



Conference – “Meeting Business Needs in the Middle East”

Dispute Board¹ Processes

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ROOTS IN HISTORY

On April 28, **1675** William Shepherd, Cromwell’s law reformer, published “**A Grand Abridgment of the Common and Statute Law of England**” with the assistance of Jo. Vaughan, Imprimatur. This was 23 years before the first arbitration legislation in the

¹ To avoid partisan terminology, I will mainly refer mainly to “Dispute Boards” (“DBs”) rather than DRBs, DABs, CDBs, or other variants. In addition, all references to England should be read as references to England and Wales. This is a personal view and should not be attributed to any organisation. © Robert Knutson London, England November 2004

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He has been both statutory and non-statutory adjudicator on the full range of construction issues and in disputes valued at up to 40 million dollars. Representative recent appointments include an ICC all Russian pipeline dispute, an LCIA Canadian/British satellite telecoms M&A dispute, chairman of an AAA American/Japanese turbine construction arbitration panel and party-appointed arbitrator in a Turkish power plant dispute. Recent cases as Counsel include lubricants arbitration in Jordan for British Petroleum Middle East (Dubai) and Egyptian Steel mill construction arbitration in London for a major German group.

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common law, and 300 years before the UNCITRAL rules. The statement of the law as it then stood was therefore a pure statement of the “common” law, as Mr Sheppard understood it.

In the first volume covering the topics of “Abatement” through to “Officers” a chapter of some 9.5 large pages is dedicated to “Arbitrament and Arbitrators”. Given that we lawyers are prone to and sometimes obliged to repeat the mantras of our forbearers, it is interesting to see how this book, which is said to be the first compendious treatment of English law written in English³, treated the question of private dispute resolution.

The very first paragraphs describe very much of what we know today:

Arbitrament is an Award or Judgment made by one or more at the Request of some parties for the ending of some difference between them. An Arbitrator is he, or one of them so chosen, said to be an extraordinary Judge in matter of difference between party and party by their mutual consent, and their authority is given to them by the parties litigant to hear and determine the matter in difference between them to whose judgment they bind themselves to stand: It is called an Arbitrament, either because these judges may determine it ex bono viri Arbitrato, not being bound to the strict Rules of Law, or because they have submitted to them, not by compulsory means but ex libero Arbitrio. Terms ley, West Symb. 2 part. sect 21.

Arbitrament, some say, is General, but when it is an Award of all Actions, demands and differences between the parties upon such a Reference thereof unto them: or Special, where the Reference and Award upon it is only one or more matters of difference mentioned between them, but whichever it is it is called a Judgment. The Award also may be made and rendered, either in writing or by word of mouth.

An Umpire is the same in effect with an Arbitrator, for he is one chosen by the Arbitrators finally to order, and determine the matter in difference between them, if the Arbitrators cannot, or do not order by the day agreed upon between them.

For this take these things in general: (1) That there are five things incident to an Arbitrament; (1) Matter of Controversy: (2) Submission to the award of the persons chosen: (3) Parties to the Submission: (4) Arbitrators: (5) The making of an award by word or writing. Co.10.137. Dyer and 217.

(2) *That the Submission is the agreement by both parties to abide and submit to the*

³ I am grateful for this observation to Roy Heywood of Wildy's booksellers in London, who wrote: "This all seems to be nicely laid out by Nancy L. Matthews in her work "William Sheppard, Cromwell's Law Reformer", published by Cambridge University Press in 1984, reprinted in 2004 in paperback at £20.99. isbn 0521890918. To quote from the rear cover's descriptive blurb, "William Sheppard is best known as one of the most prolific legal authors of the seventeenth century. His twenty two books on the law include... and the first three encyclopedias to be written in the English language." This seems to be a thorough account of William Sheppard's life, work and works."

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order made by the Arbitrators: this is sometimes made between the parties reciprocally, and sometimes to the arbitrator. It is made between the parties sometimes by Bond, sometimes by Covenant, sometimes by Promise, and it may be good, either way. And so it may be without any of these by a bare Submission and agreement only to refer it to them: and an Obligation or Assumpsit to stand to the award of I.S. and I.D. hath in an Implicit Submission it to the Award. This is also sometimes absolute without reference to any time: and sometimes Conditional, as a Submission to their Award it if it be made by such a day. Co.10131.5.78 20 H6.18 Trin 18 Jac. Cyprian Salters Case.

(3) *That if the award is Repugnant, in sensible, incertain, against Law, not definitive, or on the one side only, it may be void. Yelverton 98. for it shall not have a favorable construction as a Deed or Will shall have to bring it to the intent of parties, for it is in nature of a Judgment and must be plain and complete. Yelverton 98. Croo.1.3,4. Co.5.77.*

(4) *That if it do not pursue, and be made according to the power given to them by the Submission, it will not be good. Bendloes 38. It may in not be larger nor narrower then the authority given thereby. Jenk. Cent.3 case 6.*

(5) *Arbitrators may not refers their Arbitrament to others, or to an Umpire, unless the Submission be so made to them, nor may they make their Arbitrament in their own Names, and the Name of a third person to whom no Submission was made; nor may they alter their Award once being made. Jenk Cent 3. case 6.*

We can see in these brief words, penned well over 300 years ago, the basic rules of modern arbitration, and indeed some of the continuing controversies. So far as controversies go, there must even then have been a dynamic relationship between the notion that the arbitrator was not bound by the strict rules of law, but his award may not be upheld if “against law”.

That private parties, in private law, could be bound to their dispute resolution agreements was agreed, and the law, even in Roman times. What Mr Sheppard was doing here was not inventing or describing some peculiarly English approach to the law, but passing on the core wisdom effectively, of the Romans.⁴

MORE RECENT ANTECEDENTS TO DBs

Of course, some events have taken place between the time of Justinian and today. In both common law and civil law jurisdictions the characteristics of arbitration have been sanctified and extended. On the international plane, this has been a relatively recent development, at least insofar as there has been recognition of the rights of private parties as opposed to states.⁵

⁴ See for example, Reinhard Zimmermann, *The Law of Obligations – Roman foundations of the Civilian Tradition*, Oxford University Press 1996 ISBN 0 19 876 426X, 511 and 526 *et seq.* See also Derek Roebuck and Bruno de Loynes de Fumichon, *Roman Arbitration* HOLO Books 2004 The Arbitration Press, Oxford. The adjudicator/arbitrator *Bonus Vir* was the oldest form of known Roman (peaceful) dispute resolution. (op.cit page 46) Mr Roebuck points out that the ancients were not concerned with how modern legal scholars would classify the decision of the third party. *Infra* pp. 11-21

⁵ See **Geneva Protocol On Arbitration Clauses, 1923:**

PROTOCOL ON ARBITRATION CLAUSES SIGNED AT A MEETING OF THE ASSEMBLY OF THE LEAGUE OF NATIONS

It may well be that this “categorisation” of arbitration led to the need to identify and regulate other dispute settlement devices that looked like, but did not exactly replicate arbitration. Thus civil and common law jurisdictions also listed the characteristics of experts, and the process they embark upon, with investigative/valuation processes in different industries were noted and pigeon holed. Recently Lord Mustill has quite rightly questioned the desirability of this whole process of separating and labelling dispute resolution methods.⁶

Twentieth century history in relation to multi-tiered dispute resolution clauses has not all been in favour of the enforcement⁷. Indeed, texts ever since and including Justinian have been obliged to indicate what was and was not a valid submission of a dispute to third party resolution.

