Dispute Board Rules

Consultation
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1 INTRODUCTION

The purpose of this consultation document

The purpose of this consultation document is to commence the process of drafting and then publishing an international set of commercial dispute board rules. A variety of rules for dispute boards already exist, but they focus on the construction industry. The existing rules have been developed either from the genesis of non-binding dispute review boards or binding dispute adjudication boards, either from FIDIC Standard Form Contract or Constitution Rule. The goal of the Chartered Institute of Arbitrators (“the CIArb”) is to produce one set of international commercial dispute board rules that can be used on any medium- or long-term project, whether construction, IT, commercial or otherwise.

The first stage of this consultation is a review of the context in which dispute boards have developed and are used internationally. This consultation document seeks to identify the key issues that should be considered when drafting a stand-alone dispute board process, which is not geared to any particular economic sector. A series of questions have been identified, and responses to those questions are welcomed from individuals, organisations, and the business community. The second stage will involve the distribution of a draft dispute board procedure, again for further consultation, before the final CIArb International Commercial Dispute Board Rules (“the CIArb DB Rules”) are published.

Dispute Boards in context

It is not surprising that disputes arise in the construction and engineering industry. The size and complexity of projects, the number of participants, non-technical demands such as environmental regulations and governmental requirements, 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.¹

The use of dispute boards in the construction industry has over many years significantly contributed to the avoidance and early resolution of disputes. The scope for DBs is substantial and they could be established in a range of industries worldwide, for example in the financial services industry, the maritime industry, operational and maintenance contracts and long-term concession projects.

Well drafted dispute board rules will allow parties a flexible approach in resolving disagreements which may arise during the performance of their contract. However, 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 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 commercial dispute that can be crucial particularly in a long-term contract where maintaining a commercial relationship is very important.

¹ See the recent article in The Resolver (CIArb) by Entwistle, M (2013), Dispute boards lay strong foundations. Infrastructure Projects, August, page12.
In the last twenty years there has been an increasing demand for less adversarial dispute resolution methods such as mediation, conciliation and dispute boards. 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 avoidance role of the standing board should be emphasised: the DB encourages the parties to solve their own problems, creating an atmosphere where the parties communicate and recourse to the advisory role of the dispute board. Resolving conflicts at an early stage, or even before they arise, is an obvious benefit that greatly reduces costs such as legal fees, and reduces loss of productive time and goodwill between the parties.

**Structure of this consultation**

The structure of this consultation document comprises:

1. A review of the context in which dispute review boards and dispute adjudication boards – collectively referred to as dispute boards (“DBs”) - have developed;
2. Questions based on rules and procedures that are currently published in relation to DBs;
3. The benefits and disadvantages of DBs;
4. Appointing dispute board (“DB”) members;
5. DB members’ obligations;
6. Referring a dispute to a DB;
7. Enforcing a DB’s decision;
8. Code of Ethics;
9. Proposal;
10. Consultation timetable; and
11. Appendices. The appendices provide a comparison table of the published rules that are most widely used at the moment, together with a list of the questions posed in this consultation document.

2 **TYPES OF DISPUTE BOARDS**

Dispute review boards (“DRBs”) and dispute adjudication boards (“DABs”), collectively referred to as DBs, comprise one or three independent and impartial members who assist the parties of substantial projects in resolving disagreements arising in the course of the contract. DBs are now an internationally recognised concept, and are frequently included by default in substantial contracts, for example by the use of FIDIC or by imposition of the development banks by virtue of their procurement procedure.²

**DRBs**

² For an overview on dispute boards, see Gould, N (2006), 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), pages 1 - 36.
DRBs are required to make non-binding recommendations about disputes arising during a project. The DRB, usually a panel of three experienced reviewers, takes in all the facts of a dispute and makes recommendations on the basis of those facts and the board's own expertise. Over the last decade, this trend in 'preventive law' has been growing fast, saving time, project costs, and legal fees. 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.

DRBs originate in the construction industry in the USA, and are still found predominantly in the USA. The Dispute Resolution Board Foundation (the “DRBF”)\(^3\) is a non-profit organisation dedicated to promoting the avoidance and resolution of disputes worldwide by using DRBs and DABs. The DRBF has a policy of recommending standing DBs over ad hoc DBs and has gathered information on DRBs and DABs worldwide since 1982. Since 2001 the DRBF records show a continuing and expanding use of DRBs and DABs, and an impressive success rate of about 97%, i.e. 97% of construction disputes using DRBs were settled without proceeding to arbitration or litigation.\(^4\)

**DABs**

As adjudication developed in the 1990s, the World Bank and FIDIC opted for a binding dispute resolution process, so the DAB 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, 1\(^{st}\) 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 and uncertainties amongst the users of the documents. The MDBs recognised this and resolved to harmonise their tender documents on an international basis.

