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**Establishing dispute boards;
Selecting, nominating and appointing dispute board members**

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Introduction

This paper focuses on selecting, nominating, appointing and establishing dispute boards. Consideration is given not just to the legal issues and standard form provisions available, but also to the practical issues and difficulties of identifying and appointing board members for international projects.

The establishment and appointment of the standard Federation Internationale des Ingenieurs-Conseils "FIDIC", International Chamber of Commerce "ICC", American Arbitration Association "AAA" and Institute of Civil Engineers "ICE" provisions are considered, as well as those contained within the World Bank Procurement procedures. The differences are compared and contrasted.

From a practical perspective, the challenge for the parties is to establish a dispute board at the outset of the project, rather than waiting for a dispute to arise. There is a need to identify, consider and agree the appropriate individuals for the project, as well as to consider independence and impartiality, and establish, and be seen to establish, a level playing field for the contractor and employer or owner.¹ The identification of individuals with appropriate skills, experience and qualifications, especially in relation to the dispute

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¹ In this paper the term "employer" is used to refer to the employer, owner or purchaser of the works (thus adopting FIDIC terminology).

board chair, can be difficult and time consuming. However, the parties must overcome these issues in order to appoint a dispute board (“DB”).²

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

A brief overview of dispute boards

The term “dispute review board” or “dispute adjudication board” (collectively “DBs”) is a relatively new one. It is used to 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 provide binding decisions.

The one-person or three-person DBs are remunerated throughout the project, most 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.

The term has more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of dispute review boards (“DRBs”), which originally developed in the domestic US major projects market. DRBs were apparently first used in the USA in 1975 on the Eisenhower Tunnel. The use of DRBs has grown steadily in the USA, but they have also been used internationally. However, DRBs predominantly remain the providence of domestic USA construction projects. As adjudication developed, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the Dispute Adjudication Board (“DAB”) was borne from the DRB system; the DRB provides a recommendation that is not binding on the parties.

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 that bind the parties and must be implemented

² In this paper the term “DB” has been used to refer collectively to dispute boards, dispute adjudication boards, combined dispute boards or dispute resolution boards.

immediately during the course of the project. The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation. Genton, adopting the terminology of the International Chamber of Commerce ("ICC") describes the DAB approach "as a kind of pre-arbitration requiring the immediate implementation of a decision".³ He goes on to state that:

"the DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions."⁴

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

- Dispute review board - the DRB issues recommendations in line with the traditional approach of DRBs. An apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period then the parties agree to comply with the recommendation. The recommendation therefore becomes binding if the parties do not reject it.
- Dispute adjudication board - DAB's decision is to be implemented immediately.
- Combined dispute board ("CDB") - this attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests and the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

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

According to the ICC the essential difference is that the parties are required to comply with a decision immediately, whereas the parties must comply with a recommendation but only if the employer and contractor express no dissatisfaction within the time limit. The combined procedure seems at first glance to be a somewhat cumbersome approach attempting to build upon the benefits of the DRB and DAB, without following a clear

³ Pierre N. Genton (2003), Dispute Boards.

⁴ Para. 7-029.

pathway. Nonetheless, it may prove useful for those parties that cannot decide whether they need a DRB or a DAB.

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

The Development of international DBs

A limited number of standard form contracts are available, but those that are available set out a very similar approach to the appointment of DB members. The “standard form” procedures that are available have principally arisen from the sequential development of adjudication:

- 1970: A contractual adjudication process was introduced into the domestic sub-contractor standard forms in the UK in order to primarily resolve set-off issues between the contractor and main contractor.
- 1994: Latham issues his final report reviewing procurement and contractual arrangements in the construction industry.
- 1995: FIDIC introduced a DAB in its Orange Book.
- 1996: FIDIC introduced as an option the DAB in the Red Book.
- 1996: Part II of the Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”) included adjudication provisions in section 108.
- 1998: Part II of the Housing Grants, Construction and Regeneration Act 1996 is introduced on 1 May, together with the exclusion order (S.I. 1998 No. 648) and the Scheme for Construction Contracts, England and Wales (S.I. 1998 No. 649).
- 1999: FIDIC adopted a DAB/Dispute Review Expert (“DRE”) procedure in favour of the additional approach of relying upon the engineer acting as the quasi arbitrator as well as an agent of the employer or owner. The DAB procedure became mandatory rather than an option. The three major model forms including DABs/DREs were:

- Red Book: Conditions for Construction (a standing DAB comprising three members or one member).
 - Yellow Book: Plant and Design Build (ad hoc DAB).
 - Silver Book: Engineer Procure and Construct (Turnkey), again incorporating an ad hoc DAB.
- 2000: AAA Dispute Review Board Guidance Specification.
 - 2000: The World Bank introduced a new edition of its Procurement of Works procedure that made the “Recommendations” of the DRB or a DRE mandatory unless or until superseded by an arbitrator’s award.
 - 2002: ICC Task Force prepared draft rules for dispute boards (“DBs”).
 - 2004: The World Bank, together with other development banks, and FIDIC started from May working towards a harmonised set of conditions for DAB.
 - 2004: (July): ICE published a DB procedure. An alternative procedure is designed to be compliant with the HGCRA.

The introduction in the 1970s of the limited contractual adjudication procedure is perhaps now of historical interest. In the UK, the HGCRA was clearly a major turning point. However, it can certainly no longer be considered merely a domestic UK turning point; it also represents a major international turning point in the area of construction dispute resolution. In the international arena, FIDIC led the way by the introduction of DABs in its 1999 suite of contracts. In respect of the DAB, the FIDIC standard conditions of contract include:

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

FIDIC DAB (Clause 20)

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

be resolved during the course of the works. 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.⁵ Under UK law timescales in construction contracts are generally directory rather than mandatory.⁶ 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.⁷ A contractor would be well advised to notify in writing any requests for extensions of time or money claims during the course of the works and within a period of 28 days from the event or circumstances giving rise to the claim.

The benefit then of the DAB is that it should be constituted at the commencement of the contract, so that the members of it will visit the site regularly and be familiar not just with the project but with the individual personalities involved in the project. They should, therefore, be in the position to issue binding decisions within the period of 84 days from the written notification of a dispute pursuant to 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 appendix to the FIDIC contract should identify whether the DAB is to comprise one or three people.

The 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.⁸ 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 that is the case, then each party is to nominate one member for approval by the other. The parties may then agree

⁵ Seppala, Christopher (2003) “Claims of the Contractor”, a paper given at The Resolution of Disputes under International Construction Contracts, ICC, Paris, 6-7 February.

⁶ *Temloc v Errill Properties* (1987) 22 BLR 30, CA

⁷ *Bremer Handelsgesellschaft mbH v Vanden Avenue-Izegem PVBA* (1978) 2 Lloyd's Rep 109, HL. Cf *City Inn Limited v Shepherd Construction Limited* (2002) SLT 781, Second Division, Inner House, Court of Session.

⁸ Clause 20.3.

upon a third member who is to become 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 the General Conditions of Dispute Adjudication Agreement are incorporated by reference on Clause 4 of the Dispute Adjudication Agreements. The retainer fee and daily fee of each member are set out in the Dispute Adjudication Agreements. The employer and contractor bind themselves jointly and severally to pay the DAB member in accordance with the General Conditions of the Dispute Adjudication Agreement. Details of the specific FIDIC contract between the employer and contractor also need to be recorded, as it is from this document that the employer and contractor agree to be bound by the DAB and it is also from this document that the DAB obtains its jurisdiction in respect of the project.