Engineers paved the way for Dispute Boards

In England the increasing sophistication of commerce following the industrial revolution meant that the courts had to decide what they were looking at, and categorise, various forms of dispute resolution clauses.

In the interesting 1850 Chancery case of *M'Intosh v. The Great Western Railway Company*⁹ it was alleged that the Engineer, one I. K. Brunel, whose duty it was to measure and certify the value of certain works, had hidden the fact that he had a large shareholding in the railway, and had consistently undercertified to value of the works or failed to certify. Fraud was alleged. The issuance of a certificate was argued to be a precondition to the contractual obligation of the company to pay. The Defendants contended that Brunel was an agent and the Plaintiffs that he was an arbitrator or judge. The Lord Chancellor did not refer to the allegation that Brunel was an arbitrator, but said that "...this is clearly a case in which the Plaintiff cannot obtain what he is entitled to at law;¹⁰ and that his inability to do so has arisen from the acts of the Defendants, or their agent....".¹¹

HELD ON THE TWENTY-FOURTH DAY OF SEPTEMBER, NINETEEN HUNDRED AND TWENTY-THREE

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to **existing or future** differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration **all or any differences that may arise in connection** with such contract relating to **commercial** matters or to any other matter capable of settlement by arbitration, **whether or not the arbitration** is to take place in a country to whose jurisdiction none of the parties is subject.

⁶ Talk given at SJ Berwin international arbitration group launch party, 4 November 2004 at the Wellington Arch, London.

⁷ For a nice round-up of cases about ADR and the Law, you might refer to the AAA book by that name, and particularly the chapter by Michael Polkinghorne and James Cockayne in that book ADR and the Law, Fordham International Law Journal 18th edition, 2002.

⁹ 19 Law J. Rep. (n.s.) Chanc.374.

¹⁰ In other words under the contract.

¹¹ Cases in Chancery 74 at 96.

In *Ranger v Great Western Railway*¹² the contract provided that the decisions of the principal engineer (again, the shareholding Mr Brunel) on the whole range of issues from extensions of time, to payment for additional works and certificates would be final and without appeal during the progress and until completion of the works, and that if any difference of opinion existed thereafter, such dispute would be referred to, and finally settled and concluded by arbitration of the principal engineer and one appointed by Ranger. If they could not agree, a third person was to be named with his decision "final and binding on both parties". This was the same sort of two tier dispute resolution clause, with the first tier being the engineer's decision, and the second being arbitration, as found in *M'Intosh*.¹³ In executing the works, the contractor encountered much harder rock than he had been told lay on the route, and the Railway company eventually gave the required notices and took possession of the works. In giving judgment, the Lord Chancellor referred to the fact that a judge ought to be and is supposed to be indifferent between the parties¹⁴ but then decided: ¹⁵

The Company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The Respondents stipulated that their engineer for the time being, whoever he might be, should be the person to decide disputes pending the progress of the works, and the Appellant, by assenting to that stipulation, put it out of his power to object on the ground of what has been called the indifferency of the person by whose decision he agreed to be bound.

Lord Brougham admitted very considerable doubts, but in the end agrees, and said¹⁶ :

We have here the case not of a judge, nor indeed anything like a judge; the utmost he can be said to be is a kind of referee to whom certain matters were, by the agreement of the parties, to be referred, I will not say for his arbitration but rather for his report and decision. In some instances it is even found that he and the company are referred to in the alternative. However, looking at him in those matters in which he may, to some extent, be said to decide judicially, I consider that there he was the known officer of the Company, and his decision as such was accepted. He was not named personally as Mr Brunel, but as the "principal engineer for the time being";.... I think, therefore, that there is no ground for considering that the position in which he was placed was a quasi-judicial position.

We see in these passages both the methodology and the logic; as well as the potential fudge. First you characterise the function - is it judicial. If it is, the "judge" must be impartial. This arises from one of the oldest and most fundamental European wide doctrines *nemo sua judex in sua causa*. The potential for the "fudge" comes from a combination of the arguments that the Contractor freely and with foreknowledge agreed to be bound by the decisions of an agent who might be expected to be biased, and, in this case, as a judicial appointment is personal, the fact that the decision could be made by any principal engineer appointed from time to time, meant that this could not have

¹² (1854) H.L. Cas. 72.

¹³ This reported by the Lord Chancellor in *Scott v. The Corporation of Liverpool* at page 237.

¹⁴ *Dimes v. The Grand Junction Canal Company* 3 H.L. Cas 759.

¹⁵ page 89.

¹⁶ page 115.

been intended to be a "quasi-judicial" appointment. Thus if you undermine yourself with prior knowledge - *pacta sunt servanda*.

The disputes clause governing the disputed construction of the city gaol in the 1856 case of *Pashby v. The Mayor, etc., of Birmingham*,¹⁷ provided:

If any dispute or difference of opinion should arise with the contractor or contractors in any way relating to the contract and these conditions, connected with or relating to the proposed buildings and works, or if any question should arise between any of the several contractors relating to the proposed buildings and works, such dispute difference or question shall be settled by the architect, whose decision thereon shall be absolute and final.

In the event and after letters from the contractor complaining of the late payment, the architect settled the amount he thought was due the contractor without informing him he was doing it, and without discussing the calculation with the contractor. It had been done at the request of the City. Willes J. held that "As to the second question, there was no dispute between the parties: it is clear there could be no *res judicata* where there was no *lis*."¹⁸ The converse situation was confirmed in *Scott v. The Corporation of Liverpool*¹⁹ where the Lord Chancellor clearly heavily influenced by *Scott v. Avery*²⁰ , decided only two years earlier, held that where the contract provides that there will be determination of a contractor's claims by the judgment of a particular person, until that chosen person has spoken no dispute exists and thus no right arises in law or at equity, which might be enforced by the courts.

It should be noted that many of these cases were brought in Equity as actions for an accounting, value alleged to having been received by the corporation refusing to pay, and that such actions amounted to payment on a *quantum meruit* or for work and labour done and materials received²¹ .

The Engineer as Quasi-Arbitrator

The development of the doctrine that in certain circumstances engineers exercising their decision making powers under a contract must act impartially was given a boost by the 1861 case of *Pawley v. Turnbull*, concerning a rogue architect, who had also been made arbitrator under the contract and whose decision was to be final and binding. Without citing any particular authorities, the Vice-Chancellor noted that "The position of the architect, in order to be just to both parties, required the exercise of great discretion and great fairness."²² He went on to hold that without imputing fraud to the defendants it was proved that the conduct of the defendant architect Hey was "not of that discreet,

¹⁷ (1856) 18 C.B. 3.

¹⁸ page 1275.

¹⁹ (1858) 28 Chanc. Cas. (n.s.) 230.

²⁰ (1856) 5 H.L. Cas. 811.

²¹ comment on *M'Intosh v. Great Western Railways* by the Vice-Chancellor in *Pawley v. Turnbull* (1861) 3 Giff. 70.

²² page 82.

impartial and fair description which it ought to have been"²³ and the Vice-Chancellor then ignored the lack of a certificate from Hey to award the reasonable value of the builder's work to him.