FIDIC and the MDBs embarked upon a process to harmonise their DB provisions, and produced a special MDB harmonised edition of the FIDIC 1999 Conditions of Contract for Construction for MDB financed contracts, which 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.\(^5\)

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3 Formerly known as Dispute Review Board Foundation.
4 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, Chapter 3, pages 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.”
5 See [http://fidic.org/node/321](http://fidic.org/node/321)
NB that the MDB Harmonised Construction Contract was not intended to replace the standard FIDIC Conditions of Contract for Construction, 1st Edition 1999, which is still available to all users.

FIDIC clause 20.4 deals with the referral of a dispute to the DAB and the binding nature of the DAB’s decision. The parties must promptly give effect to the DAB’s decision, which is temporarily binding, and which becomes final and binding in the absence of a valid notice of dissatisfaction.

**Notice of dissatisfaction**

If no notice of dissatisfaction ("NOD") has been given by either party within 28 days of receiving the DAB’s decision, then the decision shall become final and binding upon both parties (FIDIC clause 20.4, paragraph 7).

FIDIC clause 20.4, paragraph 6 requires that the NOD must:

1. be issued within 28 days after receiving the DAB’s decision;
2. state that it is given under sub-clause 20.4;
3. set out the matter in dispute; and
4. set out the reasons for dissatisfaction.

Whereas the ICC Dispute Board Rules (the “ICC Rules”) give parties the option to provide reasons for information purposes as to why the party in question disagrees with the DAB’s decision. A NOD must be issued within 30 days of the DB’s determination, irrespective of whether the DRB issued a recommendation or the DAB issued a decision under the ICC Rules. It follows that even a DRB recommendation under the ICC Rules can become final and binding if the parties fail to issue a NOD.

**CDBs**

The International Chamber of Commerce (the “ICC”) has developed three alternative types of dispute board: DRBs, DABs and Combined Dispute Boards (“CDBs”). The CDB procedure is a hybrid between the DRB and DAB. CDBs may prove useful for those parties who

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7 Article 5 (3) of the ICC Dispute Board Rules states that the DAB decision remains binding if no party has sent a NOD to the other party and the DAB within 30 days of receiving the decision.

8 See Article 5 (5) of the ICC Rules.

9 Article 4 (3) and Article 5 (3) of the ICC Rules.

10 Article 6 of the ICC Rules defines a combination of DRBs and DABs as Combined Dispute Boards.
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 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.

QUESTION 1: Should the CIArb DB Rules make alternative types of dispute boards available to parties?

QUESTION 2: If you think that parties should have a choice between different dispute boards, would you regard the two ‘classic’ alternatives of DRB and DAB as sufficient?

QUESTION 3: If you think that the CIArb DB Rules should be based on one type of dispute board only, which type would you favour?

If the CIArb DB Rules were to make the DAB their only type of dispute resolution board, several other questions follow. Should the DAB’s decision always lead to a binding decision, which may only be revised by amicable settlement, arbitration or court proceedings? Or should the CIArb DB Rules provide either (1) the possibility for non-binding assistance or recommendation; or (2) the more formal provision of a non-binding procedure as an alternative to a binding decision.

QUESTION 4: Should a binding dispute board procedure also provide the power for the dispute board to provide non-binding assistance at the request of the parties during the course of the project?

QUESTION 5: Should the dispute board rules provide an entirely separate alternative procedure leading to a non-binding recommendation?

QUESTION 6: If a non-binding procedure is appropriate, should it be incorporated in one composite set of dispute board rules?

3 PRO ET CONTRA - THE BENEFITS AND DISADVANTAGES OF DBs

Pro

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. Claim avoidance is clearly one of the positive attributes of DBs.

Parties are less likely to adopt extreme positions in order to keep credibility with the DB members, also in view of the possibility that the DRB’s recommendations are admissible as evidence in case of arbitration or court proceedings.
The resolution of disputes in ‘real time’ provides the DAB 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 DAB is the resolution of disputes in manageable packages. It is unlikely (albeit not impossible) that a referral to a DAB contains the entirety of the issues arising between the parties during a project. The on-going dispute resolution by a DB usually minimises the aggregation of claims.