World Bank

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 shall comprise either one or three people (the default number being three)⁹. If the DB is to comprise three members then each party shall appoint a member and the first two members shall recommend and the parties will agree on the third member of the DB who shall be the chairman.¹⁰

Procedural Rules

International Chamber of Commerce

The ICC issued on 1 September 2004 its Dispute Board Rules, together with Standard ICC Dispute Board Clauses and a Model Dispute Board Member Agreement. The 3 alternative approaches of the ICC Rules are set out on page 3 above.

Institution of Civil Engineers

The ICE Dispute Resolution Board Procedure was issued in February 2005. The rules consist of two alternatives:

⁹ Clause 20.2.

¹⁰ Clause 20.2.

- (a) Alternative One: For use on international projects and UK contracts which are not subject to the provisions of the UK Housing Grants, Construction and Regeneration Act 1996;
- (b) Alternative Two: UK Housing Grants, Construction and Regeneration Act 1996 Compliant.

The Procedure also contains a model tripartite agreement to be entered by the contractor, employer and DRB member. Each DRB member will enter into a separate agreement. The parties can agree the identity of the DRB member if there is only one board member. If there are three DRB members, 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 procedure leaves the traditional arbitration procedures in the contract intact (in the case of a non-compliant Act contract).

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

American Arbitration Association

The AAA Dispute Resolution Board Guide Specification¹¹ provides for an independent DRB that “will assist in and facilitate the timely resolution of disputes ...”¹² The focus of the AAA procedure is on of party autonomy. The AAA will help the parties to identify the members of for the DRB, but will not appoint them in default. The DRB will assist the parties to resolve their differences. It will not make binding decision, but will issue written non-binding recommendations.

Three part agreements are once again used to bind the parties and each member of the DRB to the Rules and to identify remuneration for each of the members.

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

¹¹ Effective 1 December 2000.

¹² Rule 1.01 General, D Purpose. 1.

Appointing the DB: contractual procedures compared

The contractual provisions requiring the establishment of a board must be contained in the contract between the employer and the contractor. The usual provisions require the parties to agree the identity of the board within a limited time, and then provide a default appointing mechanism where the parties cannot agree upon the identity of a member or indeed the entire dispute board. The contract should also contain a mechanism for replacing the board members, and once again should also contain a default procedure for replacing those members who cannot be replaced by agreement.

For example, Clause 20.2 of FIDIC deals with the establishment of the dispute board, and states:

“Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 . . . The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons (“the members”). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as agreed in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall

expire when the discharge referred to in Sub-Clause 14.12 . . . shall have become effective.”

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

The ICE Dispute Resolution Board Procedure provides that the DRB shall be appointed by the date stated in the contract. If no date is stated, then the DRB shall be appointed within 56 days after the Contract is formed.¹³

The World Bank Procurement Rules require that if the DB has not been jointly appointed 21 days before the date stated in the Contract, then each party shall nominate one member and the two members shall then nominate the third member.¹⁴

Article 7 of the ICC Dispute Board Rules deals with the appointment of DB members. Article 7.1 provides that the dispute board is to be established in accordance with the provisions of the contract or if the contract is signed then in accordance with the ICC Rules which provide a default appointment procedure. The ICC Rules are therefore subordinate to, but complement the contract between the parties.

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

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

The parties may therefore refer any dispute whatsoever that arises in connection with or out of the contract including the opening up and reviewing of notices and certificates. If the DAB comprises three members then the DAB is deemed to have received the notice of dispute when it is received by the chairperson alone. This means that the parties can simply direct all of their correspondence to the chairperson, but with copies to the other members, as well as providing a copy to the other party and engineer.¹⁵

¹³ Clause 2.

¹⁴ Clause 20.2.

¹⁵ Clause 20.4 and Procedural Rule 4.

Both the employer and the contractor are obliged to provide additional information and further access to the site and its facilities as the DAB may require in order for the DAB to make its decision.

The contractor, notwithstanding that a dispute has been referred to the DAB, is to continue to proceed with the works in accordance with the contract (unless abandoned, repudiated or terminated). Both parties are contractually obliged to properly comply with every decision of the DAB. DAB decisions are therefore immediately mandatory, unless or until revised by an arbitral award, litigation or settlement.

The DAB is obliged to provide its written decision within 84 days after receipt of the reference. The DAB must provide a reasoned award, which must be issued pursuant to clause 20.4 of the contract.

The DB members should therefore be selected and the DB established ideally before work commences on site. This is not at all easy in practice, and many DBs are established after the work has commenced, some being established late in the construction cycle, and even on many occasions after the work has been completed. Those DBs that are constituted after the work has been completed are usually only established because a dispute has arisen. The parties feel compelled to establish a DB in order to resolve the disputes that have been left over until after completion of the project because the contracts require that disputes must be referred to a DB.¹⁶ Whether it is worth constituting a three-person DB after the work has concluded in order to resolve disputes is questionable.

The main benefit of the DB is that they become familiar with the project during its course. Once the work is completed, the DB will be no more familiar with the project nor the individuals involved within it than an arbitration tribunal. Further, the disputes that arise at the end of or after completion of the project are usually more complicated or substantial and would perhaps more appropriately be referred to a final dispute resolution process such as arbitration. Nonetheless, DBs are on occasions established after completion of the work solely for the purpose of resolving outstanding disputes.

Selecting the board members

The appendix to the FIDIC General Conditions of Dispute Adjudication Agreement provides a tripartite General Conditions of Dispute Adjudication Agreement. It is tripartite in the sense that it is entered into between the employer, contractor and the sole member or

¹⁶ Clause 20 of the 1995 FIDIC red book stated that all disputes “shall” be referred to the DAB. As a result all disputes had to be referred to the DAB before a reference could be made to arbitration.

each of the three individual members of the DAB. The Agreement takes effect on the latest of:

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

The distinction between the last two bullet points refers to the Dispute Adjudication Agreement appended to the FIDIC form, or alternatively provides for the parties to enter into an effective dispute adjudication agreement even if it is not in the form attached to the FIDIC contract.

The obligations and qualities of DB members

The engagement of a member for the DAB is a personal appointment. The focus, therefore, is on the individual rather than the organisation that any particular DB member might be employed by. The Dispute Resolution Board Foundation guidance takes the view that in order to be eligible for election, a Board member must not have:

- 1 Any financial ties to any party, either directly or indirectly involved in the contract;
- 2 Must not be currently employed by any party directly or indirectly in respect of the contract;
- 3 Have been a full-time employee of any party directly involved in the contract (unless the other party consents);
- 4 “A close professional or personal relationship with a key member of any party directly or indirectly involved in the contract that could give rise to the perception of bias.”
- 5 Any financial interest in the project or contract (except of course in respect of the DRB services); and
- 6 “Any prior substantial involvement in the project, in the judgment of either party.”

