICC Rules, Article 20 (1).

<sup>45</sup> AAA Rules, clause 1.04.1.

<sup>46</sup> DRBF Rules, Article G.1., Appendix 2A.

<sup>47</sup> See the judgment of the Scottish Inner House of the Court of Session, [2005] Scot CSIH 32.

<sup>48</sup> His Honour Judge Havery QC considered that it would be undesirable for the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA 1996') to be interpreted in different ways in England and Scotland, and he therefore followed the decision of *Ritchie Brothers*; see [2007] EWHC 4 and [2007] EWHC 131.

<sup>49</sup> See N Gould, 'Enforcing a Dispute Board's Decision: Issues and Considerations' (2012), *International Construction Law Review*, 442–478. See also Fred Gillion, 'Enforcement of DAB Decisions' (October 2011), *International Construction Law Review*. A summary of this article can be found in the Fenwick Elliott Annual Review 2011/2012 at <www.fenwickelliott.com>

<sup>50</sup> Clause 20.4, paragraph 6 states that 'neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause'.

<sup>51</sup> The decisions from the High Court and the Court of Appeal of Singapore in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* ('the Singapore case') sent a confusing message to parties dealing with the FIDIC form of contract. A thorough analysis of the High Court decision shows that the Singapore Court seems to have been misguided in its interpretation of sub-clauses 20.6 and 20.7. There is nothing in the FIDIC Conditions that would prevent a winning party from referring to arbitration simply the issue of the other party's failure to comply with a DAB decision, as a second dispute, without having to refer also the underlying dispute.

## 10 The DAB as a gateway to arbitration

### 10.1 DAB procedures are mandatory

Normally, if parties agree a particular method for dispute resolution, the courts are likely to intervene in the event that one party opts to ignore the specified procedure and issues court proceedings without following the agreed procedure. There are English and Swiss court decisions on that topic, but the circumstances of the cases were very different. However, both the English and the Swiss courts emphasised that DAB procedures must be treated as mandatory.

### 10.2 FIDIC drafting

The FIDIC contracts do not define what is meant by the word dispute; instead, they merely state, at sub-clause 20.4:

*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 the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer.*

FIDIC contracts, at clause 20, provide for disputes to be resolved by the DAB prior to commencing arbitration proceedings. Therefore disputes arising out of FIDIC contracts rarely come before the courts. Sub-clause 20.6 states:

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

- (i) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,*
- (ii) The dispute shall be settled by three arbitrators appointed in accordance with these Rules, and*
- (iii) The arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4.*

### 10.3 Peterborough City Council v Enterprise Managed Services Ltd

The English case of *Peterborough City Council v Enterprise Managed Services Ltd*<sup>52</sup> has clarified important provisions in the FIDIC Silver Book which favour the use of DABs as a first point of call when a dispute arises. The courts should only be used if contractually agreed methods are exhausted or would otherwise have failed.

Edwards-Stuart J upheld the defendant's application for a stay to the litigation because the contract required 'any dispute to be referred to adjudication by a Dispute Adjudication Board ("DAB"), in this case consisting of a sole adjudicator, as a precondition of any action in the courts'. The Technology and Construction Court (TCC) confirmed that referral of a dispute to a FIDIC DAB is mandatory and a condition precedent to the referral of a dispute to litigation for final determination. This case also highlighted the question of whether there is a 'gap'<sup>53</sup> in clause 20 of the FIDIC conditions where arbitration is chosen as the final method of dispute resolution.

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<sup>52</sup> [2014] EWHC 3193 (TCC) (10 October 2014).

<sup>53</sup> [2014] EWHC 3193 (TCC) (10 October 2014), per Edwards-Stuart J at 24.

Edwards-Stuart J agreed with Peterborough City Council's — the claimant's — assertion that for a DAB to be in place there must be a DAB empowered to resolve a dispute, but considered that in the absence of agreement between the parties and the adjudicator, the Dispute Adjudication Agreement (DAA) would be in the form provided within the Appendix to the Conditions, which is incorporated by reference into the DAA.

Further, Edwards-Stuart J rejected the claimant's submission 'that Sub-Clause 20.8 gives a unilateral right to opt-out of the adjudication process, save in a case where at the outset the parties have agreed to appoint a standing DAB and that, by the time when the dispute arose, that DAB had ceased to be in place, for whatever reason'. The judge also dismissed the submission that the contract adjudication provisions were unenforceable.

Accordingly, Edwards-Stuart J accepted that the determination of the dispute between the parties was to be by way of adjudication and amicable settlement pursuant to sub-clauses 20.4 and 20.5 and, only failing that, by litigation (the arbitration provisions having been removed). Consequently, Edwards-Stuart J held that: 'the action must be stayed and the parties left to resolve their dispute in accordance with the contractual machinery'.