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.

*Contra*

The one-person or three-person DBs 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 cost of a DB is an understandable concern. 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 all of the project.

The expense of periodic meetings and site visits can be regarded as prevention costs, with the benefit of avoiding disputes as a result of the DB’s presence.

The DRBF estimates:

“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. Considering only projects that refer disputes to the Board or that had difficult problems, the cost ranges from 0.04% to 0.26% with an average of 0.15% of final construction contract cost, including an average of four dispute recommendations.”

Cyril Chern and Christopher Koch contrast the DRBF’s cost range with the likely costs of arbitration:

“When compared to the likely costs of arbitration, which are anywhere between 2% and 4% of the cost of the project, this is very little, particularly if one remembers that practically no disputes which have been determined by a Dispute Board are referred to arbitration. Clearly, the larger the project the easier it is to justify the expense of a Dispute Board, but one-man Boards can be considered for smaller projects at a very modest cost.”

Therefore the costs of a DB might not necessarily be a disadvantage, but rather be a sensible prevention cost, which in the long run saves money and enables the parties to remain focused on the project.

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11 See DRBF Practices and Procedures Manual, January 2007, Section 1, Chapter 4, page 2, clause 1.4.2.
Remuneration of DB members

Payment of DB members is shared equally between the parties under all the existing DB 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 monthly retainer fee 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.13

QUESTION 7: Should the CIArb DB Rules include a pay structure of monthly retainer plus a daily fee for work performed?

(For the avoidance of doubt, the CIArb DB Rules would not specify any figure. It is up to the parties and the DB members to agree a daily fee and a monthly retainer, if applicable. This question concerns only the ideal pay structure for the CIArb DB Rules.)

If dropping a monthly retainer is preferred by those taking part in the consultation, it is acknowledged that the CIArb DB Rules will have to make it clear that DB members will spend time on the activities currently listed by the ICC Rules and FIDIC Rules as being covered by the retainer.

It is worth considering whether dropping the retainer and basing remuneration on a time-spent basis would be a popular option. We note that if the DB members are expected to spend one or two days per month reading documents and generally following the project, there might be no saving in dropping the retainer. We would welcome feedback on whether parties might view the expense more favourably if DB members have to bill on a time-spent basis.

QUESTION 8: Should the CIArb DB Rules include the option (perhaps suitable for smaller projects) that DB members shall not receive a monthly retainer, but only be paid for actual work carried out?

QUESTION 9: Should the CIArb DB Rules include a guideline as to how much time per month the DB members should spend on studying documents and generally following the project?

A potential disadvantage is that the nature and scope of a dispute may change over time and the impact of an event may not be fully understood until further into the project. If additional issues arise after the referral to the DAB, then the DAB’s decision may deal only with part of a wider dispute between the parties. This may cause issues if the wider dispute

13 Article 27, ICC Rules.
is later referred to them for resolution especially if an earlier decision is binding. This is arguably an unavoidable feature of the resolution of disputes in ‘real time’ during the course of a project, as opposed to dispute resolution after its completion.

4 APPOINTING DISPUTE BOARD MEMBERS

The idea behind a DB is that it may be called upon early in the evolution of a dispute that cannot be resolved by the parties. DBs should be set up at the outset of a contract and remain in place throughout its duration. Thus the DB members will be familiar with the contract and its performance, and also be acquainted with the parties, making the DB an effective dispute resolution mechanism with “real-time” value. Ideally, the DB 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.

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.

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.

- **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.

**QUESTION 10:** Which method of appointment do you favour: (a) the parties jointly select all three members of the DB; (b) each party nominates a member for approval by the other parties; (c) each party proposes a list of prospective board members?
QUESTION 11: Should the CIArb DB Rules allow the parties to use a different method of appointment, thus avoiding inflexibility and taking into consideration the parties’ preference in particular situations?

Parties may include an explanation as to why they propose an individual as DB 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 DB member for this project.

QUESTION 12: Should parties always include an explanation as to why they propose a prospective board member?

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. As shown in the attached Comparison Table, the replacing procedure is the same as the original appointment of DB members under the rules of AAA, DRBF, FIDIC, ICC and ICE.