“Directly involved” means the employer, contractor or JV partners in respect of the project. “Indirectly involved” includes subcontractors, suppliers, designers, architects or other professional service firm or consultant or any party on the project. This is a

relatively wide category. Finally, “financial ties” includes, but is not limited to, any ownership interest, loans, receivables and/or payment.

The Foundation then goes on to provide guidelines for DB members during the course of their service or serving on the DB. They must not:

- a. Be employed, either full-time or as a consultant, by any party that is directly involved in the contract, except for service as a DRB member on other contracts.
- b. Be employed, either full-time or as a consultant, by any party that is indirectly involved in the contract, unless specific written permission from the other party is obtained.
- c. Participate in any discussion regarding future business or employment, either full-time or as a consultant, with any party that is directly or indirectly involved in the contract, except for services as a DRB member on other contracts, unless specific written permission from the other party is obtained.”

A FIDIC DAB member warrants that he or she is and shall remain impartial and independent of the employer, contractor and engineer. A member is required to promptly disclose anything that might impact upon their impartiality or independence.¹⁷

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

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

¹⁷ Clause 3, Warranty.

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

By contrast, and pursuant to Clause 5, the employer and contractor are obliged not to request a member to breach any of the obligations set out above. Neither is the employer or the contractor able to appoint a member as arbitrator under the contract or call a member as a witness to give evidence concerning any dispute arising under the contract. Further, the employer and contractor grant immunity upon the member of the DAB for any claims for anything done or omitted to be done in the purported discharge of the member's functions unless those acts or omissions have been carried out by the member in bad faith. An indemnity is provided, joint and severally, by the employer and contractor in that regard.

The AAA DRB Guidance Specification requires DRB members:

1. To be neutral;
2. To be Free from any conflict of interest;
3. To be Impartial;
4. Not to be previously employed or have any financial ties including fee based consultancy within a period of 10 years prior to the award of the contract; and
5. Not to have a prior involvement that might suggest impartiality.

The ICC Rules require independence, and expressly obliges disclosure.

From the Agreement and the general obligations it is possible to identify 8 key considerations in respect of the obligations of a DB member can, therefore, be distilled from the rules of FIDIC, ICC, AAA and ICE. These are:

1. Neutrality;
2. Impartiality;
3. Independence;
4. Disclosure;
5. Qualifications;
6. Experience;
7. Availability; and
8. Confidentiality.

These key considerations are considered below.

1. Neutrality

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

In practice, a party nominating a member or identifying a list from which a nomination might be made, might indeed hope that the final selection might favour that party, not because they have been proposed by the party or are in fact biased, but because of cultural similarities, professional respect and/or outlook in terms of the type of organisation or their perspective in the marketplace.

In terms of perspective in the marketplace, one might assume that contractors seek DB members who have been directors of contracting organisations or are engineers who predominantly have worked for contractors, whereas employers might seek engineers from professional practices that tend to advise employers in terms of procurement and provide independent engineers. This view is only based on anecdotes. Research into the actual selection, from a neutrality perspective, would need to be carried out internationally in respect of DBs.

2. Impartiality

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

can be reduced to a question of a perception of bias. The leading case under English law is the House of Lords Decision in *John Magill v (1) David Weeks (2) Dame Shirley Porter*.¹⁸

In that case an auditor found two councillors guilty of wilful misconduct by devising or implementing a policy of targeting designated sales of council property. These sales were in marginal wards, and they had been targeted in order to increase the Conservative Party vote in the 1990 local authority elections. As a result the auditor imposed a surcharge on the sale. The Court of Appeal had allowed the appeal on liability, but the House of Lords restored the auditor's original decision.

The key question to consider, according to the House of Lords, was not whether the councillors were in fact biased, but whether the decision at the time the decision-maker in question gives it, is such that a fair-minded and independent observer, having considered the facts, might conclude that there was a real possibility that the decision-maker was biased. The test is a useful one in that it draws a distinction between the need to prove actual bias and the appearance of a potential bias based upon the circumstances at the time when the decision was made. In practice, this means that the judge or judges considering the issue of impartiality have to decide whether an independent and fair-minded observer would consider the decision-maker biased, but of course based upon the judge or judges' perceptions.

Magill v Porter related to council members. It is equally applicable to tribunals. In respect of judges, the test for apparent bias is whether the circumstances would lead a fair-minded and informed observer to come to the conclusion that there was a real possibility that the tribunal was biased.¹⁹ If this principle of judicial impartiality has been, or would be, breached, then a judge would be automatically disqualified from hearing a case or dealing further with the case.

More recently, the Court of Appeal has made it clear that this is not a discretionary case management decision reached by balancing the various factors applicable to the case. If there are any doubts, then the judge must excuse him or herself from further dealings with the case.²⁰

In the infamous case involving General Augusto Pinochet, the House of Lords ruled that the links between Lord Hoffman - who sat on the original panel that ruled to allow General Pinochet's extradition - and the human rights group, Amnesty International, were too close

¹⁸ [2001] UKH 67

¹⁹ *Taylor v Lawrence* (2002) EWCA Civ 90 (2000) QB 528.

²⁰ *Alexander Morrison & Another v AWG Group Limited & Another* [2006] EWCA Civ 6

to allow the original panel's verdict to stand.²¹ Lord Hoffman had failed to declare his links with Amnesty International before ruling in the original hearing. Lord Hoffman was a chairman and a director of Amnesty International Charity Limited. Lord Hope stated that in view of Lord Hoffman's links, "he could not be seen to be impartial". Although it was not suggested that Lord Hoffman was actually biased, his relationship with Amnesty International was seen to be such that, he was, in effect, acting as a judge "in his own cause". This is then a natural justice point. A central limb of natural justice is that a person cannot be a judge in his or her own cause.

In respect of adjudication, this approach has been applied in the case of *Amec Capital Products Limited v Whitefriars City & Estates Limited*.²² In that case, Amec applied under Part 8 of the Civil Procedure Rules to enforce an adjudicator's decision. The JCT 1998 Edition with Contractor's Design provided for the appointment of a named adjudicator. Clause 30A.3 stated:

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

The clause then sets out two further ways to appoint an adjudicator.

Appendix 1 provided that the adjudicator was to be a Mr George Ashworth of a particular firm, but no such person of that name worked at the firm. However, a person of a similar name, a Mr "Geoffrey" Ashworth was engaged at that firm. The RIBA appointed Mr Briscoe as adjudicator, and on 19 September 2003 HHJ LLOYD QC decided that Mr Briscoe had no jurisdiction and his decision was a nullity. A further notice of adjudication was served, but unfortunately Mr Geoffrey Ashworth had by that time sadly died. The RIBA once again appointed Mr Briscoe.

The issues that arose at the Court of Appeal were:

- 1) The scope of the appointment clause in the contract;
- 2) Whether there was a breach of natural justice by the adjudicator deciding something that he had already decided;
- 3) Whether there was an appearance of apparent bias carrying forward legal advice from the first decision to the second;

²¹ *R v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (House of Lords, 24 March 1999)

²² [2004] EWHC 393 (TCC)

- 4) Whether the adjudicator had failed to deal with an issue in respect of Clause 27 in his decision;
- 5) Whether a telephone conversation amounted to an appearance of bias;
- 6) Whether advice in respect of his jurisdiction amounted to an appearance of apparent bias; and
- 7) Whether the possibility of a claim against the adjudicator could amount to the appearance of bias on behalf of the adjudicator.

