



## IBC Legal Conferences

### Construction law contracts and disputes 2015

#### An overview of the CI Arb Dispute Board Rules

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#### Introduction

This talk and paper considers:

An overview of dispute boards;

- Dispute board types: Dispute Review Boards (DRB) and Dispute Adjudication Boards (DAB);
- The role of dispute avoidance in DB's;
- The range of dispute board rules: FIDIC, ICC, ICE, AAA;
- The demand for amicable dispute resolution;
- Qualifications, relevant experience and obligations of dispute board members;
- Overview of the new CI Arb dispute board rules.

At one time there were only a limited number of dispute board rules publically available. They basically comprised the AAA rules for dispute review boards, providing for nonbinding decisions, and then the rules set out in the FIDIC Contracts and then the ICC's dispute board rules. However, these have been supplemented over time by the ICE's dispute board procedure, and the use of these rules and practice in the area provided the Chartered Institute of Arbitrators with an opportunity to consider the development of an up to date set of rules dealing with past issues and problems, and that could cover dispute boards beyond the construction sector.

This paper seeks to trace briefly the development of dispute board rules and outline some of the key issues in relation to the rules that might be commonly encountered. The Chartered Institute of Arbitrators consultation, development and then final drafting of its rules is considered. The CI Arb DB Rules that were published in August 2014 are then considered against current practice and existing rules. Finally, a number of issues that are often debated, but not necessarily covered by the rules are also discussed.

#### Overview

Dispute boards ("DB") are created by contract and aid the parties in resolving their disagreements. In the last 20 years, there has been an increasing demand for less adversarial dispute resolution methods, such as mediation, conciliation and dispute boards. The scope of dispute boards 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.

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

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

DABs have more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of DRBs, which originally developed in the domestic US major projects market. According to the Dispute Review Board Foundation (DRBF)<sup>1</sup>, the first documented use of an informal DRB process was on the Boundary Dam and Underground Powerhouse project north of Spokane, Washington, during the 1960s. Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four member 'Joint Consulting Board' (JCB), in order that that board could provide non-binding suggestions. The DRBF reported that as a result the recommendations of the JCB were followed, including several administrative procedural changes and the settlement of a variety of claims and also an improvement in relationships between the parties. The project was also completed without litigation.

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

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

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1) For the DRBF, see [www.drb.org](http://www.drb.org).

have also been used internationally. However, DRBs predominantly remain the province of domestic US construction projects.

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

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

DRBs are now widely used on a range of substantial civil engineering projects in the US. Although dispute boards are most frequently used in international construction and infrastructure projects, their use is no longer limited to the mega-projects, so three-man, or indeed one-man, DRBs are being used on smaller projects.

## Growth of Dispute Boards

The Dispute Resolution Board Foundation (DRBF) has provided the following impressive statistics on dispute boards covering over 1000 projects that have used the mechanism since 1975<sup>2</sup>:

- 60% of projects with a dispute board had no disputes – meaning all disagreements were resolved before they became disputes.
- 98% of disputes that had been referred to a dispute board process resulted in no subsequent litigation or arbitration. This indicates that parties have been satisfied with the decision of the dispute board.
- The worldwide use of dispute boards is growing in excess of 15% per year, and at the end of 2006 it was estimated that over 2,000 projects with a total value in excess of US\$100 billion had used some form of dispute board.
- Although issues of confidentiality prevent an absolute determination, to date, it is understood that over two thousand five hundred disputes have been the subject of DB decisions.

## Types of Dispute Board

There are several established types of DBs and within those types the powers granted to DBs can vary widely. The key types are summarised below.

### Dispute Resolution Boards (“DRBs”)

*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.*

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2) Growth of Dispute Boards Around the World: DRBF Database, Ann McGough, 2014, Dispute Resolution Board Foundation.

