

**Dispute Resolution Board Foundation's  
8<sup>th</sup> Annual International Conference  
Cape Town, Republic of South Africa**

**2-4 May 2008**

**Dispute Boards from a Practical Perspective  
"Dispute Board Costs"<sup>1</sup>**

**Nicholas Gould  
Partner, Fenwick Elliott LLP  
Chairman, ICC's International Centre for Expertise  
Senior Visiting Lecturer, Kings College, London**

A dispute board ("DB") most frequently comprises three members, although it could comprise a sole member acting as a dispute board expert. It is, of course, highly likely that a 3 member dispute board will be more expensive than a single member board.

In respect of each member the cost is most frequently shared equally between the employer and the contractor. The costs that need to be considered for each member include:

- Retainer
- Daily rate
- Hourly rate
- Expenses
- Inflation
- Applicable currency
- Taxes
- Administration expenses (ICC)
- Interest for late payments
- Mechanics of payment
- Liability for fees
- Challenging fees
- Remedies

In addition to the costs directly associated with a member of a DB other costs might also need to be considered, including:

---

<sup>1</sup> Gould, N. gave a presentation on this subject at the DRBF's 7<sup>th</sup> Annual International Conference, Bucharest, Romania, 12 May 2007.

- The parties' costs associated with establishing the board, including management time and financial costs;
- Organising and dealing with the members for and during site visits, and providing members with documents and handling correspondence; and
- The costs of representation (whether legal or otherwise) and the costs of experts in the event of a referral, response and/or representation.

The mechanics of, and items that are included expressly in the costs associated with DB members are dealt with in the main contract and also in the tri-party agreement. The applicable rules may also have a bearing on costs. The following list comprises key cost items that should be considered and arise from the contract, third part agreements and procedural rules, although this is subject to the precise working of the contract, DB members, tri-party agreement and applicable law.

- 1 The employer or contractor are primarily liable for "one-half" of the remuneration. This avoids the perception of bias, and also encourages both the employer and contractor to take ownership of the DB process.
- 2 The employer or main contractor are usually jointly and severally liable for the DB member's fees. This means that a member can recover all of his or her fee from the employer or the contractor.
- 3 The main components of the fee comprise a retainer and then a daily (and/or perhaps hourly) fee together with (reasonable) expenses.
- 4 Retainer. The retainer is a monthly amount paid to the member. The employer and main contractor pay half each. This is to secure the availability and independence of the member. In return, the member agrees to be available for hearings, become and remain conversant with the project, and maintain files. The retainer covers head office overheads and secretarial costs. Payment of the retainer might be monthly, although it is more common for it to be paid quarterly.
- 5 The ICC Dispute Board Rules state that all 3 members should be paid the same daily rate (see Article 26.3). Further, the ICC Rules state that the monthly retainer fee should be equal to 3 times the daily rate (see Article 27.2).
- 6 Daily Fee. The daily fee applies to site visits, meetings, internal DB meetings, co-ordination, organisation, preparation, hearings, and for working on documents. It also covers the period of travel. FIDIC provides for a maximum of two days travel each way.

- 7 Under Article 29 of the ICC Dispute Board Rules travel costs are claimable for travel between the dispute board's home and the "travel destination". A member (in practice the chairman on behalf of all of the DB members) should seek approval from both parties before incurring any daily fees.
- 8 Hourly Fees. These are less frequently encountered, as the daily fee is the preferred norm. The daily fee can of course be pro-rated although there might be some debate about how many working hours there are in a day.
- 9 Expenses. These are usually paid at cost, although in some instances there might be an additional percentage. Receipts are required under the FIDIC contract where the expense exceeds 5% of the daily rate.
- 10 Taxes. Taxes, especially local ones need to be considered. VAT may be applicable. There may be a withholding tax. The question as to whether a visa is needed, or a work permit should also be considered. A work permit might be required in order to avoid paying notional earnings tax. In practice, local legal (and perhaps accountancy) advice might be required. Note that some taxes may not be recoverable under the tri-party agreement between the member and the contractual employer.
- 11 Inflation. The retainer, daily fee or hourly rate might be increased by a fixed percentage per year or by reference to an index. FIDIC states that these rates will not increase by more than 10% per year. The rate might be fixed for 12 months or perhaps 24 or indeed some other period. The rate could be fixed until the taking over certificate is issued or indeed until expiry of the tri-party agreement. The alternative of course is that there are no increases. A potential member should consider whether a rate that is fixed for a long period time is viable.
- 12 Duration. The duration of a tri-party agreement therefore has an impact on the DAB's costs.
- 13 Period. The payment period might be 28 or 30 days. Under FIDIC it is 56 days. A member might serve duplicate invoices on the employer and contractor, where each of those parties pay 50% of the total due. Under FIDIC the member is to serve an invoice on the contractor. The contractor has 56 days to pay the member. In practice, the contractor can then include the members invoice in the monthly valuation and claim 50% of it back from the employer.
- 14 If the member does not receive payment within 56 days then the employer can, on the contractor's default pay the member the entire fee. The employer can then reclaim 50% of the total fee from the contractor.