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

The carrying forward of a decision in respect of principally the same dispute (albeit that the first decision was a nullity) did not in itself create an appearance of bias. At paragraph 19 Lord Justice Dyson stated:

“The question that falls to be decided in all such cases is whether the fair-minded and informed observer would consider that the tribunal could be relied on to approach the issue on the second occasion with an open mind, or whether he or she would conclude that there was a real (as opposed to fanciful) possibility that the tribunal would approach its task with a closed mind, predisposed to reaching the same decision as before, regardless of the evidence and arguments that might be adduced.” [emphasis added]

An adjudicator must approach the question the second time with an “open mind” and consider the evidence submitted in the second referral and should not be “predisposed” to reach the same conclusion. He held, at paragraph 20, that:

“In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias . . . It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind . . . He will, however,

be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct.”

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

The legal advice that he had received in the first decision did not deal with Clause 27, and therefore an informed third party would not consider that the adjudicator was biased because the issue of Clause 27 was not dealt with in the initial legal advice. Further, the adjudicator did not deal with Clause 27 in his decision and therefore there was no basis upon which any bias could be founded. Whitefriars had not made any submissions on Clause 27 during the adjudication and so could not raise the issue now.

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

Once appointed, an adjudicator is still at risk of being perceived to be bias. Of particular interest is the decision in respect of the application of natural justice to the adjudicator’s conclusion that he did or did not have jurisdiction. As the adjudicator did not have jurisdiction to rule on his own jurisdiction, natural justice was not applicable. This was because the court was to decide whether the adjudicator had jurisdiction, and the conclusion reached by the adjudicator could not affect a party’s rights. In this respect Lord Justice Dyson at paragraph 41 stated:

“A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. . . .The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decision which can affect parties’ rights. Procedural fairness does not require that parties should have their rights to make representations in relation to decisions which do not affect their rights, still less in relation to “decisions” which are nullities and which cannot affect their rights. Since the “decision” of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make a “decision” after giving the parties an opportunity to make representations.”

Nonetheless Lord Justice Dyson warned that it will be appropriate for an adjudicator to allow both parties to make representations before coming to a conclusion about his or her

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

More recently, the IBA has produced Guidelines on Conflicts of Interest in International Arbitration.²³ These Guidelines set out the general standards to be attained, and then list examples. The examples introduce the concept of 3 classifications of disclosure; the red list, orange list and green list. The green list sets out examples where no conflict would exist. The orange list provides examples of situations where, from the parties perspective, there are justifiable doubts as to the arbitrator's impartiality or independence. The red list contains examples of situations where there would be a conflict. That list is then further divided into waivable and non-waivable examples; some conflicts can be waived by the parties, and some clearly should not be waived.

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

The difficult issue for DB members is, therefore, the adequacy of disclosure. If a professional person is nominated for a board and discloses any and all potential links, ties and relationships of whatever nature, that in fact or might, no matter how tenuous relate the member to any of the parties dealing directly or indirectly with the project, then if that person is selected it would be difficult to mount a challenge based on a perception of bias. This would be because the member would have already disclosed the issue which clearly was unimportant to the parties at the time that they appointed the person because clearly they knew about the relationship.

²³ 22 May 2004.

Before considering disclosure, it is perhaps useful to make the distinction between impartiality and independence.

3. Independence

Impartiality, and the perception of bias, is subjective in nature. Whether an individual is or is not biased is only something that that individual can truly know. An outside observer such as the parties or a judge attempts to measure whether the person is or is not biased, not by the actions of the person, but by reference to the fictitious neutral observer.

On the other hand, independence is objective. If there is a financial tie between one of the parties involved in the contract and the DB member, then the member is clearly not independent of the project. The outcome of the project may well have some financial effect upon the DB member. The member cannot, in those circumstances, be independent. But, in theory, the member could still be impartial. It may be that the integrity of the individual was such that it would not affect their professional judgment, but that is a matter of debate.

Article 8 of the ICC Rules introduces an obligation of independence. Article 8.1 requires every DB member to be and remain independent of the parties. The members of the DB are required to provide written statements to that effect, as required by Article 8.2:

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

The ICC therefore requires written disclosure in respect of independence. Should the independence of the DB member change then Article 8.3 requires immediate written disclosure to the parties and the other DB members of any facts or circumstances relating to the change in that DB member’s independence. Article 8.3 makes it clear that this obligation in respect of independence continues during the course of the DB member’s tenure.

A challenge procedure is also included within the ICC Rules. Article 8.4 allows any party to challenge the DB member in respect of an alleged lack of independence. A party can submit to the Centre a request for decision in respect of the lack of independence provided that the party, within 15 days of learning of the facts upon which a challenge would be based, makes a written submission to the Centre. The ICC can then make a final decision in respect of that challenge after giving the DB member an opportunity to comment.

In the event that the challenge is successful then the DB member's agreement is immediately terminated. The vacancy is then filled either by agreement between the parties or by way of the default procedure.

4. Disclosure

Article 8.3 of the ICC DB Rules requires immediate written disclosure by a DB member to the parties and the other DB member of any facts or circumstances which might create the perception of bias. Regardless of this rule, it is vital that every potential DB member considers whether they have or might have, or might be seen to have, a conflict of interest. The initial consideration by the potential DB member would simply involve considering whether he or she recognised any of the parties, major subcontractors, key consultants or, indeed, key individuals engaged by any of those organisations. However, that would certainly not be sufficient.

If the DB member is employed by an organisation, then a conflict check should be carried out. This would involve considering whether that organisation, or any of its individuals, is currently working for or has worked for any of the key organisations or individuals that are working for the project. If any links, no matter how tenuous, are discovered, then they should be disclosed in writing. The duty is an ongoing one, and a DB member that has been appointed should be alert to any situations that might subsequently be seen to create the perception of bias.

A duty of disclosure requires a person to:

- Disclose all material facts known to them; and
- Not to misrepresent any of the material facts. This will include statements which are true but which are misleading because they are incomplete (*Aaron's Reefs v Twiss* [1986] AC 273).

The duty is a positive one and therefore omission can constitute a breach of the agreement between the parties and the DB members, and a decision made with the involvement of that member will be void. Importantly it may not be sufficient simply to answer the questions put by a party. Care needs to be taken and material facts not specifically requested must be disclosed.

It applies to the representations made by a potential, or appointed DB member, and the duty is an ongoing one.

The contractor and owner rely on the representation made in disclosure (or lack of it). While an owner and contractor can investigate a potential member it will be extremely difficult to identify professional relationships and evaluate the extent of those

relationships. This is why the requirement to give full and accurate disclosure is given such a high emphasis.

5. Qualifications

Categories of qualifications will include:

- Education and professional qualifications;
- Seniority, in particular the length of service in a senior position;
- Specific qualifications in DB;
- Inclusion on recognised DB lists, such as FIDIC, ICC, AAA and ICE; and
- Ideally, the ability to demonstrate adequate and appropriate continuing professional development relating to DBs.

Article 8 of the ICC Rules states:

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

The question is not the number of qualifications that a DB member has. The qualifications held should be appropriate for the project, and ideally there should be a spread of focused appropriate qualifications between the three DB members. In addition to formal qualifications, it is also important that each DB member is a good communicator, which, of course, cannot be assessed by any formal qualifications.