Edwards-Stuart J decided to uphold the defendant's application for a stay to the litigation because the contract required 'any dispute to be referred to adjudication by a Dispute Adjudication Board ("DAB"), in this case consisting of a sole adjudicator, as a precondition of any action in the courts'. In that matter the arbitration provisions had been removed from the wording of the contract.

## 10.4 The Swiss judgment

The TCC's decision comes shortly after a 2014 case heard by the Swiss Federal Supreme Court (case no. 4A\_124/2014).<sup>54</sup> In the Swiss judgment, the question of whether the DB procedure was mandatory also arose, but in circumstances where the arbitration provisions applied.

The Swiss court held that the use of the DAB procedure is mandatory and a precondition for any entitlement to refer a dispute to arbitration, but that FIDIC clause 20 permits some exceptions to this requirement in accordance with the principle of good faith.

The employer — who sought to assert that the DAB procedure was mandatory — had contributed to the substantial delay in the DAB procedure being implemented, thus the Swiss court decided that it would be contrary to the principles of good faith to allow the employer to insist on the DAB procedure being a mandatory prerequisite for referring the dispute to arbitration. These arguments were not raised in the English case. Given the lack of any underlying principle of good faith in English law, were these arguments to come before the TCC, they would probably be rejected, but the DAB provisions would be held to be mandatory irrespective of any issues of good faith.

Cases published by the ICC are consistent with decisions of the English and Swiss courts. In ICC case 14431 the arbitral tribunal noted that the words 'shall' in the first paragraph of sub-clause 20.2 and 'may' in the first paragraph of FIDIC sub-clause 20.4 are contradictory, as the former seems to point to the mandatory nature of the DAB while the latter presents it as an option.

However, there is no contradiction. Use of the word 'shall' in sub-clause 20.2 establishes a rule as to how disputes are to be pursued: they are to be adjudicated by a DAB in accordance with sub-clause 20.4. Use of the word 'may' in sub-clause 20.4 does not denote an option entitling a party to deviate from the rule in sub-clause 20.1, but rather the option any party has of either referring the dispute to

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<sup>54</sup><<http://www.swissarbitrationdecisions.com/sites/default/files/7%20juillet%202014%204A%20124%202014.pdf>> accessed 1 April 2017.

dispute resolution in accordance with the contract (a DAB in this case) or not pursuing the dispute at all under the contract.<sup>55</sup>

## 11 The FIDIC December 2016 revision

### 11.1 The new Yellow Book

The updates to the FIDIC Yellow Book are significant as they reflect the changes in the construction industry since 1999. Many changes to the new Yellow Book build on the positive changes introduced in the Gold Book in 2008 as well as reflecting the success of the NEC3 contract suite to date, which has focused heavily on project management. The new contract is now 50% longer so those who enjoyed the relative brevity of the previous FIDIC conditions may be disappointed.

The most important change is the update to the claims provisions which will encourage faster dispute resolution. The new Yellow Book also has the increased prevalence of time-bars, the increased complexity of the claims procedure and notification requirements, and the DAB being more integrated into the claims procedure.

The sub-clause dealing with employer claims in the first edition has been deleted in its entirety, and instead of individual clause provisions for employer claims (former sub-clause 2.5) and contractor claims (former sub-clause 20.1), these have now been merged together within enlarged sub-clauses 20.1 and 20.2. The new claims provisions are now much more detailed, with the claims procedure in sub-clause 20.2 alone running to almost three pages.

### 11.2 Dispute avoidance/adjudication board

Clause 21 is now entitled ‘Disputes and Arbitration’. The change in name of the DAB to ‘Dispute Avoidance/Adjudication Board’ is indicative of its more proactive role in dispute avoidance as well as dispute resolution. Disputes now reside in a new, much extended clause 21, leaving clause 20 for employer and contractor claims under the contract.

Sub-clause 21 includes a requirement for a standing DAB rather than ad hoc. This is a welcome and positive change, and builds on the benefits of a standing board in relation to dispute avoidance. Interestingly, the decision to change the name was made in order to give greater emphasis to the DAB’s role in avoiding disputes, and the DAB has been integrated into the escalating claims resolution procedure.

Sub-clause 21.4.4 provides that if a party is dissatisfied with the DAB decision it must give a notice of dissatisfaction (NOD) within 28 days and must commence arbitration within a further 182 days. If neither party commences arbitration within that period, the NOD ‘shall be deemed to have lapsed and no longer be valid’.

It also allows the DAB to invite the parties to make a joint referral if it becomes aware of any issue or disagreement. This positive obligation may become a useful dispute avoidance instrument.