For example under Article 7 of the ICC Rules, the ICC Dispute Board Centre appoints the DB members if the parties fail to do so by the specified dates, and the ICC’s administrative expenses include an amount for each appointment of a DB member. The non-refundable amount for the request for appointment of a DB member under the ICC Rules is US$ 2,500.14

In view of the importance of establishing a DB at the start of a contract, it is advisable that DB rules include a default appointment mechanism if the parties cannot agree on some or all of the DB members.15 If the parties fail to appoint the DB by a certain date under the CIArb DB Rules, the CIArb shall appoint the DB upon the request of any party and in accordance with the default appointment procedure. The CIArb should make this a short and efficient process and charge an appropriate fee for each requested appointment.

QUESTION 13: Should the CIArb DB Rules include a guideline which recommends early appointment of DB members and also recommends to the parties to co-ordinate their selection of DB members and chairman in such a way as to provide the maximum of appropriate skills for the project?

QUESTION 14: By which date must the parties appoint the DB in order to avoid the default appointment procedure?

QUESTION 15: Within how many days of the request of one or both parties should the CIArb appoint DB members, or the whole dispute board if needed?

(1) Within 7 days?
(2) Within 14 days?
(3) Within 21 days?
(4) Within 28 days?
(5) Within another time period? Please specify.

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14 ICC Rules, Article 32 (1) and (2); Appendix, Schedule of Costs, Article 1.
15 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.
QUESTION 16: What other rules for such default appointment procedure would you suggest?

QUESTION 17: What would you consider an appropriate fee for appointing a DB?

5 DB MEMBER’S OBLIGATIONS

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

1. Neutrality. This really means that the DB member should be impartial and without any conflicts of interest.

2. Impartiality. 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. The key question was not whether two councillors were in fact biased, but whether the decision, at the time the decision-maker 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.

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.

3. Independence. In contrast to the above, the obligation of independence is objective. If there is a financial tie between one of the parties and the DB member, then the DB member is clearly not independent of the project. Article 8 of the ICC Rules introduces an obligation of independence, and requires written disclosure of 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.

4. Disclosure. What facts need to be disclosed? The growth of international business and larger international law firms have increased the cases of possible conflicts of interest and the number of disclosures made by (potential) dispute board members and arbitrators.

For example, Article 8.3 of the ICC Rules requires immediate written disclosure by a DB member of any facts or circumstances which might create the perception of bias. If any links, no matter how tenuous, are discovered, then they should be disclosed in writing. The duty of disclosure is an on-going one.

Disclosure of any relationship, no matter how minor, may give one party the opportunity to deny the other party her 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.\textsuperscript{17} Part II of the IBA Guidelines contains comprehensive lists of many situations and circumstances which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence.\textsuperscript{18}

The IBA Guidelines emphasize that disclosure is not an admission of a conflict of interest: “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.”\textsuperscript{19} 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.”\textsuperscript{20}

The obligations of DB members and arbitrators with regard to neutrality, impartiality and disclosure are so similar that the IBA Guidelines, should be considered when drafting the CIArb DB Rules.

5. Qualifications. When appointing a DB member, the prospective DB member’s qualifications relevant to the circumstances, availability, nationality and relevant language skills should be considered, as well as any observations, comments or requests made by the parties.

6. Experience. Ideally, the DB members should be experienced in a wide range of matters, such as the type of construction or other work in question, interpretation of contract and legal issues. They should also have excellent management and communication skills.

7. Availability. The DB members should be sufficiently available for the duration of the project.

8. Confidentiality. DB rules or tripartite agreements usually require DB members 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.\textsuperscript{21} However, the analyzed DB rules and tripartite agreements do not expressly establish an obligation of confidentiality as between the parties.

\textsuperscript{17} IBA Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004 by the Council of the International Bar Association, page 4.

\textsuperscript{18} 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.

\textsuperscript{19} IBA Guidelines, Part I, Explanation to General Standard 3, paragraph (b).

\textsuperscript{20} IBA Guidelines, Part II, paragraph 5.

\textsuperscript{21} See for example ICC Rules, Article 9 (2).
The DAB’s duties and obligations are also affected by the applicable law, including the rules of natural justice such as providing both parties with an equal opportunity to put their case.

QUESTION 18: Should each DB member provide a written declaration that there is no conflict of interest and disclose any facts or circumstances which in the eyes of the parties may give rise to justifiable doubts as to the DB member’s impartiality or independence?

QUESTION 19: If the CIArb is to appoint a DB member and/or the DB, should the potential DB member submit to the CIArb a written declaration that there is no conflict of interest and disclose any facts or circumstances which in the eyes of the parties may give rise to justifiable doubts as to the DB member’s impartiality or independence before being appointed?