6. Experience

It is important that any DB member nominated for appointment has appropriate experience. This is a difficult question. It is not just a question of identifying individuals with appropriate experience in respect of the type of project, but also in the construction methods and, ideally, experience of the cultural backgrounds that may be brought together for any particular project. One of the benefits, and also the challenges, of a three-person DB is that each member may have different qualifications and experience.

The blend of qualifications and experience of the three-person DB can provide a powerful combination of decision-making abilities. In this respect the selection of the three-person DB should be more refined than the selection of three arbitrators for a tri-arbitral tribunal. The arbitral tribunal will be hearing a possibly substantial dispute, most usually many years

after the end of the project. A three-person DB will be on hand during the course of the project and would interact with individuals with key decision-making powers during the course of the project.

Identifying available and appropriate DB members will become more difficult as the use of DBs increases. Those with some experience will be preferred, making it more difficult for those that have not sat as DB members to gain DB experience. One solution would be the introduction of a mentoring system. In the UK the Association of Independent Adjudicators "AICA" has adopted this approach in order to develop and improve the quality of adjudicators. Recently qualified adjudicators on the AICA list are assisted by an experience mentor adjudicator. This approach could be adopted by the international DB appointing bodies. The 3 person DB lends itself to such as process, as the more experienced chairperson can guide the 2 wing members and assist them to develop their DB skills.

Some DBs, in particular, the American approach of the Dispute Review Board, provide informal advice or direction during the course of the project. Clearly, a DB that is active, interested in the project and respected by the participants, is more likely to have a potentially substantial effect upon the success of the project and, as indeed research shows, may well act as an effective dispute and avoidance procedure.

7. Availability

An appointment to a DB is a personal non-delegable obligation. The difficulty, of course, is that the most appropriately qualified and experienced individuals are busy people in high demand. There is also the greater chance that they may be unable to act due to conflicts or arguable perceptions of bias because of their relationships with key contractors and employers. Initially, some of the most appropriate individuals may not be available, quite simply because of conflict issues or because of their busy schedules.

A second consideration is whether in fact a dispute member will be able to make available the appropriate time to act for particular projects. This would depend upon location and duration. If the project requires considerable travel, then that will of course be a factor. Further, if a project is a mega one, then it may last for a considerable number of years. The DB member would need to consider whether they could dedicate sufficient time, not just in terms of their existing workload, but also in some cases in terms of retirement planning. The parties should also give this separate consideration as DB members' optimism to take part may not translate into an adequate dedication once the project has commenced.

8. Confidentiality

Article 9 of the ICC Rules provides that DB members shall keep confidential any information obtained by the DB member during the course of their activities as a board member. Further, and as a related matter, a DB member is not to act in any judicial, arbitral or similar proceedings relating to any dispute arising from the Project. This means that they cannot act as a judge, arbitrator, expert, representative or advisor of any party.²⁴

The duty restricts a DB member from fulfilling certain other roles in respect of the same project that would most likely lead to the perception of bias. The duty to keep confidential however, restricts a members ability to make the full disclosure that might be required in respect of his or her nomination to another DB. Care will be needed to ensure that full disclosure is given without breaching the requirement of confidentiality.

How are board members selected in practice?

It may be cynical to suggest that the selection of board members in practice is somewhat limited by the sphere of appropriate individuals known to the key decision-makers and the perception that a board member should be disposed towards the party nominating him or her. Some employers and contractors consider that the member nominated by them should perhaps decide all issues in their favour, or even act as an advocate “on the inside”.

An informed employer or contractor would consider the issues raised above, and when considering a nomination identify a series of attributes that should be displayed by any potential candidate. Some of these attributes should apply to all DB members, whilst others would be project dependent. So, for example, all potential DB members should be impartial (although a nominating party may hope for partiality), while the type of project and construction techniques will dictate the final profile of the individual sought.

A list of potential attributes, based upon the above factors and a list provided by the Dispute Review Board Foundation, should include:

- 1 Ideally complete objectivity, neutrality and impartiality as a fact;
- 2 Independence (in the objective, freedom from financial ties, sense);
- 3 No conflict (in other words, passing the “perception of bias” test, which could be said to be distinct from the fact position in 1 and 2 above);
- 4 Experience with the type of project (for example, experience in the construction of hydro-electric power stations, as distinct from other forms of power station);

²⁴ Article 9.3, ICC Dispute Board Rules

- 5 Experience with the types of construction technique (which may be peculiar to that particular project);
- 6 Have, for example, 10 years experience in a “senior position”;
- 7 Experience with interpretation of contract documentation, the standard forms that might be applicable and sufficient legal understanding to deal with bespoke forms or amendments or interpretation issues;
- 8 Experience in the substantive law (desirable, although not necessary for all members of the panel);
- 9 Experience with the procedural rules of the DB;
- 10 Experienced training and understanding of the DB process;
- 11 Experience with the resolution of construction disputes;
- 12 Availability;
- 13 A dedication to the objectives of the DB process;
- 14 Membership of a recognised DB panel;
- 15 A qualification by a recognised DB training centre; and
- 16 Well-developed communication skills, both orally and written.

In addition, the potential chairperson should be selected perhaps because they have chaired DBs before, but predominantly because they have experience in dealing with adversarial situations, the ability to effectively run meetings and, in particular, conducted meetings in difficult circumstances.

Identifying potential board members

Potential board members could be identified from:

- 1 Existing DB members or other appropriate professionals who might be able to serve as DB members identified by the employer or contractor or the project team;
- 2 Requests to the employer, contractor or project team organisations in order to see whether any individuals may have experience of appropriate DB members. This may result in a recommendation, which may be that such a person is appropriate or, indeed, inappropriate;
- 3 Contacting one’s own professional institution, whatever that may be;
- 4 Considering the DRBF published list or website;
- 5 Considering the ICC list;
- 6 Considering FIDIC’s website and list; and/or

7 The ICE has recently begun to form a list of potential DB members.

The process of selection

Ideally, any party nominating a range of DB members for selection and then appointment should thoroughly and carefully investigate those individuals. Any potential DB members that are not appropriately qualified or would in any event be rejected because of a perception of bias, should have been identified and eliminated from the list.

The ideal situation is for the employer and contractor to agree upon all three members. This would usually require both the employer and contractor to identify a shortlist of individuals and exchange that shortlist in order to select and appoint a panel of three. In an ideal world, at least one of the names on the shortlist would be the same, such that that person could perhaps be the chairperson, and two further “wing members” could then be agreed from the remaining individuals. This is rarely the case in practice.

Party approval

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

- 1 Parties joint selection;
- 2 Parties agree on two and those two nominate the third; or
- 3 Parties select from a range, and the selected two nominate the third.

The actual process will, of course, depend on the procedural rules. In the absence of an adequate process, then any of the above could be adopted or, indeed, some other hybrid process. As the above three approaches are the predominant ones, they are each considered in turn below.

1 Parties joint selection

The parties jointly select all three members of the DB. The parties might exchange written criteria or, indeed, meet and discuss the qualifications for the prospective board. They will most likely exchange lists and CVs and then in writing agree which of the nominations will be selected for appointment. They can then approach the final selection in order to see whether those individuals will accept the appointment.