### Dispute Adjudication Boards ("DABs")

*DABs issue decisions which must be implemented immediately and, unlike DRBs, the decision is binding on the parties unless revised by an amicable settlement or arbitration/litigation.*

### Combined Dispute Boards ("CDBs")

*CDBs are a hybrid between the DRB and DAB, whereby CDBs are empowered to issue recommendations but also, if one party requests and no other party objects, temporarily binding decisions. CDBs can create some uncertainty and there is no provision for CDBs in the CI Arb Rules.*

## Dispute Boards in context

Dispute boards ("DBs") typically comprise one or three independent and impartial members, who will usually have expertise in the type of work or services to be performed in the contract, and who assist the parties in resolving disagreements arising in the course of the contract.

Although DBs are still used almost exclusively in construction projects, the scope of DBs is substantial and they are beginning to 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 DB rules will allow parties a flexible approach in resolving disagreements that may arise during the performance of their contract, and to facilitate the rapid resolution of disputes which can be crucial particularly in long-term contracts where maintaining a commercial relationship is very important.

## DB Rules

### The major forms Of DB Rules compared

Over the last 20 years DBs have become increasingly prevalent and there is a growing interest in using DBs outside of construction projects. However, prior to the CI Arb Rules there was no single set of international dispute board rules that could be used on a wide range of commercial projects. The ICC Rules are the closest but they are still focused on the construction industry, and the FIDIC DAB procedure is woven into the fabric of the FIDIC contract and extracting the rules requires very careful drafting. A comparison of the leading rules is set out below.

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

- Clauses 20.2-20.8: functions and constitution of the DAB
- Appendix: General Conditions of Dispute Adjudication Agreement
- Annex 1: Procedural Rules
- Dispute Adjudication Agreement (one- or three-person DAB).

### International Federation of Consulting Engineers ("FIDIC")

Clause 20 of the FIDIC form deals with claims, disputes and arbitration. Emphasis is placed upon the contractor making its claims during the course of the works and for disputes to

be resolved during the course of the works also. Clause 20.1 requires a contractor seeking an extension of time and/or any additional payment to give notice to the engineer 'as soon as practicable, and not later than 28 days after the event or circumstance giving rise to the claim'.

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

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

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

The FIDIC Appendix does not provide a default number, but Clause 20.2 states that the parties are to agree if the Appendix does not deal with the matter. If the parties cannot agree, then the appointing body named in the Appendix will decide whether the panel is to comprise one or three members. The default appointing authority is the President of FIDIC or a person appointed by the President of FIDIC. The appointing authority is obliged to consult with both parties before making its final and conclusive determination.

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

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

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

### World Bank DB (Clause 20)

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

The World Bank and a number of other multilateral development banks (“MDBs”) have for many years adopted the FIDIC Conditions of Contract for Construction, 1st 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 MBD harmonised edition of FIDIC 1999 Conditions of Contract for Construction for MBD financed contracts, which was released in May 2005<sup>3</sup> (“the MDB Harmonised Construction Contract”). The third amended version of the MDB Harmonised Construction Contract was published by FIDIC in June 2010<sup>4</sup>, which is the standard set of contract conditions adopted by the leading development banks.

### International Chamber of Commerce (“ICC”)

Under the ICC Dispute Board Rules (the “ICC Rules”), the parties can choose to implement three types of Dispute Board Procedures: DAB, DRB and a third type of dispute board, Combined Dispute Boards (“CBDs”), which was developed by the International Chamber of Commerce (the “ICC”). CBDs are useful for those parties who cannot decide if they need a DRB or a DAB. However, a CBD can create some uncertainty. When CBDs issue recommendations with respect to disputes, they may instead issue a temporarily binding decision if one party requests this and no other party objects. The decision must be implemented immediately. If one party objects to issuing a binding decision, this leads to a period of uncertainty as the CBD then has to decide whether to issue a recommendation or decision. Due to the possible confusion that can be caused by this path, the new CI Arb rules have not adopted CBD as a dispute board that can be chosen by the parties.

Both the ICC rules and CI Arb rules provide that the DB shall comprise either one or three members, but if the parties have not agreed on the number of DB members, the DB shall be comprised of three members.

If the DB is to comprise of three persons, both the ICC rules and CI Arb rules state that the third DB member is to be appointed by the two appointed DB members to select the third DB member as a chairman subject to the approval of the parties.

The parties are restricted by the time in which they must appoint a DB member under the ICC rules, which must be within 30 days, whereas this can be longer under the CI Arb rules provided that you have specified the date in the contract.