In *Sharpe v. Sao Paulo Railway Co.*²⁴, an 1873 Equity Appeal case, Sir M.W. James confirmed that the courts of equity would not entertain suit (one might still have been available at common law for damages) where the engineer certificate was to be final, if the engineer acted in good faith - "I myself should be very loathe to interfere with any such stipulation upon any ground except default or breach of duty on the part of the engineer."²⁵ This contract said that the certificates of the engineer would be final and that all matters, except such questions as were to be determined by the company's engineer, were to be referred to arbitration. In a separate concurring judgment, Sir G. Mellish L.J. stated²⁶ :

Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an engineer, or what is to be found due by an arbitrator, and there is no agreement to pay otherwise - that is to say in every case where the certificate of the engineer or arbitrator is made a condition precedent to the right to recover, there the Court has no right to dispense with what the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the engineer or the company which may make it inequitable that the condition precedent should be relied on.

In the nineteenth century the scope of the services to be provided and the quality of the decisions to be made by the engineer were not as broad or as well defined as they may seem today. In fact, for quite some time biased decisions of the Engineer were difficult to overturn in the absence of fraud or bad faith, and this was during a period when the standard forms in use provided for final and conclusive certificates of the engineer on measurement final payment and termination for failure to proceed with due diligence. In appropriate cases the courts prevented injustice by preventing engineers who were vested with the powers to decide all disputes under the contract as arbitrator from proceeding with the reference. The court would refuse a stay to arbitration and decide the dispute itself⁸ or decide that the engineer's certificate was not within the scope of the relevant submission to his jurisdiction.⁹

Nonetheless, the possibility of unfair decisions on the part of engineers in the employ of the Owners was clear, and the next generation of judges began the reform of the law. In *Re An Arbitration between Hohenzollern Actien Gesellschaft and the City of London etc.*¹⁰ there were no real legally relevant factual differences with the *Sharpe* case, but the result was radically different. The engineer refused to certify - for right or wrong - and the arbitrator said that money was due. If this case were *Clemence v. Clarke*, the

²³ page 84.

²⁴ 1873 8 Ch. App. 597.

²⁵ Sir M.W. James at 609

²⁶ page 612

⁸ *Blackwell and Co. Ltd. v. Derby*, Hudson's Building Contract 4th edition, 1914 Volume II, page 401; see also *Nuttall v. Manchester* 4 HBC II 203.

⁹ (1889) *Lawson v. Wallasey Local Board* 11 Q.B.D. 229.

¹⁰ (1886) 54 L.T.(N.S.) 596.

contractor would have been lost, but Lord Esher M.R., who had a wonderful career of talking negatively about the jurisdiction of arbitrators and then expanding their province, held that as the arbitrator had decided (rightly or wrongly) that the money was due (in the absence of a certificate, against well received wisdom of the time) then, as long as the arbitrator acted within his jurisdiction, there was no appeal or redress. The fact that the contractor, a locomotive builder, was compensated for work actually done was no doubt peripheral to this determination.

It is somewhat interesting that the Law Times headnote summarises the ratio decidendi as "...a dispute had arisen within the arbitration clause, and that, whether the arbitrator was right or wrong, as he had not exceeded his jurisdiction the court would enforce the award." The editor of Hudsons Building Contracts 4th edition 1914, Mr Hudson himself, who was a well regarded construction barrister, states in his headnote that the court held "that the absence of a certificate was not conclusive against the contractor's right to payment, and that a dispute as to the certificate was a dispute within the arbitration clause, and that the award made was valid."

3.7 In *Nuttall v. Manchester*, the Court of Appeal refused to stay a building dispute to arbitration because the City Surveyor, who had had several disputes with Mr Nuttall, was the designated arbitrator, and as such was thought to be too much of a judge in his own cause.¹¹ This case was cited to the House of Lords in *Jackson v. Barry Railway Company*, where at first instance the contractor had succeeded in obtaining an injunction against the engineer proceeding with a reference. The engineer had written a letter on the same day as the formal reference of the dispute to him repeating his former views. The court held that this was not sufficient evidence that he would be unable to keep an open mind in the reference. As an aside, it is interesting that the disputes clause, which simply said that all disputes would be referred to the engineer, whose decision was conclusive and binding, was held without demur to be a reference to arbitration.¹²

In 1901 the Court of Appeal decided *Chambers v. Goldthorpe*¹³, which stood as good law for 73 years for the proposition that in ascertaining the amount due to the contractor the architect was in the position of an arbitrator and therefore was not liable in negligence. This decision was eventually overturned in *Sutcliffe v. Thackrah*¹⁴, but the juridical basis for it, that in exercising his skill and knowledge he was acting as a quasi-arbitrator, has remained largely untouched.

There is one case of considerable antiquity and high authority which puts the status of the engineer's decisions (particularly on the subject of ordering or failing to order variations) pending arbitration beyond reasonable doubt. In *Brodie v. Cardiff*¹⁵, the

¹¹ *Nuttall v. Mayor and Corporation of Manchester* 4 HBC II 203.

¹² compare *In Re Carus-Wilson and Greene*, (1886) 18 QBD 7 where a person valuing timber was held to be a mere valuer, so no application to set aside could be entertained.

¹³ [1901] 1 Q.B. 624.

¹⁴ [1974] A.C. 727.

¹⁵ [1919] A.C. 337 at 351/352 and 360/361.

majority of the House of Lords made it clear that an arbitrator's overthrow of an engineer's decision (in this case a biased but not fraudulent refusal to admit certain works as extras under the variations clause) had retrospective effect, and the Engineer's decision stood until that overthrow. Incidentally, a refusal of the Engineer to certify the variations at the time, when it was a precondition that all variations be in writing, had no effect.

The eventual judicial determination that third party engineers were "quasi-arbitrators" resulted over time in the adoption within England of the accepted dogma that in rendering certain types of decisions, where he is not acting as an agent for the employer, engineers had to act "impartially". This was as a result of the actions of English judges rather than any demonstration of even-handedness on the part of the contracts draughtsmen.

So we see in the early English cases some of the elements required for modern Dispute Boards – a multi-tier dispute resolution system, a high regard for the sanctity of contract, and concern to ensure that decisions given, were given fairly if the contract seemed to require it.

English (non-statutory) adjudication

Harking back to Sheppard, it is noticeable that the dispute resolution process he describes and labels as Arbitrament, could actually describe a number of processes. It is described as

"...an Award or Judgment made by one or more at the Request of some parties for the ending of some difference between them."

It has certainly been the case over the years that not all disputes decided by contractual mechanisms, have been disputes which were arbitrated. Some were resolved by adjudication and others by what has fashionably been called expert determination, though it might formerly have been known as valuation, or arbitration. The classic exposition from (relatively) modern times is that given by Lord Esher MR, who is cited here as understood by Longmore LJ in the Wilson case below:

*13. Since it is just a matter of construction, not much assistance can be gained from authority, but the question whether an agreement is an agreement to arbitrate or merely to value as an expert has occasionally had to be decided, and Mr Bowdery has referred us to one such case *Re Carus-Wilson and Green (1886) 18 QBD 7*. There a contract for the sale of land provided that the timber was to be paid for at a valuation made by two valuers appointed by the parties, who were to appoint an umpire to decide if the valuers did not agree. The valuers did not agree, so the umpire decided. The aggrieved party applied to set that valuation aside on the basis that it was an arbitration award and thus, according to the legislation then in force, could be set aside on certain grounds. The Court of Appeal refused to entertain the application.*

The passage to which Mr Bowdery referred us is at page 9, where Lord Esher MR said this:

The question here is whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.