The parties may decide which of the members is to be the chairperson, or leave that responsibility to the members themselves.

There are several advantages in allowing the panel of three to decide who is to be the chair. One apparent advantage is that it will be difficult for any particular member to have allegiance to any particular party. Further, if the board is unable

rapidly and easily to agree upon its chair, then it is highly unlikely that the board will be able to resolve difficult construction disputes during the course of the project. One would therefore hope that the board would quickly and easily establish the chairperson without any difficulty.

2 Parties agree on two and those two nominate the third

Each party nominates a member for approval by the other parties. This may be done once again by the exchange of lists and rejection, until two members are approved. Once approved, those two members will then be appointed. The two appointed members will then nominate the third member, who is subject to the approval of the employer and contractor. The third member will then most usually serve as the chairperson.

This procedure is more likely to lead to a board member being referred to as “the contractor’s representative” or “the owner’s representative”.

This method appears to be the most frequently used.

3 Parties select from a range, and the selected two nominate the third

The contractor and the employer propose a list of prospective board members. That list should contain a minimum of three prospective board members. The contractor will then select from the employer’s list, while the employer selects from the contractor’s list. Difficulties can arise when the entire list is rejected. A further list would need to be submitted. It may be said that the best potential candidates are therefore lost in this initial round.

Once the two board members have been selected, then those board members will, subject to the approval of both parties, nominate the final board member. Most frequently, this third person will serve as the chairperson.

Identifying the third man (or woman)

As can be seen from the above, the Rules differ as to how the third member of the DB will be appointed. Some allow for the parties to select all three members, whilst others allow the two nominated DB members to select the third member (some with and some without the approval of the parties).

Selecting the chair

The chairperson could therefore either be identified by the agreement of the parties, or by agreement by the first two DB members nominated, or by agreement between the three appointed DB members.

Ideally, the chairperson should have DB experience, although the majority of DB members acting as chairpersons have most frequently obtained their dispute resolution experience by acting as arbitrators.

Should board members be lawyers?

Returning to the theme of experience and qualifications, it seems rational to suggest that one of the panel members may be a specialist construction lawyer. That person could then complement the panel by focusing on the procedural issues and provide, in particular, advice with regard to interpretation and legal points. This philosophy is not universal.

Many involved in dispute review boards, emanating from the United States in particular, take the view that dispute review boards, and now dispute adjudication boards, are practical dispute resolution procedures that are used during the course of projects, and should therefore comprise construction professionals, most usually engineers. The challenges for dispute review boards and dispute adjudication boards are, without doubt, different to those faced by an engineer when making decisions during the course of the project. That is not to say that an engineer has an easy task, but that the distinction is that a DB is a legalistic and most frequently adversarial process that leads to a binding decision being imposed on the parties.

The key question is not whether a lawyer should be involved, but whether the experience and qualifications of all three members provide a sufficient blend of appropriate skills that is the best for the project in question.

Constituting the board: back to the contract

Once all three DB panel members have been agreed, then they need to be formally appointed. The standard forms in the contract provide the obligations between the contracting parties to appoint a DB, or in default for one party to begin the process of default appointment by a nominating body. The standard form contracts also provide for a tripartite agreement between the employer, contractor and an individual board member, as well as a schedule setting out the powers of the board.

Default appointments

All contracts that include contractual DB provisions should provide a default appointment mechanism, should the parties be unable to agree on the identity of any or all of the board members. The final paragraph of Clause 20.3 of FIDIC provides that that person named in the appendix to the tender may appoint “after due consultation with both parties” any member of the dispute adjudication board. An appointment would be final and conclusive. The default procedure applies in four situations, which are:

- 1 If the parties fail to agree upon the appointment of a sole member of a one-person DAB within 28 days of the effective date;
- 2 If either party fails to nominate an acceptable member in respect of a three-person DAB within 28 days of the effective date;
- 3 If the parties cannot agree upon the appointment of a third member (in this case acting as chairman) within 28 days of the effective date; or
- 4 If the parties cannot agree on a replacement member “within 28 days of the date on which a member of the Dispute Adjudication Board declines to act or is unable to act as a result of death, disability, resignation or termination of appointment”.

The ICC DB Rules also provide a default appointment procedure. First, Article 7.2 states that if the contract does not deal with the number of persons that are to comprise the board then the DB shall be composed of three members. If the contract provides that a DB will comprise only one member, then the default procedure is dealt with at Article 7.3 as follows:

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

The default procedure in the ICC Rules is triggered either by the signing of the contract or a performance of the contract. In any case either party may request the ICC to appoint the DB member within 30 days.

A similar appointment procedure is provided in Article 7.4 in respect of a three-person dispute. The article anticipates that the parties are to jointly appoint the first two DB members. In default of appointment of one or both of those members then either party may once again ask the ICC to appoint within 30 days of the same two trigger events.

Article 7.5 provides that the third DB member is to be proposed by the two appointed DB members within 30 days of the appointment of the second DB member. The parties are then to appoint the DB member within 15 days from receipt of the proposal. If they do not, or the two appointed DB members fail to propose a third member, then either party can request the ICC to appoint the final DB member.

Finally Article 7.5 provides that the third DB member is to act as the chairman “unless the DB members agree upon another chairman with the consent of the Parties”.

The ICE Procedure's default appointment applies in the following situations:²⁵

- 1 If the parties fail to agree on the sole DB member by the date nominated in the contract;
- 2 Either party fails to nominate or approve a member (either for approval by the other party or to act as chairperson) or a replacement member of a three-member DB;
- 3 The parties fail to agree upon the appointment of a replacement member within 42 days after the date on which the existing member's appointment was terminated;
- 4 If there is no DRB in place for any reason.

The ICE will, within 14 days upon the request of either or both parties, select and appoint the necessary DB member. Such a selection and appointment is final and conclusive.

The AAA adopts a different approach. The BRD "assistance" terms provide:

- Within 14 days of the effective date of the contract the contractor and the owner file a request with the AAA to identify a list of potential DRB members:
- The AAA arranges a telephone conference with the parties to identify the qualification required of the DRB members:
- The AAA produces a list for review within 14 days of the telephone conference;
- Those on the list carry out disclosure;
- The owner and contractor each have 14 days to propose a person from the list; and
- There is then 14 further days for the owner and contractor to accept the other parties proposal.

If the nomination is not accepted then the process is repeated. There is no default appointment process. The AAA merely assists the owner and contractor to agree its DRB members. Once 2 members have been selected the AAA notifies the owner and contractor. The AAA then sends the 2 members a list form which the 2 nominated members are to select a third board member within 14 days. Once selected the AAA informs the owner and contractor. They have 14 days to accept the third nomination. If they reject the third person the process is repeated until the final board member is agreed. If the 2 board members reach an impasse, then the owner and contractor are to agree the identity of the final board member.

The AA does not at any stage impose its choice on the parties. That is because the AA DRB process provides that the DRB is to make recommendations that the owner and contractor may adopt. It does not give binding decision. There would therefore be little benefit in imposing a panel on the parties. The owner and contractor need to agree the identity of a

²⁵ Clause 3.1.

board that they respect in order for the parties to feel compelled to accept the recommendations of the DRB

Who can appoint if the parties are in default?