- 15 Remedies for Non-payment. If the member is not paid then it may be possible for the member to suspend or terminate the agreement. The tri-party agreement is the contract that one should first consider. This will expressly set out the members rights in respect of non-payment. If notices are required then they must be served strictly in accordance with the tri-party agreement. The substantive law of the tri-party agreement might also assist the member.
- 16 Interest. The tri-party agreement might provide a contractual right to interest. For example under the ICE Dispute Board terms interest is payable at 8% over the base rate of the Bank of England. In the absence of a contractual remedy one will have to turn to the substantive law, and consider perhaps the procedural law depending upon the dispute resolution procedure.
- 17 Administrative Expenses. Under the ICC Dispute Board Rules the parties may also incur administrative expenses. These comprise:-
- \$2,500 US per appointment;
  - If the decision is challenged then a registration fee of \$2,500 US per decision. In addition, there will be an administration fee not exceeding \$10,000 US; and
  - If the parties have agreed that the ICC is to review decisions, then the registration fee for a review of each decision is \$2,500 US. The maximum administration fee that can be charged in addition to the registration fee is \$10,500 US.
- 18 Statistics. According to the Dispute Review Board Foundation, research carried out by them suggest that a dispute review board costs 0.05% of the final construction costs where there were few disputes. If there are many disputes then the cost is around 0.25%. In the research, the lowest reported percentage was 0.04% of the final construction cost. The highest was 0.26%, with the average being 0.15%. The average number of dispute recommendations across all of the projects sampled was 4.

**Nicholas Gould**  
Fenwick Elliott LLP  
Aldwych House  
71-91 Aldwych  
London  
WC2B 4HN  
Tel: +44 (0) 20 7421 1986  
Fax: +44 (0) 20 7421 1987  
[ngould@fenwickelliott.co.uk](mailto:ngould@fenwickelliott.co.uk)

15 May 2007 (updated February 2008)

## NICHOLAS GOULD

BSc (Hons) LLM (Lond) FRICS FCI Arb MCI OB, Solicitor, CEDR  
Lead Mediator, Registered Adjudicator, Chartered Surveyor,  
Senior Research Fellow King's College London

Fenwick Elliott LLP Solicitors  
Aldwych House, 71-91 Aldwych, London WC2B 4HN  
Telephone: + 44 (0)20 7421 1986 Fax: +44 (0)20 7421 1987  
Email: [ngould@fenwickelliott.co.uk](mailto:ngould@fenwickelliott.co.uk)

Position: Partner



### Contract Experience

Most of the frequently encountered standard forms including JCT, ICE, NEC, PPC, ACE, IChemE, M/F, GC/Works, FIDIC; Sub-contracts DOM/1, DOM/2, Blue Form, ECA; various domestic and international bespoke contracts including EPC, EPCM and PFI/PPP contracts.

### General Experience

Nicholas conducts a mix of dispute resolution and non-contentious work. Predominately advising institutions and companies who own, finance, invest, build and facilitate development opportunities and construction projects. He acts in a wide range of construction sectors including office, retail, leisure, residential, hotel, industrial, process plant, petrochemical, and energy. Dispute resolution experience spans litigation, arbitration (domestic and international), adjudication (accredited adjudicator CI Arb, AICA and CEDR), mediation, early neutral evaluation and expert determination. He has also conducted Government funded research into mediation for the DETR (as it was), as well as acting as an adjudicator and a mediator in construction, engineering and commercial disputes.

### Career

He qualified at Masons, and was formerly a senior lecturer at the University of Westminster. Before joining the University of Westminster in 1993 he worked in the construction industry for a period of approximately 8 years. A solicitor and chartered surveyor, his dual qualifications provide a layer of expertise that adds a practical level to his work. He joined Fenwick Elliott as an Associate in March 2002, and became a partner on 1 January 2004.

### Qualifications

Solicitor, FRICS, FCI Arb, MCI OB, CEDR Solve lead mediator, UK Mediation registered, ADR Chambers registered, Resolex registered and Construction Conciliator's Group registered. BSc (Hons) with first class honours, Diploma in Law, Legal Practice Diploma, LLM (Lond) including distinction for ADR at the London School of Economics, CI Arb adjudication course, CEDR mediation course, Dispute Review Board Certificate (Practice and Chairing).

### Other Activities

Nicholas is a Senior Visiting Lecturer and an Executive Committee Member, at the Centre of Construction Law, King's College, London, an assessor for the Commercial Management MSc at UMIST, and an external examiner for the MSc in construction law at Wolverhampton University. Nicholas regularly lectures at King's College London, and is a member of the executive committee responsible for the running of the MSc Construction Law of arbitration. He also lectures for IBC at their summer school at Cambridge University, Pickavance Masterclass, ICE, DIAC, RICS, DRBF, CIOB, UMIST, CEDR together with a variety of in-house and ad hoc lectures. Video includes: College of Law, Einstein Network; Mediationfirst; and a live radio appearance on BBC Southern Radio.

He has published widely in the area of construction law and dispute resolution, and won a Silver Award at the CIOB Literary Awards in 2000 for his book "Dispute Resolution in the Construction Industry" published by Thomas Telford. The Rt. Hon Sir Philip Otton described the book as "*the most fascinating publication to come across [his] desk for many a year.*" A list of his [publications and articles](#) is available.

### Memberships

Nicholas is a past Chairman of the Society of Construction Law, the Vice Chairman and case editor for the Adjudication Society, Member of the Dispute Review Board Foundation, visiting lecturer at the University of Manchester, external examiner at Wolverhampton University, Worshipful Company of Arbitrators, Publicity Officer of the Construction Conciliator's Group, and member of King's College Construction Law Association.