Clause 20 is now entitled ‘Employer’s and Contractor’s Claims’. Under the new sub-clause 20.3, the parties may, if they so agree:

*jointly refer a matter to the DAB in writing (with a copy to the Engineer) with a request to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract.*

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<sup>55</sup> Christopher R Seppälä, ‘Commentary on Recent ICC Arbitral Awards Dealing with Dispute Adjudication Boards under FIDIC Contracts’, 9, *The International Construction Law Review* [2016].

This clause provides that the claiming party may apply to the DAB if the engineer has issued a notice to the effect that the claim is time-barred and the claiming party believes there are circumstances which justify the late submission of its preliminary or fully detailed claim. A failure to submit this to the DAB within 14 days of the engineer's notice deems the engineer's notice to be final and conclusive.

### 11.3 The claims procedure and the FIDIC time-bar

The DAB has power to override the time-bars where it is 'fair and reasonable' to do so and sub-clause 20.3, 'Waiver of Time-limits', provides a non-exhaustive list of such circumstances. These include the extent to which the other party would be prejudiced by acceptance of the late submission and any evidence of the other party's prior knowledge of the claim. This is built on the approach in the Gold Book of giving the DAB the right to override the time-bar.

Clause 20 of the new Yellow Book contains two time-bar clauses and various time limits and notice provisions. Ensuring that claims are dealt with in a structured way is entirely consistent with the key theme of effective project management and dispute avoidance. However, given the current uncertainty, both under English law and in civil law jurisdictions, as to how strictly time-bar provisions will be enforced, it remains to be seen whether these provisions will have the effect FIDIC intends.

## 12 Law governing DAB

It is important to identify which law governs the DAB procedure. If only one law is referred to in the contract, it is likely that this law would primarily govern everything. However, it is possible for one legal system to govern the merits of the dispute (in other words, the contractual relations) between the parties, whilst a different legal system could govern the dispute resolution procedure.

For example, in the case of a FIDIC contract that is subject to English law but to arbitration under the ICC Rules with the seat in Singapore, the procedural law supporting arbitration will be the law of Singapore. This is because the parties will be holding their arbitration in Singapore and it is the local court that will be needed in order to support that process.

In *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others*,<sup>56</sup> the Court of Appeal has clarified what, for some time, has been an uncertain area of jurisprudence as to which law should apply to the arbitration agreement where none is expressly stated.

The English Court of Appeal was asked to determine the enforceability of a contractual mediation clause. The clause was contained in an insurance policy just before an arbitration clause and required the parties to mediate before proceeding to arbitration. *Sulamerica CIA Nacional de Seguros SA*, the insurer, had not sought to mediate prior to starting the arbitration proceedings. *Enesa Engenharia SA*, the insured, submitted that the mediation and arbitration clauses were part of a single dispute resolution regime, thus mediation was a condition precedent to arbitration. The Court of Appeal agreed with the judge of the court of first instance, Cooke J, that these did not give rise to a binding obligation to mediate. Therefore there was no requirement to comply with the mediation clause in order to be permitted to commence arbitration. Moore-Bick J noted that the relevant condition neither set out any defined mediation process, nor referred to the procedure of a specific mediation provider.

The Court of Appeal formulated a three-stage test to determine the law of an arbitration agreement: (1) is there an express choice of law governing the arbitration agreement; (2) if not, can a choice be implied; and (3) in the absence of a choice, with which law does the arbitration agreement have the

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<sup>56</sup> [2012] EWCA Civ 638.

‘closest and most real connection’. The three stages should be undertaken separately and in this particular order: express choice; implied choice; and closest and most real connection. In reality, the second and third stages often merge because in order to decide whether the parties have made an implied choice of proper law it is necessary to consider the system of law with which the agreement has its closest and most real connection.

The Court of Appeal held that the express choice of Brazilian law to govern the substantive contract was not sufficient evidence of an implied choice of Brazilian law to govern the arbitration agreement. The parties could not have intended to choose a law that could significantly undermine their agreement, and therefore it held that the arbitration agreement was governed by English law.

This test was applied in *Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings*,<sup>57</sup> in circumstances where the parties had expressly chosen Indian law to govern the underlying contract and London as the seat of arbitration provision. The debate centred upon the relative significance of the Indian governing law clause compared with the London seat of arbitration when determining the law of an arbitration agreement. Smith J held that on the facts the parties had intended that Indian law should apply.

The court therefore decided that the parties had evinced an intention that Indian law would apply to the arbitration agreement, with the effect that the tribunal was held not to have jurisdiction in relation to one of the challenged awards. Also, Smith J went on to say that he had not been required to apply the third stage of the *Sulamerica* test, which encompassed determining which system of law the arbitration agreement had the closest and most real connection with. If he had, he would have concluded that English law applied as the choice of London would be the seat of the arbitration.