A default appointment can be made by the person, persons or organisations named in the appendix to the contract or the applicable rules. These include:

1. FIDIC 1999 edition: The President of FIDIC or a person appointed by the President;
2. World Bank: The appointing entity or official named in the Contract Data;
3. ICE Rules: the ICE; and
4. ICC Rules: the ICC.

Replacing DB members

A DB member might need to be replaced as a result of:

1. Death;
2. Disability;
3. Termination; or
4. Resignation.

Clause 20.2 of FIDIC states that the contract with a board member can only be terminated by the mutual agreement of both parties. The FIDIC DAB Agreement provides that the employer or contractor may, acting jointly, terminate the DAB by giving 42 days' notice.²⁶ If the member fails to comply with the Dispute Adjudication Agreement, or the employer or contractor fails to comply with it then those affected may terminate the tripartite Agreement. If a member breaches the Agreement then he or she will not be entitled to any further fees. Any disputes arising under the tripartite Agreement are to be dealt with by ICC arbitration comprising a single arbitrator.²⁷

The employer or contractor acting alone cannot terminate the DAB or a single member of the DAB once the DAB has been constituted. Once constituted the principle obligation of the DAB is to make binding decisions. However, the parties may jointly agree to refer a matter to the DAB simply for an advisory opinion.

²⁶ Clause 7, Termination

²⁷ Clause 9, Disputes

If the parties do agree to terminate the appointment of an individual member of the DAB, then they should replace that person by agreement or if the parties cannot agree a member should be nominated by the appointing entity. The parties might also need to replace a member if the member declines to act, resigns, becomes disabled or dies.

Article 7.6 of the ICC Rules provides:

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

The ICC’s Rules therefore embellish the simple replacement mechanism by confirming that an incomplete DB remains valid, but cannot hold hearings or issue determinations unless the parties agree.

Similar provisions regarding termination exist in the ICE Procedure. A DB member’s appointment may be terminated by mutual agreement of the parties by giving the member 84 days’ notice.²⁸

Selling one’s services

DBs are increasingly being used on a global scale. Contractors and employers will turn to those already known by them in the dispute resolution arena as potential DB members. Those who operate within the dispute resolution field may therefore have the opportunity to obtain DB experience. Many are now attempting to join the limited lists that are available, although there is little evidence that contractors and employers are using those lists to identify DB members.

The initial DB meeting

It would be usual for the board to meet in private in order to discuss the project and agree, at least the agenda for the first and future DB site meetings. The procedural rules of the DAB should be further considered by the board members at their initial private meeting as these rules set out the minimum procedures that the DB must follow.

²⁸ Clause 2.6

The annex to the General Conditions of the FIDIC Dispute Adjudication Agreement sets out procedural rules for the DAB. The DAB is to visit the site “at intervals of not more than 140 days” and should visit the site during critical construction events. Consecutive visits should not be less than 70 days.²⁹ The timing and the agenda for each site visit should be agreed between the DAB and the parties.³⁰

In practice the DAB sets out the agenda, and the chairperson puts it to the parties, and unless an objection is received from either of the parties the board then proceeds upon that basis. At the conclusion of the site visit, the DAB is to prepare a report setting out its activities during the site visit and identifying those individuals who attended the site visit.³¹

Annex Clause 4, requires the parties to furnish the DAB with a complete copy of the contract, progress reports, variation instructions, certificates and other documents which are “pertinent to the performance of the Contract”, or communications between the DAB, employer and/or contractor shall be copied to the other party and all the members of the DAB.

Clause 6 of the General Conditions of the Dispute Adjudication Agreement deals with payment. There are two main elements to payment. The first is the retainer fee, which is paid on a monthly basis in consideration for the member being available for site visits and hearings, becoming conversant with the project and providing general services.

The second aspect of the fee comprises a daily payment for travelling to and from the site (a maximum of two days travelling in each direction) as well as for each day spent working on site, the hearings, preparing decisions and reading submissions. Reasonable expenses together with taxes properly levied are then to be paid in addition. The retainer fee is paid from the last day of the month in which the DAB becomes effective until the last day of the month in which the taking over certificate is issued for the whole of the works. After that date, the retainer fee is reduced by 50% until the DAB is terminated or a member resigns.

It is therefore highly likely that each of the three members of the DAB will receive a different retainer fee and claim a different hourly rate. Each member submits their invoices for the monthly retainer and airfares quarterly in advance. Invoices for daily fees and other expenses are then submitted at the conclusion of a site visit or hearing. The contractor is to pay each of the members’ invoices in full within 56 calendar days from receipt.

²⁹ Annex, Procedural Rule 1

³⁰ Annex, Procedural Rule 2

³¹ Annex, Procedural Rule 3

From a practicable perspective it is often sensible for the two “wing” members of the DAB to submit their invoices to the chairperson who then submits those invoices together with his or her invoice in one go to the contractor. This means that the chairperson can remain the single point of contact for any issues arising in respect of the DAB’s charges and that the final date for payment for all of the members will be on the same date, thus allowing the chairperson to take up the issue of late payment for the DAB if necessary.

If the contractor does not pay then the employer is obliged to pay the amount due. If a member has not received payment within 70 days from receipt of invoice by the contractor then that member may:

- Suspend his or her services until the payment is received; and/or
- Resign.

Annex Clause 7 (Procedural Rules) states that the DAB has the power to act inquisitorially. Further, the DAB is to establish the procedure before deciding a dispute and may refuse admission to the hearings and proceed in the absence of any party who has received notice of the hearing.

The DAB may also decide upon its own jurisdiction, conduct any hearings as it thinks fit, take the initiative and ascertain the facts, make use of its own specialist knowledge, decide upon the payment of interest if any, provide provisional or interim relief, open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer.³²

Once a hearing has been concluded the DAB shall meet in private in order to discuss and prepare its decision.³³ Decisions should be reached unanimously, but if this “proves impossible”, then a decision may be made by the majority. In practice, a single decision is usually issued by the DAB: a majority decision and a further section where the minority member sets out his or her written report. If a member fails to attend the hearing then the other two members may proceed to a unanimous decision unless the employer and contractor agree otherwise or the absent member is the chairperson and he or she instructs the other members not to proceed. The contractor and employer could of course ask the other two members to proceed and make a unanimous decision.³⁴

³² Annex, Procedural Rule 8

³³ Annex, Procedural Rule 9(a)

³⁴ Annex, Procedural Rule 9(c)

The move towards legislation for international adjudication

The legislation in the UK, and other jurisdictions introducing adjudication, has merely dealt with the domestic position. However, it has been radically suggested that adjudication legislation could be provided by a two-part statute.³⁵ The first part of the bill would deal with the domestic territorial position, whilst the second part could provide for adjudication in respect of a construction contract anywhere in the world.

This approach adopts the legislative concepts of international arbitration. Most arbitration Acts provide for domestic arbitration in the country of origin, whilst also supporting, recognising and enforcing international arbitration. In other words, the international adjudication section of the bill would provide an adjudication procedure together with the ability of a local court to support the process in terms of nominating adjudicators by default, or identifying or nominating a body by default and enforcing decisions. Parties anywhere in the world could choose the adjudication procedure of another jurisdiction.

