

4.3 Current Practice and Procedures

4.3.1 Training and Certification of Dispute Board Members

Many organizations, both commercial and professional, give short seminars and lectures about DBs. This training is informal and lasts only a day or two. It is not participatory training, but consists of a series of lectures with opportunity for questions.

FIDIC maintains a President's List of Approved Adjudicators, for use when asked to select DB members. The list is available to FIDIC members on the FIDIC website. The website also contains detailed instructions to apply for listing. Applicants must be members of one of the consulting engineering organizations that are members of FIDIC or themselves be members of FIDIC.

Documents are submitted with an application to facilitate assessment of the applicant's experience and standing in respect to dispute resolution. When the accumulation of applicants justifies, FIDIC arranges an Assessment Workshop, conducted by a three-person Assessment Panel. Applicants are required to become familiar with the FIDIC Conditions of Contract before attending the workshop.

The workshop is a strenuous two-day exercise. There are no lectures; instead there are a multiple choice answer quiz, an overnight assignment of writing an essay type answer to a hypothetical problem, quizzes requiring essay type answers, individual private interviews, and an end-of-workshop assignment of writing a DB decision, to be submitted within two weeks of the conclusion of the workshop. All three members of the Assessment Panel are in attendance throughout, and all review all written assignments and attend all private interviews. At the end of the assessment process, the Assessment Panel submits to FIDIC's Executive Committee a written report of its assessments of the applicants, and in due course the applicants are notified by FIDIC's executive director of the outcome of the assessment.

FIDIC plans to monitor the President's List to assure that its listees are active on DBs and require listees to report DB assignments periodically.

During the work of the task force that developed the ICC Dispute Board documents, there were discussions regarding the establishment of an ICC list of recommended Board members, but it was decided that this would be contrary to the ICC's long-standing policy of not maintaining lists of recommended arbitrators or mediators.

The World Bank does not maintain a list of recommended Board members.

Since 1996 the ICE has published a list of accredited Board members. The persons listed undergo a rigorous assessment, personal in-depth interviews, and are subject to regular review as to their continued suitability for inclusion of the list. When named as the default appointing authority, the president of the ICE appoints Board members and Chairs from the ICE DB list.

4.3.2 Member Selection

All of the standard DB documents have detailed provisions governing member selection. Generally, these provisions provide for both one-person and three-person DBs, and require that both parties to the contract approve all members.

For three-person DBs, The World Bank provisions call for selection to be made by each party selecting one member for approval by the other party, and those two select the third member, who serves as Chair. The FIDIC provisions call for selection by the same method, except that the Chair is approved

by the two parties. The ICC Rules provide for “joint appointment” by the parties of the first two members, with the third member to be proposed to the parties by the two members first chosen.

Most ideas for persons to nominate are by word of mouth or acquaintance with persons active in the field. Some parties choose from the published lists mentioned above. Parties also consult published lists of arbitrators and mediators.

Provisions are included for “default appointers” so that if either party fails to nominate a member or agreement cannot be reached on a Chair, the default appointer will select, so that neither party can prevent the formation of the DB and thus frustrate the process. Examples of default appointers are the president or vice president of FIDIC for FIDIC DBs, and the ICC Dispute Resolution Centre for DBs under the ICC. FIDIC and the ICC offer appointment services for DBs for a fee.

The ICC will hear challenges by the parties to an appointed DB member for alleged bias or partiality. A fee is charged for this service.

All three of the provisions cover replacement of DB members who resign or are incapacitated or die. The multinational DB systems deal with appointment and replacement of DB members in more detail than other DRBs.

4.3.3 Meetings

Language usually is not a problem with multinational DBs, as English is the dominant language in these contracts.

The standard forms in use in multinational contracts typically leave it to the parties to establish the frequency of regular visits of the DB. Published guidance suggests that DBs should visit quarterly. This is not a financial burden to the parties when the Board members are local to the project. However, where the DB is comprised of persons who must travel long distances, a site visit is a significant item of cost. For example, up to two days of paid travel time in each direction are normally allowed for a site visit. Often a stay in a hotel is required before proceeding on to site. Once at the site, the visit usually lasts two or three days. The result is that a routine visit can involve a week of daily fees for each Board member plus international airfares. Consequently the parties may attempt to increase the time between regular visits, endangering the effectiveness of the DB.

4.3.4 Conduct of Dispute Board Members

Conduct of Board members is most important in multinational practice. The World Bank, FIDIC and ICC provide detailed requirements to assure that DB members are and will remain independent of the parties. To this end, all Board members can strictly observe the DRBF Code of Ethics.

Persons of different nationalities, from different cultures, with different customs attend the meetings. Body language, gestures, facial expressions, and vocal inflections assume magnified importance, and must be borne in mind constantly, not only during meetings and hearings but also in social contacts between the Board members and the parties.

Board members must be aware of cultural differences. For example, there are cultures that do not like confrontation, so an aggressive voice tone or aggressive body language is unproductive. Some cultures find it difficult to express disagreement openly. This leads to seemingly bland remarks that are completely misunderstood by persons accustomed to clear, crisp statements of positions and reasons. Another challenging area is that many cultures show great respect and deference to older persons. This can carry over into what can be, and what cannot be said to older people.