A sort of low point in English law came about in 1990 with the Court of Appeal decision in *Cameron v Mowlem* [1991] 52 BLR 24, in which it was decided that an adjudicator sitting in judgement of a set-off claim under an English standard form of contract could not decide in total what sums were due under the contract (as he had purported to do) inferentially because the contract did not expressly give him the right to substitute his decision for that of the certifier. It was certainly not particularly clear at that stage what powers, if any, the Courts would be willing to accord to a body not sitting under the Arbitration Acts.

Happily this case was followed by another, *Drake & Scull Engineering Ltd v Mclaughlin & Harvey plc*, [1993] Vol. 60 BLR 107 in which His Honour Judge Bowsher QC, on the same form of contract, issued a mandatory injunction to enforce the adjudicator's decision that money should be paid into a stakeholder account.. The learned Judge wrote¹⁶:

Accordingly, it seems to me to be plain that the defendants are under a contractual duty to comply with the orders of the adjudicator, and to do it before the arbitrator makes his decision.

One of the most recent cases to consider these issues in England is the Court of Appeal judgment of 18 January 2001 *David Wilson homes Ltd v. Survey Services Ltd (in liquidation) and Anor* [2001] EWCA Civ 34, [2001] 1 BLR 269. In that case the Court of Appeal had to consider whether or not a bare reference to a decision of a QC was arbitration or some more "ephemeral" sort of ADR.

Longmore LJ wrote in part:

11. For my part, I prefer the arguments of Mr Phillips. There is no need for a clause which deals with reference of disputes to say in terms that the disputes are to be referred to an "arbitrator" or to "arbitration". The necessary attributes of an arbitration agreement are set out in the second edition of Mustill & Boyd, Commercial Arbitration at page 41. But, for present purposes, the

¹⁶ [1993] Vol. 60 BLR 107 at 110

important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement. That is what this clause in my opinion does, and it is therefore an arbitration agreement within the meaning of section 6 of the Arbitration Act 1996.

Unfortunately, the judgment of Simon Brown LJ is not too illuminating. He wrote in part:

*22. As to the suggestion that this was some sort of non-binding ADR clause, that seems to me nothing short of absurd. The condition goes to the lengths of providing, if necessary, for the Chairman of the Bar Council to appoint a Queen's Counsel to deal with the reference. That, to my mind, is quite inconsistent with any suggestion that the process required by the clause is simply an optional extra in the contract. **Rather it makes business sense only if it provides for a final and binding determination of whatever dispute or difference is referred - if, in short, it is an arbitration agreement. (emphasis added)***

23. In the result, the appeal succeeds.

In equating a final and binding determination (only) to arbitration, Lord Justice Simon Brown was mischaracterizing the history of private dispute resolution. The learned editors of the Building Law Reports commented somewhat wryly:

*The claimant was somewhat unlucky. Nowadays it is well established that there is available a variety of dispute resolution processes ranging from adjudication (both binding and non-binding), expert decision (both binding and non-binding), mediation, conciliation and arbitration. At the very least, arguably, the clause in question was ambiguous as to the basis upon which the QC was to operate; given that it was an insurance policy and that the wording probably emanated from the insurance company in the first place, it might have been thought at the very least that the construction should have been against the resolution involving a binding result. That having been said, the court clearly were of the view that it was pointless referring such disputes and differences to an obviously impartial QC unless the decision was to be final and binding. **Although this decision is binding when the same or comparable wording is used, it may be that it will not take much to convince other courts otherwise when the relevant wording is only slightly different. (emphasis added)***

It was quite amazing to see the court state that if a final determination is intended, only arbitration could have been foreseen.

Uncertainty in this area has come about, amongst other reasons, both because of the historical reluctance of the English courts to give support to arbitration agreements, because those courts were up to the 1850s paid on the basis of the number of cases they had¹⁷, and the reluctance to enforce mere "agreements to agree". As late as 1992, Lord Ackner in *Walford v Miles*¹⁸, wrote:

'The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the

¹⁷ The famous case of *Scott v Avery* itself has an interesting comment on this issue, and makes it plain that one of the reasons they allowed parties to oust the jurisdiction of the Courts.

¹⁸ [1992] 2 AC 128 at 138

instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith." However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it is appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen negotiations by offering him improved terms. Mr Naughton, of course accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question - how is a vendor ever to know that he is entitled to withdraw from further negotiations?' How is the court to police such an "agreement?" A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content.'

Fortunately, so far as Dispute Boards are concerned, there is a direct and enlightened¹⁹ English precedent.

Dispute Boards in England

The legal characterisation in England of Dispute Boards took place a decade ago, in the case of *The Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*²⁰ when the House of Lords stated very clearly that the contractual dispute resolution mechanisms chosen by competent commercial parties should not be interfered with. The Channel Tunnel contract (a modified version of FIDIC Red Book 3rd edition) had in place a "Panel" the mandate for which was strikingly similar to the contractual terms governing the conduct of FIDIC DABs to this day.

It is relatively common knowledge in our field that the Channel Tunnel disputes procedure was adapted by the drafters of FIDIC for the first FIDIC procedures of this type, with the change in the description of the Panel to a DAB. Notable here are the phrases indicating that the parties should "give effect" to the decision of the Panel until it is "revised by arbitration" phrase.

Please carefully absorb Lord Mustill's statement:

"...I would endorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts..."

¹⁹ and faithful to the romans
²⁰ [1993] 61 BLR 1

I was lucky enough to be in the House of Lords for this case. There was much discussion between their Lordships and Counsel about the nature of this clause, and whether it was entirely an arbitration clause or a two stage clause in which the second part only was arbitration – what came clear from the discussion (and is recorded in the Judgment) was that there was no doubt that their Lordships took the view that the whole clause was binding on the parties “unless it broke down”- see page 287 H. See also the discussion at page 289 D-G, and Lord Mustill’s indication at page 290 that a mandatory injunction for specific performance (in this case continuance of contract works in disputed areas) by the Panel would have had to be complied with. This is a much more radical measure than the order for payment asked for in most cases.

Finally, kindly note the Learned Lord’s reference to “...**the duty of the court to respect the choice of tribunal which both parties have made, and not take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone**”. These are wise words of general application.

This decision of the House of Lords is on contract wording which is for these purposes identical to the wording of Clause 20 in the current 1999 FIDIC suite of contracts. The case indicates very directly that DABs decisions should be given effect to until revised in arbitration, and that the Courts should be loathe to involve themselves in the dispute board process.

DISPUTE BOARDS UNDER THE (INTERNATIONAL) COMMON LAW

There is every reason to believe that this approach would be accepted in most Common Law jurisdictions. Generally speaking, the principles applied are ancient, as the start of this analysis implies. There could be problems in those jurisdictions which adopted English law when that law was relatively hostile to non-state dispute resolution or at a time when the law was not greatly developed.

An interesting case in this respect is the 2003 South Africa case of *Welihockyj and Others v Advtech Limited and Others* 2003 (6) SA 737 (W). In this case, faced with a contractual provision stating that disputes would be resolved by “an independent person acting as expert and not as arbitrator”, the South African court held that whether arbitration or expert investigation is contemplated depends not only on the wording of the reference, but also on the manner in which the presiding officer arrives at a decision, the nature of the dispute and the extent of the dispute.

In the circumstances there were references to fraud and a complicated but apparently flawed investigation was undertaken. The judge noted that there was nothing in the agreement which was counter-indicative, including the references to an “expert”, and held that the contract clause in question was actually an arbitration clause.