An international adjudication bill might include the following aspects:

1. Be drafted on a “minimum interference, maximum enforceability” basis;
2. Adopt the New York Convention for the purposes of enforcement;
3. Provide for the local courts to identify an adjudicator or nominate an adjudicator nominating body in the appropriate part of the world. This could be done by a judge on a documents only (email) basis;
4. Provide a limited ability for challenges. There would always be the ability to challenge on the basis of no jurisdiction, but how restricted should challenges be based upon grounds of natural justice?
5. A decision would be binding, unless or until subsequent arbitration, litigation or settlement; and
6. Detailed procedural rules would need to be included.

The advantages of such an approach would mean that international projects could make use of adjudication procedures in a country supported by a competent court system, which is not always the case in some developing countries where considerable construction projects are being carried out. Further, the parties could choose an adjudication system that appears to be more effective than others, or adopt a system whose procedurals appear

³⁵ Robert Fenwick Elliott.

to suit their project or their needs to a greater extent than their domestic adjudication process, if any.

Conclusion

In order to establish a DB, it will be necessary to identify potential appropriate candidates, to nominate them and then to appoint them. Contractors and employers tend not to focus on disputes at the start of projects. DBs are therefore frequently not appointed and established at the commencement of projects. In those projects where a dispute subsequently arises, the contractor and employer will then struggle to agree upon and establish their DB. It is perhaps arguable that the benefits of it are substantially reduced by not having those individuals available at the commencement of the project.

Ideally, the DB should be established before work starts on the site. The DB can then follow the project and deal with any issues that might arise. The identification of appropriate DB members is crucial. Those members will need to be impartial and experienced in a wide range of matters, such as the type of construction in question, interpretation of contract and legal issues. In addition, they will need to have excellent management and communication skills, and be sufficiently available for the duration of the project, and sufficiently available to deal promptly with any disputes that might arise.

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APPENDIX; Comparison of procedures table

APPENDIX : Comparison of Procedural Rules

	AAA	FIDIC - Red Book	ICC	ICE	World Bank
Who Appoints?	The parties (from a list provided by the AAA): 1.02.	Parties by date in Appendix to Tender: Cl 20.2.	The Parties in accordance with the Contract or if the Contract is silent, in accordance with the ICC rules: Article 7(1).	Parties by date in the Contract Data. If no date stated, then within 56 days after Contract formed: Rule 2.2.	Parties by date in the Contract Data: Cl 20.2.
How?	Each party nominates one member: 1.02.	Jointly by the date in the Appendix to Tender <u>or</u> each nominates 1 member: Cl 20.2.	Jointly for sole member DBs. Each party nominates 1 member for 3 member DBs: Article 7(3).	For 1 member DB: By agreement between the parties: For 3 member DB: each party nominates 1 member: (Rules 2.3 & 2.4).	Jointly 21 days before the date in the Contract Data or after this time, each nominates one member: Cl 20.2.
Who appoints Chair?	2 members nominate the chair and the parties approve: 1.02.	Members nominate Chair and parties agree: Cl 20.2.	2 members nominate chair and parties agree: Article 7(5).	Two members nominate the Chair and parties agree: Rule 2.4.	Two members nominate the Chair and parties agree: Cl 20.2.
By When?	Within 14 days after receipt of a list of persons from the AAA: 1.02.	By date in Appendix to Tender: Cl 20.2.	Within 30 days after appointment of 2 nd DB member: Article 7(5).	The date specified in the Contract Data or if not date is specified, within 56 days after Contract formed: Rule 2.1.	21 days or less before the date stated in the Contract Data: Cl 20.2.

	AAA	FIDIC - Red Book	ICC	ICE	World Bank
How do you replace Board?	Either party may object for cause to the AAA. If, for any reason a Board member is unable to perform the duties of office, the AAA may declare the office vacant: 1.02.	1. On a member's: <ul style="list-style-type: none"> - death - disability - resignation - termination of appointment. 2. Contractor and Employer acting jointly: Cl 20.2.	On a member's: <ul style="list-style-type: none"> - death - resignation - termination of appointment (Article 7(6))	On a member's: <ul style="list-style-type: none"> - death - disability - resignation (Rule 2.7) 2. Parties agree and give member 84 days notice of the termination: (Rule 2.6 and 2.7).	1. On a member's: <ul style="list-style-type: none"> - death - disability - resignation - termination of appointment. 2. Contractor and Employer acting jointly. (Cl 20.2)
Replacing Board	As original appointment procedure: 1.02.	As original appointment procedure: Cl 20.2.	Same manner as replaced DB member: Article 7(6).	As original procedure: Rule 2.8.	As original appointment procedure: Cl 20.2.
Default Appointment	No default procedure	Third party can appoint if DB not appointed by parties: <ul style="list-style-type: none"> - For 1 member DBs: if parties fail to agree by date in Contract Data - For 2 members DBs: if either party fails to nominate a member by date in Contract Data; 	ICC can appoint can appoint if DB not appointed by parties: <ul style="list-style-type: none"> - For 1 member boards: if parties fails to appoint with 30 days after signing the Contract or within 30 days after the commencement of any performance of 	Third party can appoint if DB not appointed by parties: <ul style="list-style-type: none"> - For 1 member DBs: if parties fail to agree by date in Contract Data - For 2 members DBs: if either party fails to nominate a member or fails 	Third party can appoint if DB not appointed by parties: <ul style="list-style-type: none"> - For 1 member DBs: if parties fail to agree by date in Contract Data - For 2 members DBs: if either party fails to nominate a member or fails to approve a

	AAA	FIDIC - Red Book	ICC	ICE	World Bank
		<ul style="list-style-type: none"> - Chair: the Parties fail to agree on the appointment by the date in the Contract Data; - Fail to replace within 42 days of death, disability, resignation or termination <p>(Cl 20.3)</p>	<p>the Contract, whichever occurs earlier</p> <ul style="list-style-type: none"> - For 3 member boards: if either party fail to appoint one of both DB members with 30 days after the signing of the Contract or within 30 days after the commencement of any performance under the Contract, whichever occurs earlier <p>(Article 7)</p>	<ul style="list-style-type: none"> to approve a nominated member by date in Contract Data; - Chair: the Parties fail to agree on the appointment by the date in the Contract Data; - Fail to agree upon replacement within 42 days after existing member's appointment terminated; - There is no DRB in place for any reason. <p>(Rule 3)</p>	<p>nominated member by date in Contract Data;</p> <ul style="list-style-type: none"> - Chair: the Parties fail to agree on the appointment by the date in the Contract Data; - Fail to replace within 42 days of death, disability, resignation or termination. <p>(Cl 20.3)</p>
Who Appoints in Default?	n/a	Person named in Contract Data after consultation with both parties: Cl 20.3.	ICC	ICE within 5 days of request of either/both parties (for UK Housing Grants Construction and Regeneration Act ("HGCRA") compliant	Appointing entity or official named in the Contract Data upon request or either or both parties and after consultation with the parties: Cl 20.3.

	AAA	FIDIC - Red Book	ICC	ICE	World Bank
				projects): Rule 3. ICE within 14 days of request of either or both parties (for international projects and UK Contracts not subject to the HGCRA): Rule 3.	

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