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3) General Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition May 2005, <http://fidic.org>

4) General Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition June 2010, <http://fidic.org>

The method of referring a dispute to the DB is very similar under both the ICC rules and CI Arb rules. The only real difference is the time frame in which the other party must submit their response by (30 days under the ICC rules and 28 days under the CI Arb rules). However, under the CI Arb rules, the referring party may also reply to the response within 14 days of receiving it (subject to obtaining the permission of the DB).

Unlike the CI Arb rules, parties do not have to comply with any contractual pre-view requirements before referring a dispute to DB, and the DB has a slightly longer period within which they must make their determination by (i.e. 90 days of the statement of case being received as opposed to 84 days under the CI Arb rules).

#### Institute of Civil Engineers ("ICE")

The ICE Dispute Resolution Board Procedure was issued in February 2005. The rules consist of two alternatives: Alternative One for use on international projects and UK contracts which are not subject to the provisions of the HGCRA, and Alternative Two which is HGCRA compliant.

This differs from the CI Arb rules which implement one set of international commercial dispute board rules that can be used on any project.

The procedure also contains a model tripartite agreement to be entered by the contractor, employer and DRB member ("DB member"). Each DB member will enter into a separate agreement. The parties can agree the identity of the DB member if there is to be only one board member.

If there are to be three, each party may nominate one member for approval by the other party. The parties shall then consult both members and agree upon the third member, who shall be the chairperson. This leaves the traditional arbitration procedures in the contract intact (in the case of Alternative One). This is similar to the CI Arb rules with the exception that it is the DB members who select the third member (with the approval of the parties) and not the parties.

The other difference is that the ICE rules provide that the appointment of the DB members must be made within 56 days from the date of the contract.

If the parties fail to establish a DB, the CI Arb shall, after consulting the parties, appoint the DB member or members within 28 days of the written request of one of the parties. On the other hand, the ICE will appoint the DB member or members within 14 days of the written request of one of the parties and is not under an obligation to consult any of the parties when doing so.

Unlike the CI Arb rules, parties under an ICE agreement do not have to comply with any contractual pre-view requirements before referring a dispute to the DB. Either party may at any time give notice of its intention to refer a dispute to the DB and must provide copies to the other party.

Under both the ICE rules and CI Arb rules, the DB must give its decision with its reasoning within 84 days of receiving the referral/position statement.

### American Arbitration Association ("AAA")

The AAA Dispute Resolution Board Guide Specification<sup>5</sup> provides for an independent DRB that 'will assist in and facilitate the timely resolution of disputes ...'. The focus of the AAA procedure is on party autonomy<sup>6</sup>. Therefore, there is only one type of dispute resolution platform, the DRB, which can be implemented, unlike the CIArb rules where you have the option to choose a DRB or DAB. The DRB will assist the parties to resolve their differences. It will not make a binding decision, but will issue written non-binding recommendations.

The AAA will help the parties to identify the members of the DRB, but will not appoint them in default. However, the appointment of DB members can be viewed as being limited as it can only be made from the list of individuals provided by the AAA unlike the CIArb rules. Also, the DB must consist of three members and the parties do have the option for the DB to consist of a sole DM member.

There is also a restricted period in which the DM members must be appointed by (i.e. 14 days from the date of the contract), and unlike the CIArb rules, there is no provision for when the appointment must be made by if the contract is silent on the date.

Both the AAA rules and CIArb rules are similar in that contractual pre-review requirements must be met before parties can refer a dispute to the DB.

The DB's recommendations in writing is due within 14 days of hearings, unless the parties agree for this time to be extended. Unlike the CIArb rules, the AAA rules do not specify whether the DB must give reasons for the determination, but either party may request clarification if it does not understand the recommendation, and also request the DB to reconsider if new information becomes available.

Under the CIArb rules, if a party rejects a recommendation they may submit the dispute to arbitration, or if the parties agree, to the courts. The AAA rules on the other hand do not specify what can be referred to arbitration or court proceedings.