As a simple matter of principle, this has to be wrong. The parties' agreement creates the third party dispute resolver, and gives him his powers. If he or she can be qualified as an arbitrator, they may have statutory powers (to the extent that they are conferred to arbitrators in the jurisdiction in question) as well. A reference of a matter to a person acting as expert and not arbitrator has been understood to be a reference to an expert for many years.

The legislation²¹ in South Africa defines arbitration as “a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement whether an arbitrator is named or designated therein or not”. This is an unexceptional definition which mirrors that in other Commonwealth legislation. It is not dissimilar to the definition at the start of this review. The judge in this case defined arbitration as reference of a dispute for final determination to someone other than the courts. This negative definition tends to pre-judge the issue, but is of course similar to the approach which succeeded in the English *David Wilson Homes Ltd v. Survey Services Ltd (in liquidation) and Anor*²² case discussed above.

The *Welihockyj* case is probably best understood as an example of hard cases making bad law. The expert had undertaken an extensive but (so far as the court was concerned) inadequate investigation into certain allegations, including allegations of fraud and apparently made the wrong decision.

Interestingly, the court made reference, in making its decision, to a host of English authorities, including Mustill and Boyd 2nd edition 1989, and certain cases, including a 1985 English case about whether surveyors²³ were arbitrators. There the English judge held they were not, and therefore were not immune from a lawsuit for negligence.²⁴

It is no doubt also important, on the facts of this case, that the “expert” chose to describe himself, and was addressed as the “arbitrator”. This may be taken, if it was consensual, as a variation to the dispute agreement.²⁵ Otherwise, there is no excuse for overriding a specific contractual provision intending to avoid that baggage. The reference to an expert is intended to do exactly this. It may have been the wrong decision, but the language about acting as an independent expert and not an arbitrator was intended to avoid having the dispute treated as an arbitration. The South African Court should not have gone against the expressed intentions of the parties, but given the state of the precedents, it is not too surprising. It could have happened in any number of former English colonies, including perhaps my own original jurisdiction of Canada²⁶.

So, it relatively easy to understand how this confusion can come about. The characterisation approach is historically based, and has been used by courts to import

²¹ Arbitration Act 1965 section 1.

²² [2001] EWCA Civ 34, [2001] 1 BLR 269

²³ Trained professionals who value land, amongst other things.

²⁴ *Palacath v Flanagan* [1985] 2 All ER 161

²⁵ 2003 (6) SA 737 at 746

²⁶ Although it has to be noted that Canada is very aware of ADR concepts.

arbitration act based solutions to particular disputes for years, and occasionally, determine that non-arbitrators could be sued for their negligence. While this involved a certain amount of desirable flexibility, the time has no doubt come for the parties agreements to always be respected.

The problem with the “characterisation” approach is obvious. It can, and did here, create a lottery, as the recent English case on reference to a QC *David Wilson Homes Ltd v. Survey Services Ltd (in liquidation) and Anor* [2001] EWCA Civ 34, [2001] 1BLR 269 also shows: By not putting their minds to it, or avoiding the issue, the parties may end up with all the baggage of an arbitration without actually intending this to be the result. The form of dispute resolution should not depend on the procedure used or the claim made; it should depend on the form of agreement.

Other Commonwealth countries have been keen to assist the establishment of ADR. Before the Channel Tunnel case, in New South Wales, Australia the Supreme Court in *Hooper Bailie Associated Limited -v- Natcon Group PTY Ltd (1992 N.S.W.L.R 194)* held that the Court will give effect to an agreement to conciliate or mediate in *Scott -v- Avery*²⁷ form by staying an arbitration commenced in breach of the agreement. To be enforceable however, the Court held that the agreement must provide sufficient certainty in the conduct required of the parties who are to participate in the ADR process. These are the sentiments echoed in the *Cable and Wireless* case in England a full 10 years later.

The position in Australia was not achieved without some retrenchment. In the case of *Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236*, a construction contract, the parties argued about whether or not the contractual mediation procedures had to be carried out prior to applications to the Courts.²⁸

It was argued that the mediation clause²⁹ lacked sufficient certainty to be given legal effect as (1) there were no provisions dealing with the remuneration to be paid to the

²⁷ *Scott -v- Avery* form is provision making the conciliation process a condition precedent of the right to go to arbitration or litigation.

²⁸ I am grateful to Ian D Nosworthy BA LLB FIAMA FCIArb AIPM Barrister Arbitrator Mediator for his paper for The Law Society of South Australia country update seminar Choosing the right ADR, Rising Sun Hotel, 15 October 2004, <http://www.nospart.com.au/papers/RightADR.doc> The case citation is *Aiton v Transfield* [1999] NSWSC 996 (1 October 1999), and it is available at http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1999/996.html

²⁹ The clause provided : 28.3 Expert

Where the Parties agree to submit a dispute or difference to the Expert Resolution Process, such dispute or difference shall be resolved in the following manner: (a) An Expert will be appointed by the Parties, or in default of Contract upon such appointment, either Party may refer the appointment to, in the case of financial matters, the President for the time being of the Institute of Chartered Accountants in Australia, in the case of technical matters, the President for the time being of the Institution of Engineers in Australia and, in the case of any other matters (including a dispute as to the interpretation of this Contract) the President for the time being of the Institute of Arbitrators in Australia. In all events, the Expert must have reasonable qualifications and commercial and practical experience in the area of Dispute and have no interest or duty which conflicts or may conflict with his function as an Expert.

(b) The Expert will be instructed to :

(i) promptly fix a reasonable time and place for receiving submissions or information from the Parties or from any other Persons as the Expert may think fit;

(ii) accept oral or written submissions from the Parties as to the subject matter of the Dispute within 10 Business Days of being appointed;

(iii) not be bound by the rules of evidence, and

mediator if agreed or appointed, (2) what was to happen if one or both of the parties did not agree with the fees proposed by any such mediator, and (3) what was to happen if the nominated or agreed mediator declined appointment for any reason.

Einstein J held that:-

ADR clauses as a precondition to litigation generally (original heading in Judgment)

42 *There is no legislative basis for enforcing dispute resolution clauses otherwise than those which provide for arbitration: [Commercial Arbitration Act 1984](#) (NSW). However, it is clear that if parties have entered into an agreement to conciliate or mediate their dispute, the Court may, in principle, make orders achieving the enforcement of that agreement as a precondition to commencement of proceedings in relation to the dispute: Hooper Bailie.*

43 *To achieve enforcement of such an agreement it is essential that the agreement is in the Scott v Avery form - that is, expressed as a condition precedent. Such a clause was seen not to offend the general tenet of law that it is not possible to oust the jurisdiction of the court as it acted, in effect, as a postponement of a party's right to commence legal proceedings until the arbitration was concluded, not as a prohibition against a party having such recourse: Scott v Avery (1856) 10 ER 1121. Further, as mentioned previously, the agreement is enforced, not by ordering the parties to comply with the dispute resolution procedures, but by forbidding them from using other procedures from which they have agreed to abstain until the end of the dispute resolution process.*

44 *The Court will not adjourn or stay proceedings pending alternative dispute resolution procedures being followed, if the procedures are not sufficiently detailed to be meaningfully enforced: Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (1995) 36 NSWLR 709.*

(iv) make a determination in writing with appropriate reasons for that determination within 20 Business Days of the date referred to in [Subsection 28.3\(b\)\(ii\)](#). (c) The Expert will be required to undertake to keep confidential matters coming to the Expert's knowledge by reason of being appointed and the performance of his duties.