6 REFERING A DISPUTE TO A DB

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. Under the FIDIC Rules the existence of a dispute is a precondition for referral to the DAB if either party seeks a binding decision. Whereas 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.\textsuperscript{22}

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.\textsuperscript{23} 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.\textsuperscript{24} 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.\textsuperscript{25}

QUESTION 20: What preconditions (if any) for referral to a DB would you recommend?

Options:

(1) Prior good-faith negotiations between the parties to settle the dispute.

(2) A reasonable belief by one of the parties that the negotiations are unlikely to succeed.

(3) Compliance with prior dispute resolution process as per contract.

(4) Compliance with any contractual pre-review requirements.

\textsuperscript{22} FIDIC 1999, General Conditions of Contract for Construction, clauses 20.2 and 20.4.
\textsuperscript{23} AAA Dispute Resolution Board Guide Specifications, clause 1.04.B.
\textsuperscript{24} Articles 6.A, 6.B.2 and 6.B.3, Appendix 2, Guide Specifications.
\textsuperscript{25} Article 17, ICC Rules.
(5) **Existence of a dispute.**

(6) **Passage of a reasonable period of time without progress toward a negotiated settlement.**

(7) **Any other preconditions?**

(8) **No preconditions for referral. Either party may refer a disagreement to the DB at any time.**

**The DB’s jurisdiction**

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).

**Time limits**

The DB 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.\(^{26}\) The ICE Rules stipulate the same due date.\(^{27}\) Under the ICC Rules, the reasoned determination is due within 90 days of the statement of case being received by the chairman.\(^{28}\) Under the AAA Rules, the DB’s recommendation is due within 14 days of hearings.\(^{29}\) The DRBF Rules specify no due date, but state that the DB recommendations shall be issued as soon as possible after the hearing.\(^{30}\)

All the DB Rules referred to above 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.

**QUESTION 21:** What should be the time limit under the CIArb DB Rules for a DB to issue its decision or recommendation?

**Options:**

(1) **Within 14 days of the referral being received by the DB.**

(2) **Within 14 days of hearing.**

(3) **Within 28 days of the referral being received by the DB.**

(4) **Within 84 days of the referral being received by the DB.**

(5) **Within 90 days of the referral being received by the DB.**

(6) **Any other time limit?**

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\(^{26}\) FIDIC Rules, clause 20.4.

\(^{27}\) 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.

\(^{28}\) ICC Rules, Article 20 (1).

\(^{29}\) AAA Rules, clause 1.04.I.

\(^{30}\) DRBF Rules, Article G.1., Appendix 2A.
QUESTION 22: Should the CIArb DB Rules include a guideline regarding simple matters which in the discretion of the DB can be decided in much shorter time frames, such as a week or even shorter in cases of a one man DB?

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, 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 & Forester and Aveat Heating Ltd v Jerran Faulkus Construction Ltd confirmed that adjudication decisions given outside the 28-day time limit are not valid. 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.

7 ENFORCING A DB’S DECISION

The FIDIC DAB Provisions

The enforcement of a DB decision is a key issue. We have focused on the specific DAB and arbitration provisions of the FIDIC Red Book 1999 Edition in order to consider the enforcement of a DB decision under English law. The enforcement of DB decisions is not necessarily a simple matter under FIDIC contracts.

Clause 20.4 deals with the referral of a dispute to the DAB and the binding nature of the DAB’s decision. Paragraph 4 of clause 20.4 reads:

“Within 84 days after receiving such reference, (...) the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision 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. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.”

Paragraph 7 of clause 20.4 reads:

“If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it

31 See the judgment of the Scottish Inner House of the Court of Session, [2005] Scot CSIH 32.
32 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.
35 Clauses referred to in this chapter are clauses of the FIDIC Red Book: FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, first edition 1999.
36 Emphasis added.
received the DAB’s decision, then the decision shall become final and binding upon both Parties.”

NB the distinction between the decision being “binding” in sub-clause 20.4 paragraph 4, and it being “final and binding” in sub-clause 20.4, paragraph 7. A DAB’s 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.

Notice of dissatisfaction

If either party does not accept the DAB’s decision, it must serve a NOD in accordance with clause 20.4, paragraph 5:

“If either Party is dissatisfied with the DAB’s decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.”