The AAA rules do not allow the parties to obtain the advice or informal opinions of the DB members whereas the CIArb rules do make a provision for this provided that the advice and/or opinion is obtained jointly.

The new CIArb rules are considered in more detail below.

### CIArb Rules

In August 2014 the Chartered Institute of Arbitrators produced and published a set of international commercial dispute board rules (the "CIArb Rules"). The CIArb Rules are designed to be easily incorporated into contract by inserting one of two alternative precedent clauses, and they can be used on any medium or long-term project, whether construction, IT, commercial, or otherwise.

Although a variety of other dispute board rules already exist, they focus solely on the construction industry. In addition, some rules are drafted as an integral part of a standard form contract from which extracting the rules requires very careful drafting (for example the FIDIC suite of contracts).

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5) AAA Dispute Resolution Board Guide Specification; [https://www.adr.org/aaa/faces/services/disputeavoidanceservices/disputeresolutionboards?\\_afLoop=381718472279925&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D381718472279925%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D12bmtcvt6g\\_181](https://www.adr.org/aaa/faces/services/disputeavoidanceservices/disputeresolutionboards?_afLoop=381718472279925&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D381718472279925%26_afWindowMode%3D0%26_adf.ctrl-state%3D12bmtcvt6g_181)

6) Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members, Nicholas Gould, Society of Construction Law, December 2006.



The CIARB Rules were clearly drafted with the intention of resolving some of the issues that have become evident in the existing dispute board rules, and to simplify and clarify the procedure. There is also a stronger emphasis on dispute avoidance.

Some key features of the new CIARB Rules are:

- They are the only single set of international dispute board rules that can be used in any commercial or construction contract.
- The parties may empower the dispute board either to make binding decisions (i.e. a DAB) or to make non-binding recommendations (i.e. a DRB).
- Only standing dispute boards are provided for.
- Dispute boards must be involved throughout the contract, including holding periodic meetings and providing informal advice on the joint request of the parties.
- The dispute board procedure is simplified and is subject to clear steps with default timeframes to be applied if the contract is silent.
- DAB Decisions can be enforced summarily or by expedited relief if the parties agree.

The CIARB Rules provide for standing DBs and the benefit is that the DB members may be called upon as soon as a problem arises to help the parties resolve their differences before they become polarised in their views. Resolving conflicts at any early stage, or even before they arise, is an obvious benefit that greatly minimises costs such as legal fees and reduces loss of productive time and goodwill between the parties. In addition, the resolution of disputes in “real time” usually minimises the aggregation of claims which means that the disputes can be resolved in manageable packages.

The CIARB Rules are able to be incorporated into any commercial or construction project by inserting one of two alternative sets of dispute board clauses, one for DABs and one for DRBs, thereby giving the parties the choice of appointing a DB to make non-binding Recommendations or binding Decisions.

The parties can decide whether the DB will be comprised of one or three members, although if the contract is silent on this or if the parties are unable to agree, there shall be three members. In addition, if the contract is silent as to the time period for appointment, it shall be 28 days from the date of the contract.

Upon selecting the DB members, the parties are required to enter into a “Tripartite Agreement” with each DB member, setting out the terms of the DB member’s appointment. The agreement confirms: that the DB members have expertise in the type of work or services to be performed in the contract and will remain impartial and independent of the parties throughout the appointment; that all information provided during the course of the appointment is confidential; and remuneration as agreed between the parties.

The CIARB Rules only provide for standing DBs (i.e. no ad hoc DBs). This reflects the ideal that DB members become familiar with the contract and its performance, and acquainted with the parties, in order to be an effective dispute resolution and avoidance mechanism with “real-time” value. Further to this, the DB members are required to hold an initial meeting with the parties “as soon as practicable” after the commencement of the contract, and conduct periodic meetings thereafter, and the parties may at any time jointly refer a matter or dispute to the DB for it to give an “informal advisory opinion”.

If there is a Dispute, the first thing that the parties must do is comply with any pre-conditions which the parties have included in the contract (if any). Once done, either party can refer the Dispute to the DB by submitting a Position Statement to the other party and the DB. The Position Statement must include a summary of the Dispute, a list of the issues and the referring party's position, the redress sought, and supporting evidence.