(d) The Expert will have the following powers:

(i) to inform himself independently as to facts and if necessary technical and/or financial matters to which the dispute relates;

(ii) to receive written submissions sworn and unsworn written statements and photocopy documents and to act upon the same;

(iii) to consult with such other professionally qualified persons as the Expert in his absolute discretion thinks fit and

(iv) to take such measures as he thinks fit to expedite the completion of the resolution of the dispute.

(e) Any person appointed as an Expert will be deemed not to be an arbitrator but an expert and the law relating to arbitration including the [Commercial Arbitration Act 1986](#) (SA) and the NSW equivalent, as amended, will not apply to the Expert or the Expert's determination or the procedures by which he may reach his determination.

(f) The Dispute resolution will be held in Sydney, New South Wales unless the Parties otherwise agree.

(g) In the absence of manifest error, the decision of the Expert will be valid, final and binding upon the Parties.

(h) The costs of the Expert and any advisers appointed pursuant to [Subsection 28.3\(c\)\(iii\)](#) will be borne by Purchaser or Supplier or both as determined in the discretion of the Expert taking into account the Expert's decision in the dispute.

(i) The Parties will give the Expert all information and assistance that the Expert may reasonably require. The Parties will be entitled to be legally represented in respect of any representations that they may wish to make to the Expert, whether orally or in writing.

The Judge paid very close attention to the obligation of good faith in this agreement, and noted its importance in establishing whether or not there was a sufficiently certain agreement to negotiate.

FRENCH LAW APPROACHES

The approach of the South African and Australian courts can be usefully compared with recent decisions of the French courts. The French courts³⁰ do not have any formal role in the jurisprudence of the Middle East, but anyone who knows the history of the brilliant jurist Al-Sanhouri and his texts, including Al Waseet, knows the practical importance of French approaches.

In the Cour d'Appel de Paris 1ere Chambre, section C, on 29 April 2003 a decision was rendered with respect to an ICC Pre-arbitral Referee decision, which completely and unequivocally supports the freedom of contract of parties with respect to their dispute resolution procedures. The circumstances were that the National Petroleum Company of the Congo/Republic of the Congo had made an agreement about the sale of petrol with the Total Fina Elf E&P Congo company. It included an ICC pre-arbitral referee clause. In pursuance of the pre referee procedure, M Pierre Tercier was appointed by the ICC and he decided that the execution of the agreement could not be stopped unilaterally as long as an arbitral tribunal had not given its award, and effectively forbade the party wishing to terminate the contract from doing so until the arbitral tribunal had judged the matter.³¹

The Claimant asked the "Cour d'Appel" to annul the decision of Maitre Tercier for non respect of the scope of his mission (article 1502-3 NCPC), and added that the decision he gave was equivalent to an arbitral award³².

The Court held the "pré-référé arbitral" decision was valid as the system of the "pré-référé arbitral" had been agreed between the parties and article 6.6 of the ICC Rules on "pré-référé arbitral" provides that the parties are bound to execute without delay the "pré-référé arbitral" decision. Therefore the Republic of Congo and the SNCP's claim was inadmissible.

The Court of Appeal rejected the argument that the decision of the third party acting as referee was to be assimilated to an arbitral award, and noted that the characterisation of the pre-arbitral referee as arbitrator had been carefully avoided by the ICC. It noted that the parties had agreed in the rules to execute without delay the order of the referee and

³⁰ I wish to thank Anne-Marie Whitesell of the ICC in Paris for assistance with these cases, and my colleague and consultant/assistant Aurelie Chelle for reviewing my text and the cases.

³¹ «Leur interdit de faire obstacle a l'execution du contract de vente de petrole conclu par les parties, et donc suspendre ou interrompre unilateralement l'execution, tant que les griefs de font ne seront pas juges par le tribunal arbitral competnet pour en connaître» (extract from the Decision of the Court of Appeal)

³² Third Ground - failure by the arbitral tribunal to comply with the terms of the mandate conferred on it (articles 1484-3°and 1502-3 NCPC)

that the Order of M. Tercier had the agreed authority given to it by the parties. The Court therefore declared the application to be ill-founded.

Similarly, the binding effect of a conciliation agreement was confirmed in the French courts by the Cour de Cassation (Chambre Mixte), Decision of 14 February 2003, in the case of *Poiré v Tripiet*.

Here a peremptory calling of a Bank Guarantee was ruled to be void as the contract called for conciliation before any call was exercised. Mr Poiré had assigned to Mr Tripiet his shares in the capital of a company. The contract of assignment provided a guarantee in favour of the assignee and another clause provided that all disputes regarding the contract would be first submitted to 2 conciliators before any legal action.

Mr Poiré (the Claimant) called on Mr Tripiet (the Defendant) under the guarantee. The Defendant argued that the Claimant had not respected the preliminary Conciliation Clause and brought an action for a peremptory declaration of inadmissibility. The Cour de Cassation held the conciliation clause was enforceable and the calling of the guarantee was not admissible.³³

In a note³⁴ on this and another decision³⁵ with similar force handed down in the same period, Professor Charles Jarrosson mentions that the claim (of the Claimant) is a decision “en l'état”:- as long as the conciliation still has not taken place, the claim is inadmissible, but once it has been carried out, the judges will receive the claim.

Professor Jarrosson adds this decision is important for arbitration cases where mandatory conciliation is a precondition to the effect of the arbitration clause. With the solution for this case, the arbitral tribunal will be able to decide that a claim is inadmissible “en l'état” and that its mission is suspended until the cause of inadmissibility has disappeared, ie until it is shown that the conciliation process provided for in the contract has taken place and failed.

The arbitrator is not acting without jurisdiction (“dessaisi”) by a decision of inadmissibility “en l'état”. Professor Jarrosson notes that this case is similar to the English High Court case of *Cable & Wireless Plc v IBM UK Ltd* of the 11 October 2002, in which Mr Justice Colman adjourned court proceedings for declaratory relief and required the parties to complete the contractual requirements for ADR before continuing with their court

³³ ***New Code of Civil Procedure (NCPC)***
CHAPTER III PEREMPTORY DECLARATION OF INADMISSIBILITY

Article 122 - Shall constitute a plea seeking a peremptory declaration of inadmissibility one which, without an examination on the merits of the case, shall cause to render the opponent's claim inadmissible on the grounds that it does not disclose a right of action, a locus standi or an interest, or it is precluded by virtue of prescription, a determined time-limit or by the operation of res judicata.

³⁴ Revue de l'arbitrage 2003 2 page 403 at 406

³⁵ Cour d'Appel de Paris in *SCM Port-Royal c/ Pebay et Samper*, 23 Mai 2001

actions.³⁶ Indeed this solution is in effect similar to that which should be obtained in many Common Law jurisdictions.

Professor Jarrosson notes also that there is a limit to this principle as seen in the decision of the Cour d'Appel de Paris in *SCM Port-Royal c/ Pebay et Samper*, 23 Mai 2001³⁷, where it was held that the Claimant would not be limited by the preliminary conciliation clause and could make a claim before the Juge de referes in emergency cases.

It is also said that the French courts confirmed in 2003 that this approach in favour of contractual dispute resolution procedures applies also to mediation in the *Negre* case³⁸. In this case the parties had signed a contract where M. Negre would be the "adviser" ("conseiller") for Vivendi to access the Chinese market. The (pathological) disputes clause in the Contract provided that all conflicts in relation with this contract would be "definitively decided in Paris, following the ICC Rules on Conciliation and Arbitration (or the French Commercial Tribunal) by one or more arbitrators named in accordance with these Rules and with the application of French law". The parties also agreed without reservations to (judicial) mediation.