With regard to the 28-day time limit for issuing a NOD, it was held in Anglian Water Services Ltd v Laing O’Rourke Utilities Ltd that a NOD that appeared to be late was, on careful factual analysis, not late. The judge reviewed the exchanges between the parties in detail and concluded that the NOD was received in time, and therefore allowed the referral to arbitration. Further, the judge stated that he would exercise his discretion in granting an extension of time under section 21 of the Arbitration Act 1996 if any delay had been caused by the defendant.

The situation is quite different if one or both of the parties fail to issue a NOD, or issues a NOD outside the agreed timescale without the responding party contributing to the delay. The DAB’s decision will then become final and binding, and there is a strong argument that it finally puts the dispute to rest.

Temporarily binding decision

The drafting of clause 20.4, paragraph 4 is somewhat ambiguous.

“(…) The decision 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. (…)”

The temporarily binding nature of a DAB’s decision would be clearer if the words “who shall promptly give effect to it” were not immediately followed by “unless and until”. However, the DAB’s decision is binding even if one of the parties has served a valid NOD; but it will become final and binding only if a valid NOD has not been served by either party within 28 days of the DAB’s decision. In other words, in the absence of a valid NOD, the DAB’s decision shall become final and binding upon both parties.

Status of a DB’s decision

37 Emphasis added.
39 See Clause 20.4, paragraph 7.
DB members do not act as arbitrators and DB’s decisions do not qualify as arbitral awards. So what is the nature and status of a DB’s decision? A DB’s decision is contractually binding because the parties agreed by contract to be bound by it. If a DB made a decision in respect of a dispute, then (subject to any new facts) the DB is also bound by its past decision. Failure to comply with the DB’s decision is a breach of contract by the defaulting party. The contractual remedy is a referral to arbitration.

Since a DB’s decision is not an arbitral award, a court cannot enforce it under the New York Convention 1958 as if it were an arbitral award, but a local court might come to the conclusion that as a matter of fact all the issues between the parties have been decided by the DB’s decision, and that it should be directly enforced under an interim relief or summary judgment procedure.

However, if the contract includes an arbitration clause, an English court would grant a stay of litigation under section 9 of the Arbitration Act 1996. It is most unlikely that an English court would consider enforcing a DB decision if the contractually agreed procedure is to refer any dispute to arbitration.

The court of a country that has adopted the UNCITRAL Model Law is also likely to stay court proceedings if there is an arbitration agreement between the parties. Section 9 (4) of the Arbitration Act 1996 and Article 8 (1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments adopted in 2006) provide that a court “shall” grant a stay of the litigation or refer the parties to arbitration “unless the arbitration agreement is null and void, inoperative or incapable of being performed”.

Arbitration

Before a dispute can be referred to arbitration, it first must have been referred to the DAB. The referral of the DAB’s decision to arbitration can be made under clause 20.6, or under clause 20.7, depending on the circumstances. The party referring the matter to arbitration has to select the applicable arbitration clause, and draft a referral that reflects the requirements of that provision.

Clause 20.6

A DAB’s decision may be referred to arbitration under clause 20.6, provided that either of the parties has served a valid NOD. The timely service of a NOD is a condition precedent to arbitration under clause 20.6.

Arbitration under clause 20.6 is the applicable pathway in order to:

1. resolve disputed DAB decisions; or
2. resolve a dispute where no DAB decision has been issued.

41 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.”
If the underlying substantive dispute is referred to arbitration, then the request is for the arbitrators to use their full power “to open up, review and revise” the DAB’s decision.\footnote{Clause 20.6, paragraph 2 reads: “The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.”}

There cannot be automatic enforcement of a DAB’s decision if a NOD has been served, but the referral to arbitration could include the request for an immediate interim award, applying the principle “pay now, argue later”. A wide-ranging defence and counterclaim should not prevent the arbitrators from considering the DAB’s decision and issuing an award that gives prompt effect to the DAB’s decision (early in the arbitral timetable).

**Clause 20.7**

Arbitration under clause 20.7 is the route to enforcement where there has been a failure of either party to “promptly give effect to” the DAB’s decision; and it is this “failure itself” that is referred to arbitration.

If the failure to comply with the DAB’s decision is referred to arbitration, then the request is for an immediate award, so that the award can be enforced without any consideration of the merits of the original dispute. This may be appropriate where no NOD has been given by either party.