After the referral of a Position Statement a series of procedural steps will follow, namely:

- the other party will have 28 days to submit its Response;
- the referring party may, with the DB's permission, reply to the Response within 14 days of receiving it;
- the DB will set out a timetable leading up to a hearing or meeting; and
- the DB must provide its Decision or Recommendation, with reasoning, within 84 days of receiving the Position Statement.

Throughout this process the parties are still free to settle the dispute at any time, with or without the DB's assistance.

In terms of enforcement, DRB Recommendations are non-binding and therefore neither party can be compelled to comply with the Recommendation. However, each party is required to either accept or reject the Recommendation within 21 days, after which time either party may submit the Dispute to arbitration (or, if the parties agree, the courts).

In the case of a DAB Decision the parties are contractually bound to comply with it "without delay". If either party fails to comply with the Decision, or provides a written notice rejecting the Decision within 21 days of receiving it, then either party may submit the Dispute to arbitration (or, if the parties agree, the courts). The CI Arb Rules make it clear that pending any appeal the parties must comply with the Decision and the parties can expressly provide for expedited or summary relief in the contract. The rules have been drafted to avoid the enforceability issues inherent in some other forms, such as the FIDIC Rules.

However, it must be acknowledged that a standing DB which remains in place for the duration of a contract is an additional expense for the parties. It is therefore likely that the CI Arb Rules will mainly be suitable for mid- to high-value projects because of the cost involved.

It is too early to tell how successful the CI Arb Rules will be in terms of implementation in international and domestic contracts. However, the Rules clearly demonstrate a step forward for DB resolution. In particular, the CI Arb Rules are free from many of the issues found in other existing rules, they can be easily incorporated into any commercial contract, and they reflect a global trend towards greater upfront investment in dispute avoidance in order to minimise and avoid the often extremely costly consequences of disagreements escalating into arbitration and litigation.

## Appointing Dispute Board Members

A DB should ideally be established at the outset of a contract (at or around the time of the commencement of the works on site) and remain in place throughout the project duration. This enables DB members to become 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.

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 time-consuming. It is recommended that the parties co-ordinate their selection of DB members and chairperson in a way so as to provide the maximum of appropriate skills for the project that is relevant to the circumstances, including the availability of the DB member for the duration of the project.

The contract between the parties should state whether the DB will comprise of one or three members. If the contract is silent on this, or if the parties do not agree, then there shall be three members on the DB.

If the parties agree to have a sole DB member, they must appoint the member by the date stated in the contract or within 28 days of the contract if the contract is silent on the date.

If, on the other hand, the parties wish to appoint three DB members, then each party nominates one member for the approval of the other party. The third member is then selected by the two members (subject to approval by the parties) who will act as chairperson. As before, the three members must be established by the date stated in the contract or within 28 days of the contract if the contract is silent.

One party cannot terminate the appointment of a DB member unilaterally. The appointment can only be terminated by the agreement of both parties and a new DB member must be appointed in the same way as the replaced member was required to have been appointed.

If there is a conflict of interest, or if a DB member fails to comply with the Tripartite Agreement, either party can apply to the CI Arb, at any time, to remove the DB member in question. The CI Arb also has the power to appoint a DB member if the parties fail to do so in the manner set out above.

### **A DB Member's obligations and ethics**

The DB members must treat all information provided to them during the course of their service as confidential or, if they have to disclose the information, this must only be for the purpose of avoiding or settling a dispute unless they have the consent of the parties or a right by law.

The DB members are also under an obligation to adhere to the ethical obligations set out in the rules or in the Tripartite Agreement.

The DB member, and any subsequently appointed replacement DB members, must be impartial and independent at all times and confirm that there is no conflict of interest. In the event that there is a conflict, the member must disclose it to the parties immediately. If the parties wish to express an objection with regard to that member, they must do so within 21 days otherwise they will be deemed to have waived any potential conflict of interest.

Deriving from the principle that no person can be his or her own judge, the following situations preclude a person from serving as DB Member:

There is an identity between a Party and the prospective Member, or the prospective Member is a legal representative of one of the Parties.

The prospective Member is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the Parties.