M. Negre wanted the Tribunal de Commerce to decide if the arbitration was not possible as the contract was not international (it was between 2 French citizens), that the clause was not clear and it would be too expensive for him. The Cour de Cassation rejected all these arguments and indicated the arbitration clause was still effective. The agreement to mediation would not be considered to be a renunciation of the agreement to arbitrate without an unequivocal demonstration that this was what was intended.

The French courts have not to my knowledge opined on the validity or otherwise of the Dispute Board procedures, but I would assume, given the jurisprudence just examined, that they would in normal circumstances give effect to the parties' agreement.

THE GERMAN LAW APPROACH

The German Courts³⁹ have in effect already ruled that Dispute Board type procedures are enforceable. This is a very important development, not least because several of the World's major trading nations have laws which are inspired by the German model. These countries include Turkey, Greece and Russia.

³⁶ The ADR clause provided in part:

The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40. If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings"

³⁷ Revue de l'arbitrage 2003 2 page 405

³⁸ Cour de Cassation (1ere Chambre Civile) 28 Janvier 2003 (M. Negre c/ Societe Vivendi).

³⁹ I am grateful to my colleague and consultant, Niuscha Bassiri, for this law and this case.

Conciliation is common in Germany. A recent development in most of the Federal Lander (states) is that conciliation proceedings are mandatory under certain circumstances. A claim made before the state courts would be inadmissible if these mandatory conciliation proceedings have not concluded first. The Federal Supreme Court in Germany (Bundesgerichtshof) has ruled repeatedly that a claim brought before the court prior to a conciliation attempt which has been stipulated is inadmissible.⁴⁰

In the judgment in 1998 the Federal Court held that if an M&A contract for the takeover of a tax consultancy stipulates that in the event of a dispute a conciliation attempt before the competent Tax Consultant Board (a professional body for people in that profession like the Law Society or Bar Council) must first be made, a claim brought before the court prior to such a conciliation attempt is inadmissible. In this particular case, this did not apply, however, because the conciliation proceedings commenced by the claimant could not be conducted, because the defendant refused to pay his share of the costs of the Board. The Federal Supreme Court ruled in this case that the defendant is consequentially barred from relying on the conciliation clause as it would be “unzulässige Rechtsausübung”, i.e. an inadmissible exercise of rights.

The Federal Court states that the dispute board clause has the same spirit and purpose as well as the procedural effect as an arbitration clause. The difference is that the arbitration clause permanently excludes the reference to the state court. The Federal Court held that the inadmissibility of rights argument, which is part of the good faith objection, should be assessed as in cases regarding arbitration clauses. As early as November 1987 the Federal Court had ruled that the arbitration agreement obliges both parties to co-operate in the process of arbitration, in particular to share pro rata the advances usually required by the arbitration courts.⁴¹ The same applied in this case where the parties concluded not an arbitration agreement, but a conciliation agreement.

This judgment is important on two issues. First, it reaffirms the Federal Supreme Court's earlier judgments that as long as the conciliation attempt has not been carried out any claims brought before the state courts in breach of the agreement are inadmissible. Second, by giving the conciliation clause the same procedural effect as an arbitration agreement, the Federal Supreme Court emphasises the importance of dispute resolution agreements generally and reduces the uncertainty that such clauses might engender.

This judgment overruled a prior judicial authority from the Higher Regional Court of Frankfurt/Main which had ruled that it is a “natural impulse” of a party not to pay any advance if this party is the subject against whom the procedure is commenced.⁴² Thus, the Federal Supreme Court's intention obviously was to set policy on the effect of conciliation agreements.

⁴⁰ BGH, VII ZR 344/97, 18 November 1998; BGH, VII ZR 197/82, 23 November 1983, NJW 1984, 669

⁴¹ BGHZ 102, 199, 12 November 1987

⁴² OLG Frankfurt a.M., 24 U 248/95, 7 November 1997. Note that under German law the defendant which has not reacted to a statement of case in the state court, because he might – to use the Frankfurt Higher Court's language - has a “natural impulse” not to participate in a case he feels not to be the right defendant, will be confronted with a judgment by default. Pursuant to Section 797 a) of the German Code of Civil Procedure decisions resulting from conciliation proceedings are enforceable.

ICC Court

In the ICC Court⁴³, sitting in Paris, we have seen a certain number of arbitrations following references to Dispute Boards, including one Egyptian one I am acting for the Claimant on at the moment. Under the ICC Court Rules, it goes without saying that for conflict reasons I could not take part in the ICC Court decisions on that case, but I can indicate that there have been no issues which I am personally aware of about the validity of the DB procedure itself. However, there have been arguments, including in my case, about the enforceability of DB decisions, the need to refer disputes to DBs, and the jurisdiction of DBs.

CONCLUSION ON LEGAL ENFORCEABILITY

What I would observe is that the jurisprudence cited above confirms the importance of adhering to the pre-agreed contractual procedures. This may in turn cause parties to proceed with caution if they are considering trying to side-step contractual provisions requiring some procedure prior to arbitration.

I would include in this caution, a caution about ignoring prior references to the Engineer in FIDIC contracts (or the equivalent). There are numerous published decisions⁴⁴ of ICC tribunals about whether or not the prior reference to the Engineer is mandatory, and broadly speaking the inclination in those decisions seems to me to have been **not** to consider the prior reference to the Engineer for a decision to bar subsequent arbitration of disputed claims. There have of course also been some cases where the need for a prior reference to the Engineer has been considered to be necessary before the Tribunal can be seized.

Writing very generally and no doubt unfairly, civilian tribunal have tended to indicate that the insistence on a timely notice to the engineer and reference to him is facultative only, or that it would be inconsistent with the proper application of the principles of good faith to allow parties to successfully rely on this point.

Common law lawyers tend on the other hand to determine that there was in fact a decision, or they use their interpretation of the contract to indicate that the prior reference to the Engineer was not necessary.

That these tendencies are evident in published extracts of ICC awards is demonstrated in part, for example, by case 4229 of 26 June 1985⁴⁵, evidently a construction case (the

⁴³ The proceedings of the ICC Court are (naturally) confidential. Sanitised extracts from Arbitral Awards do make their way into the press from time to time, either from the ICC itself, or trusted collaborators of the ICC.

⁴⁴ I have not revisited these for this paper, but I know there are many important extracts from ICC cases in the ICLR and Yearbook of Commercial Arbitration.

⁴⁵ ICC International Court of Arbitration Bulletin Volume 11/1 Spring 2003 page 74

original Interim Award is written in French) in which the Tribunal decided that the preliminary *saisine* of the conciliators was a faculty⁴⁶, not an obligation.

Similarly in a Partial Award dated 29 January 1990 in Case 6276⁴⁷, a standard FIDIC Red Book 3rd edition type of clause was considered by the Arbitral Tribunal. The Tribunal held that there were 2 preconditions to arbitration to be satisfied by the Claimant. The first was the resort to amicable settlement and the second the submission of the dispute to the Engineer. With respect to the first condition the Tribunal noted that there were no objective criteria which could be examined in determining whether or not there had been an attempt to settle amicably. The Tribunal held that this was a question of good faith and there was ample evidence in the dossier to indicate that the Claimant had reached the point where it had a good faith conviction that the parties were deadlocked.