There are a number of arbitral awards confirming the enforceability of non-final DAB decisions by ordering the losing party to pay immediately to the winning party the amounts ordered by the DAB even though a NOD had been given in respect of those DAB decisions.\footnote{See Gillion, Fred (2011), Enforcement of DAB decisions, The International Construction Law Review, October issue; and a summary of this article in the Annual Review 2011/2012 on www.fenwickelliott.com}

The decisions from the High Court and the Court of Appeal of Singapore in PT Perusahaan Gas Negara (Persero) TBK ("PGN") v CRW Joint Operation ("CRW") ("the Singapore case") sent a confusing message to parties dealing with the FIDIC form of contract.\footnote{PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 202; and CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33.}

The High Court of Singapore set aside an ICC arbitral award on the basis that the ICC tribunal had exceeded its powers in making a final award ordering PGN to make immediate payment to CRW of the sum which the DAB had decided was due to CRW. The Court of Appeal of Singapore confirmed this decision and concluded that the ICC arbitral tribunal had, by summarily enforcing a binding but non-final decision by way of a final award without a hearing on the merits, acted in a way which was “unprecedented and more crucially, entirely unwarranted under the 1999 FIDIC Conditions of Contract”.

The findings of the Singapore courts show that the interpretations of FIDIC clauses 20.4, 20.6, and 20.7, and in particular the implications of a NOD, lead to jurisdictional pitfalls, which may prevent a winning party from obtaining in arbitration the amounts awarded by the DAB.

With regard to the Singapore case, Fred Gillion comes to the conclusion that:

“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. It should therefore be possible for a winning party to commence a relatively straightforward arbitration simply based on the other party’s breach of Sub-Clause 20.4. Only one condition should not be overlooked by the winning party before doing so: that second dispute must have been first referred to the DAB and an adequate and timely notice of dissatisfaction must have been served in respect of that second DAB decision.”

All this leads to the question whether the CIArb DB Rules should have a NOD procedure at all. 45

QUESTION 23: Should a NOD procedure be excluded from the CIArb DB Rules?

QUESTION 24: Should parties be able to request an immediate arbitral award where the DAB decision has become final and binding?

QUESTION 25: If you believe that a NOD procedure should be included in the CIArb DB Rules despite the enforcement difficulties which can be created by the NOD procedure, would you make the giving of reasons for dissatisfaction in the NOD a mandatory requirement (as per FIDIC Rules), or a voluntary option (as per ICC Rules)?

QUESTION 26: If you believe that a NOD procedure should be included in the CIArb DB Rules, how long should the period for serving a NOD be?

(1) 14 days from the receipt of the DB’s decision?
(2) 21 days from the receipt of the DB’s decision?
(3) 28 days from the receipt of the DB’s decision?
(4) Any other time period? Please specify.

Enforcing a DAB decision

An arbitral tribunal faced with a request promptly to give effect to the DAB’s decision must first consider its own jurisdiction.

(1) Does the arbitral tribunal have power under clause 20.7 to consider “the failure itself” to comply with the DAB’s decision? If a DAB’s decision has become final and binding on the parties, it can be enforced as such.

(2) Or does the arbitral tribunal have power under clause 20.6 “to open up, review and revise” the disputed DAB decision, and thus form its own view about whether to enforce part or all of the DAB’s decision.

45 On 1 April 2013 the FIDIC Contracts Committee issued a Guidance Note dealing with the powers of, effect of and the enforcement of DAB decisions which suggests amendments to Clause 20. The Guidance Note is intended to make it clear that the failure to comply with a DAB decision should be capable of being referred to arbitration under sub-clause 20.6 without the need first to obtain a further DAB decision under sub-clause 20.4 and comply with the amicable settlement provisions of sub-clause 20.5. The Guidance Note follows the approach to be found in sub-clause 20.9 of the FIDIC Gold Book.
A third possibility is that the matter has been referred to arbitration under clauses 20.6 and 20.7, perhaps due to partial or unclear NODs.

Secondly, the arbitral tribunal must consider the scope of the dispute. If the referral to arbitration requests giving effect to the DAB’s decision, then the tribunal should consider:

(1) **The procedural validity of the DAB’s decision**, hereby considering a variety of questions, such as:

   (a) Did the DAB have jurisdiction to issue the decision?
   (b) Was the DAB validly appointed and constituted?
   (c) Did the DAB answer the particular dispute (validly) referred to it, and not something else?
   (d) Did the DAB answer all of the matters in dispute?
   (e) Was the DAB’s decision adequately reasoned and delivered on time?
   (f) Compliance with rules of procedural fairness and natural justice?