The prospective Member has a significant financial or personal interest in one of the Parties or in the matter at stake.

The prospective Member regularly advises one of the Parties or an affiliate of one of the Parties, and the prospective Member or his or her firm derives a significant financial income therefrom.

The situations listed in this clause are non-exhaustive examples of specific situations which give rise to justifiable doubts as to a person's impartiality and independence. Disclosure of any of these situations cannot cure the objective conflict of interest.

## Referring a dispute

If there is a dispute, the first thing that parties must do is comply with any contractual pre-review requirements or prior dispute resolution process which may be required under the contract.

In circumstances where a dispute arises, either party can, at any time, give notice of its intention to refer to the Dispute to the DB by submitting a Position Statement to the other party and to the DB. The referring party must include in the Position Statement a summary of the Dispute, a list of the issues and their position together with the redress sought. This must be submitted with any supporting evidence.

Following the submission of a Position Statement, the responding party must submit a Response within 28 days of receiving the Position Statement. The Response must include a summary of their position, supporting evidence and a statement of what they request the DB to determine.

The referring party may, with the DB's permission, reply to the Response within 14 days of receiving it.

Throughout this process, the parties are still free to settle the dispute at any time, with or without the DB's assistance.

## Enforcing a decision

The DB's decision must be made within 84 days of the DB receiving the Position Statement.

The parties are only contractually bound by the DB's decision if they have chosen to implement a DAB. If, on the other hand, the parties chose to implement a DRB they would not be bound by it as it would only be a Recommendation as opposed to a Decision.

If a DRB issues a Recommendation, each party must either accept or reject the recommendation within 21 days. After the 21 days, either party can either voluntarily comply with the Recommendation or submit the dispute to arbitration, or if the parties agree, the courts.

The recommendations made by the DRB are admissible in subsequent arbitral or judicial proceedings.

## The structure of the Dispute Board Rules

The CI Arb rules are written in a way which, unlike the rules under FIDIC, allows it to be implemented in contracts in any industry and not just construction. It has one set of rules for DABs and one set of rules for DRBs, thereby giving the parties the choice of obtaining a non-binding Recommendation or a binding Decision and is, therefore, not restrictive (like FIDIC which only uses DABs) or uncertain (like the ICC which offers three different types of dispute boards).

The rules also offer clarity. For example, the rules in AAA and ICE do not specify what can be referred to arbitration or court proceedings, whereas this is clearly set out in the CI Arb rules.

The CI Arb rules also create certainty in that it specifies when a DB member must be appointed if the contract between the party is silent on the date. By contrast, the AAA and FIDIC rules do not make any provision in circumstances where there is no date specified in the contracts regarding the appointment of DB members.

Furthermore, the purpose of the CI Arb rules is to assist the parties as much as possible in order to avoid disputes, which, in turn, enable parties to focus on the delivery of the project. The CI Arb rules do this by allowing parties to jointly obtain the informal advice of DM members without having to refer a dispute which can be contrasted with the rules under the AAA.

## Conclusion

Prior to the new CI Arb rules, there was no single set of international dispute board rules that could be used on a wide range of commercial projects. For example, the ICC Rules are the closest but they focused on the construction industry, and the FIDIC DAB procedure is woven into the fabric of the FIDIC contract. Extracting the rules required very careful drafting and the issues posed by enforcing a dispute board's decision under the FIDIC contract are wide-ranging. The new CI Arb rules offer a more simplistic and straightforward approach to avoid those issues and the rules can be implemented in any commercial or construction contract by the incorporation of a short precedent dispute board clause. The different types of dispute boards are examined below.

Due to the recent introduction of the new CI Arb rules, it is difficult to tell at this stage how successful it will be in terms of its implementation in international contracts. However, what is certain is that it can be used in any commercial contract and is not specific to a particular industry. Therefore, parties to the contract do not have to query whether the rules will work for their bespoke contracts nor will they have to be concerned with any

rigid rules or areas of uncertainty as the rules offer two types of dispute boards, whilst, at the same time, avoiding confusion by not offering a combined dispute board which can hinder parties' ability to decide on the suitability of a dispute board.

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