4.3.5 Referral of a Dispute

Either party can refer a dispute to the DB. Some multinational contracts have added a specific requirement that the parties shall have made a strong effort to settle a dispute before referral to the DB. Others have specific reference to involvement of the DB in an attempt to resolve disagreements before they crystallize into disputes. These procedures provide for the DB to provide guidance to the parties in connection with potential disputes, similar to Advisory Opinions [2.4 and 3.5].

4.3.6 Hearings

Hearings with multinational DBs tend to be more formal than those in the North America. There are several reasons for this:

- Compared to practices in North America, multinational construction contracts tend to have less commonality between the parties. For example, the contractor may be a joint venture of firms of differing nationalities; the engineer may be a firm of consulting engineers from a different nation, and neither the contractor nor the engineer is of the same nationality as the employer. The contractor and/or the engineer may be new to the country of the project, and may not anticipate any further work in that country after completion of the contract. Thus, the parties may share little if any common attitudes and practices on construction or contractual matters.
- FIDIC and the development banks want determinations of disputes to be based on written presentations, to focus the points at issue and assure that they have been presented fully and clearly to the DB.
- Disputes on multinational construction projects often involve complex issues entailing large amounts of money. This leads to the use of lawyers to prepare written presentations to the DB to better assure clarity and completeness.
- These contracts commonly have government entities as employers. They are usually under intense scrutiny and publicity regarding resolution of problems on the project. Government officials sometimes face difficulty in settling disputes by negotiation because of the potential for charges of favouritism or even corruption. These officials want to establish a clear record of strict observance of the contract requirements, and to present every argument they can find which might defeat a claim against their government.

Nevertheless, hearings for multinational contracts usually are less formal than hearings in arbitration or litigation. The parties present their arguments through the persons who have been most directly involved in the performance of the contract. The use of lawyers to make presentations in the hearings is discouraged, except in relation to legal matters.

DB determinations are admissible in evidence in subsequent proceedings relating to the dispute.

4.3.7 Clarification and Reconsideration

The World Bank and FIDIC forms do not provide for clarification or reconsideration. As a practical matter, multinational DBs allow questions seeking clarifications, but have not engaged in reconsideration, absent new facts.

Article 24 of the ICC Rules provides for “Correction and Interpretation of Determinations.”

4.3.8 Subsequent Dispute Resolution Activities

Typical multinational DB provisions include international arbitration for final and binding resolution of disputes that have not otherwise become final and binding. This generally includes a provision that allows a shortcut to arbitration proceedings if a party fails to comply with a binding DB determination.

The standard Conditions of Contract promoted by The World Bank, FIDIC, and the ICC foresee arbitration in accordance with the published Rules of existing bodies such as the ICC International Court of Arbitration, the United Nations Commission on International Trade Law, or the London Court of International Arbitration.

The World Bank provisions foresee that a DB member can be called as a witness and give evidence before the arbitrators on any matter whatsoever relevant to the dispute. The FIDIC Guide comments: “Unless the Parties agree otherwise, no Member should participate in a future arbitration, either as an arbitrator or as witness.” The ICC Rules at Article 9(3) state: “Unless otherwise agreed by the Parties, a DB Member shall not act in any judicial, arbitration or similar proceedings relating to any Dispute, whether as a judge, as an arbitrator, as an expert, or as a representative or advisor of a Party.”

Occasionally a party fails to comply with an arbitral award, and it becomes necessary to seek enforcement of the arbitral award by appeal to a national court having jurisdiction over the person or assets of the failing party. Success in obtaining such enforcement is much easier if the nation, which was the seat of the arbitration, and the nation in which court enforcement is sought both are signatories to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. This should be kept in mind when considering the arbitration agreement established at the time of entering the contract.

4.3.9 Termination

The standard forms of The World Bank, FIDIC, and ICC all provide that the parties can terminate one member or the entire DB by written agreement. Replacement is by the same procedure as that used in choosing the member.

The World Bank and FIDIC forms provide that the DB will be available after substantial completion of construction and during the Defects Liability Period (typically one year), but without periodic site visits - a standby arrangement in case problems of defective design, materials, or workmanship arise.

4.3.10 Compensation and Payment

Forms of The World Bank, FIDIC, and ICC have comparable payment provisions. The parties share all costs equally. Board members are paid a daily fee while working or travelling plus a monthly retainer. Expenses, including business class air travel, are fully reimbursed.

The daily fee is agreed by the parties and DB members. The World Bank documents refer to the use, unless the parties otherwise agree, of the daily fee for arbitrators as established by the International Centre for the Settlement of Investment Disputes, an organization which is part of The World Bank.

The monthly retainer is intended to cover the DB member becoming familiar with the contract, reading periodic progress reports, maintaining files, all office overhead costs, and being available to come to the site on short notice. Typically, the retainer is an amount equal to three times the daily fee.