(2) **The material validity of the DAB’s decision.** If the DAB’s decision is procedurally valid, then there should be a presumption of enforcing it. Adopting a summary judgment approach of an English court, the tribunal could come to the conclusion that the merits of the issues in dispute are irrelevant because the DAB duly answered the issues in dispute with a reasoned decision, which should be enforced regardless of any errors of law or fact.

There could be circumstances that might prevent the arbitrators from enforcing a valid DAB decision. For example, if there is a defence or counterclaim, and serious financial doubts exist about the claimant being able to repay any money as a result of the interim award, the arbitral tribunal might take that into account. NB that this is a matter of local law.

8 CODE OF ETHICS

The Canons of the DRBF Code of Ethics are:

“**Canon 1** Board members shall disclose any interest or relationship that could possibly be viewed as affecting impartiality or that might create an appearance of partiality or bias. This obligation to disclose is a continuing obligation throughout the life of the DRB.

**Canon 2** Conduct of Board members shall be above reproach. Even the appearance of a conflict of interest shall be avoided. There shall be no ex parte communication with the parties.

**Canon 3** Board members shall not use information acquired during DRB activities for personal advantage, or divulge any confidential information to others unless approved by the parties.

**Canon 4** Board members shall conduct meetings and hearings in an expeditious, diligent, orderly, and impartial manner.
Canon 5 The DRB shall impartially consider all disputes referred to it. Reports shall be based solely on the provisions of the contract documents and the facts of the dispute.”\textsuperscript{46}

QUESTION 27: Should the CIArb DB Rules include canons of ethics and practice guidelines on how DB members are expected to conduct themselves?

Under most DB rules, the parties must act jointly if they decide to terminate an appointment, whether it is for cause or without cause.

QUESTION 28: What should be the procedure for dealing with DB members who do not abide with the conduct code? Options:

(1) Parties must act jointly if they decide to terminate an appointment.

(2) Parties may at any time jointly agree to terminate member’s appointment without cause and with immediate effect.

(3) Either party may object about a DB member’s behaviour to the CIArb. The CIArb’s decision as to whether the DB member should be disqualified is conclusive.

9 PROPOSAL

A single set of international dispute board rules that could be used on a wide range of commercial projects does not truly exist. The ICC Rules are the closest, but they are focused on the construction industry. The other rules that are available are entirely focused on the construction industry, and the well known FIDIC DAB procedure is woven into the fabric of the FIDIC Contract. Extracting the terms and using them in a separate contract or indeed a different industry require careful drafting. Adjusting or amending the dispute board or the dispute resolution procedures generally in a FIDIC Contract also requires consideration and very careful drafting. The issues posed by enforcing dispute board decisions under a FIDIC Contract are wide-ranging, and a more simplistic and straightforward approach could avoid those issues. The aim of this consultation is to find such straightforward approach.

The primary proposal, therefore, is one set of stand-alone dispute board rules that can be used in any commercial or construction contract by the incorporation of a short 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.

The next level of detail relates to the key issues that would need to be covered within the dispute board procedure. This consultation proposes that the main issues covered by the CIArb DB rules would be:

1. Precedent submission clause;

2. Definitions;

3. Appointment of the members;

4. Confidentiality;
5. Impartiality and independence;
6. Members agreement;
7. Procedure and timetable;
8. Site visits and progress reports;
9. Meetings;
10. Commencement and completion;
11. DB powers;
12. Referring a dispute;
13. Submissions from the parties;
14. Hearing and evidence;
15. Date for the decision;
16. Review and correction;
17. Admissibility of a DB decision in future decisions and other proceedings;
18. Fees and expenses;
19. Exclusion of liability;
20. Precedent - members agreement;
21. Precedent - meetings;
22. Precedent - progress reports; and
23. Precedent - procedural timetable.

10 CONSULTATION

Comments, suggestions and answers to any or all of the questions posed in this consultation are welcome. Any individual, institution or business may submit submissions either formally or anonymously. All feedback is welcome. Submissions should be sent to:

clockwood@fenwickelliott.com

The deadline for submissions is 21 November 2013.

A summary of the issues raised will then be published, and at the same time a set of dispute board rules will be published for further consultation. Once a consultation has
been received in relation to draft dispute board rules, the final rules will then be published by the Chartered Institute of Arbitrators.

11 APPENDICES

1. Appendix 1 - Consultation Questions;

2. Appendix 2 - Comparison table of dispute board rules.