*Arsanovia* confirms that the law governing the arbitration agreement will not always be implied from an express choice of governing law or an express choice of seat. This case also showed that if there were an omission of an express choice of law to govern the arbitration agreement, it might lead to uncertainty and protracted jurisdictional challenges, and parties might risk incurring significant expense and delay and an award might be set aside.

The English court decision in *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd*<sup>58</sup> summarised the guidance provided in *Sulamerica Cia Nacional De Seguros SA and others v Enesa Engenharia SA* and *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* on determining the governing law of an arbitration agreement. In *Habas Sinai* the court applied those principles to determine the law of the arbitration agreement in a contract between a Turkish company and a Hong Kong company which provided for arbitration in London but no governing law of the substantive agreement or the arbitration agreement.

Applying these principles, the court found that the applicable law of the arbitration agreement was the law of the country of the seat, ie English law. The court held that the applicable law of the agreement must be examined before any question of the validity should be considered. It refused to exclude consideration of the clause allegedly agreed in excess of authority when such clause was necessary to determine the applicable law. This required a consideration of the terms of the contract as made, rather than the authority with which it was made. The court emphasised that as between principal and third party there was no difference between actual and ostensible authority and found that Habas’ agents had ostensible authority to agree to the London arbitration agreement. *Habas Sinai* highlighted the importance of expressly including a governing law clause in the arbitration agreement.

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<sup>57</sup> [2012] EWHC 3702 (Comm).

<sup>58</sup> [2013] EWHC 4071 (Comm).

Interestingly, the outcome of the application of the *Sulamerica* three-stage test remains unpredictable. It depends on whether there is an express choice of law of the contract; whether there is a choice of seat in the arbitration agreement and whether this is different to the express choice of law of the contract, and whether there are any other factors which may displace an attempt to imply a choice of law on the basis of the chosen seat and lead to application of the third stage.

In the Singapore case of *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others*,<sup>59</sup> the court took the approach that the law of the seat of arbitration governs the arbitration agreement. The Singapore court took a different view when deciding the law of the arbitration agreement compared with *Sulamerica*, which leant towards adopting the law of the underlying contract as the law of the arbitration agreement. The court stated that:

*it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise.*

The court continued:

*In fact, the more commercially sensible viewpoint would be that the latter relationship often only comes into play when the former relationship has already broken down irretrievably. There can therefore be no natural inference that commercial parties would want the same system of law to govern these two distinct relationships. The natural inference would instead be to the contrary. When commercial relationships break down and parties descend into the realm of dispute resolution, parties' desire for neutrality comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment (it would take the main role subsequently when the time comes to determine the merits of the dispute), and primacy is accorded to the neutral law selected by parties to govern the proceedings of dispute resolution.*

## 13 Conclusion

It has to be acknowledged that a standing dispute board which remains in place for the duration of a contract is an additional expense for the parties. It is therefore likely that dispute boards will mainly be suitable for mid- to high-value projects because of the cost involved.

The DRBF estimates that DRB cost ranges from 0.05% of final construction contract cost for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with disputes.<sup>60</sup> When compared with the likely costs of arbitration, which are anything between 2% and 4% of the cost of the project, the expense of a dispute board can be regarded as sensible prevention cost, or as an insurance premium against the uncapped costs of litigation.

Since 2001 the DRBF records show a continuing and expanding use of DRBs and DABs, and an impressive success rate: about 97% of construction disputes using DRBs were settled without proceeding to arbitration or litigation.<sup>61</sup>

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<sup>59</sup> [2014] SGHCR 12.

<sup>60</sup> *DRBF Practices and Procedures Manual* (January 2007), Section 1, ch. 4, p. 2, clause 1.4.2.

<sup>61</sup> For detailed information on projects catalogued by the DRBF, see <[www.drb.org](http://www.drb.org)>. With regard to recent developments and data on the use of DBs, the DRBF issued the following statement in the *DRBF Practices and Procedures Manual* (January 2007), Section 1, ch. 3, pp 2–3: ‘The use of DRBs is growing so fast and so widely that reliable data has become impossible to collect. In addition, data on DBs outside North America has always been limited because most contracts require Board members to “treat the details of the contracts as confidential”, causing concern over reporting even minimal data. Therefore the DRBF will no longer update the database in the detail currently presented on the website. However, information of a more limited nature will be collected and reported as noted below.’

The benefit of avoiding disputes or resolving them quickly as a result of the DB's presence may far outweigh its costs. The cost of litigation and arbitration can be extremely high and, at the end of the process, the prevailing party may realise that it spent far more to win the dispute than the issue in dispute was ever worth. The applicable courts and arbitral tribunals are often unable to facilitate the rapid resolution of an international dispute that can be crucial, particularly in a long-term contract where maintaining a commercial relationship is very important.

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