With regard to the second prerequisite, the reference to the Engineer, the Tribunal held that this is governed by precise rules which may not be transgressed. No Engineer had been appointed under the Contract! The Tribunal held that this alone did not relieve the Claimant of the need to refer disputes to the Engineer, and that they should have requested the appointment of an Engineer. Only when this was refused could they argue that there was a breach of contract which would dispense with his precondition. The Tribunal therefore held that the arbitration of the affected claims was premature.

What I am suggesting here is that the common interest of all of the higher courts (and arbitral tribunals) to promote ADR, including Dispute Boards, may have the perhaps unintended result of causing more claims to be disallowed before constituted arbitral tribunals because there has been a failure in some respect the tribunal considers to be important, to properly follow the binding contractually agreed procedures.

Conclusion on the law

A page by Cliff Dilloway on the website of Endispute.co.uk contains the following admonition:

Expert Adjudicators or Determinators

We would not recommend trying to resolve disputes using an “expert not an arbitrator” particularly if at the same time the contract requires that matters of law are to be decided by a lawyer. The courts have not yet finally decided how these forms of dispute resolution work and you may find yourself at the expense of a public service trial (and even appeal) for the benefit of those that follow. The law loves precedents and there are few regarding expert adjudications. Why should you pay for a court case to establish a legal principle rather than to resolve your dispute?

These seem like wise words in the current circumstances. One of the reasons this paper has been written is to assist in ensuring that DBs and other ADR mechanisms do not become entangled through “over-lawyering”. It should however be possible, in most

⁴⁶ There is no obvious translation of this that I am aware of “facultative” seems to be the equivalent of “providing a facility” (which may be used or not).

⁴⁷ ICC International Court of Arbitration Bulletin Volume 11/1 Spring 2003 page 76

circumstances and most places, to be able to ensure dispute-free Dispute Board provisions.

THE LIFE, DEATH AND DIET

What then is the difference between a modern Dispute Board, appointed by the parties to a contract, and arbitration? If the DB decisions are intended to have a binding character, the main difference is the legislative gloss placed on arbitration by generations of lawyers and commercially minded legislators, as well as the international treaties defining and upholding arbitration and arbitration awards.

If the DB is however, only intended to give recommendations, we are talking about a process which is much more similar to mediation or other non-binding ADR techniques, and the legal playing field is somewhat different as well. The chances of engaging the liability of the DB are small, and the failure of the Parties to follow recommendations only something to ponder if the dispute should ever end up before an arbitral tribunal or the courts.

For all Dispute Boards, the rules remain relatively simple, and bounded by the law of contract. The life, death and diet of the DB, will be decided by:

- the contract creating it;
- the *ad hoc* agreements of the parties; and
- the character (as in personalities) of the DB itself.

A BRIEF HISTORY OF DBS IN CONSTRUCTION CONTRACTS

DB's had their origin in the Americas in the early 1970s, where they were used first on an underground tunnel in Colorado and a major civil engineering projects in Central America. Their apparent results were good, and for some years, there were no reports of litigation/arbitration following the establishment of a DRB in the Seattle style. At the moment, there appear to be at least 3 US states (Idaho, California and Washington) and one Canadian province (Alberta) which have enacted regulations to govern their agreement to DRBs in their contracts. They are also acceptable to the US Government (DOT). It is said that DRBs have overtaken arbitration in California road contracts.⁴⁸

The first pro-ADR step internationally was taken when the Fédération Internationale des Ingenieurs-Conseils (FIDIC) published in 1987 the 4th Edition of their well known Conditions of Contract for works of Civil Engineering and Construction which included in Clause 67(2) a requirement that the parties attempt to settle the dispute amicably before the commencement of arbitration. The new step caused some initial uncertainty as to whether or not the amicable settlement text was obligatory and what happened when it was not complied with⁴⁹. FIDIC followed this with a supplement for the use of a FIDIC style DAB on Red Book projects.

⁴⁸ Forum, the DRBF Newsletter, August 2003

⁴⁹ See for example the discussion of the Tribunal found in the Award in ICC case 7641 found in the ICC Bulletin Vol. 9/1 May 1998 page 74

Similarly, the World Bank Sample Bidding Documents for the Procurement of Works published in December 1990 mentioned the possibility of using a Dispute Review Board ("DRB"). This first World Bank version provided for non-binding procedures in the American style. It was roughly in this period that DBs began to be established in several high profile projects including the Channel Tunnel contract, the Fixed Link for Oresund, and other projects in Hong Kong, China and Central America.

DBs are now a fixed aspect of international and national construction contracting, and they are continuing to diminish the perceived need to resort to the courts or arbitration.

The DB model is good for any number of long term contracts or relationships

Certainly as DBs continue to penetrate the construction and infrastructure world, it seems inevitable that they will come to be used on non-construction projects, or projects where the physical construction element is relatively peripheral. In the UK, they have been used since the statutory adjudication scheme began in 1998 for disputes between architects and Owners and similar disputes. They have been successful there as well.

THE DRBF AND THE "AMERICAN MODEL"

The American development of DBs has been the greatest in any one country, and the American model deserves special treatment at this stage in the paper, as it will serve to highlight the subsequent developments in other places.

The premier organisation in North America concerned with DBs is the **Dispute Resolution Board Foundation** in Seattle, Washington State. Members like me have been treated over the years to a story of the continuing success of DBs, but the model has apparently stayed very close to the original ideal. When compared to the FIDIC and ICC models, it has some important differences, which deserve highlighting. The DRBF's own website sets out the differences conveniently when it sets out the essential principles of the Concept:⁵⁰

*"The Board's output consists of **written, non-binding recommendations (emphasis added by R Knutson)** for resolution of the dispute. The report includes an explanation of the Board's evaluation of the facts, contract provisions and the reasoning which led to its conclusion. Acceptance by the parties is facilitated by their confidence in the DRB-in its members technical expertise, first-hand understanding of the project conditions, and practical judgment; as well as by the parties opportunity to be heard.*

While the DRB recommendation for resolution of a dispute is non-binding, the DRB process is most effective if the contract language includes a provision for the admissibility of a DRB recommendation into any subsequent arbitration or legal proceeding.

⁵⁰ DRBF ° 6100 Southcenter Boulevard #115 ° Seattle, Washington 98188-2441 ° (206) 248-6156 copyright © 1996-2004, The materials from the DRBF are reprinted here with their permission.

Nine Elements of a Dispute Review Board

According to the **Construction Dispute Review Board Manual**¹ there are nine essential elements necessary for a DRB to be successful. If any of these elements are missing, success is jeopardized. These elements are:

- All three members of the DRB are neutral and subject to the approval of both parties.
- All members sign a Three-Party Agreement obligating them to serve both parties equally and fairly.
- The fees and expenses of the DRB members are shared equally by the parties.
- The DRB is organized when work begins, before there are any disputes.
- The DRB keeps abreast of job developments by means of relevant documentation and regular site visits.
- Either party can refer a dispute to the DRB.
- An informal but comprehensive hearing is convened promptly.
- The written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation.
- The members are absolved from any personal or professional liability arising from their DRB activities.

¹ Matyas, R. M., A. A. Mathews, R. J. Smith and P. E. Sperry. *Construction Dispute Review Board Manual*, McGraw-Hill, 1996.”

The written recommendations of the DRB are not binding on either party...

The DRBF has not been dogmatic in setting rules to be followed by anyone wishing to set up a DRB, rather it has stuck to guidelines and models which are hopefully followed by the contracting parties. One has the impression that under its wide umbrella it contemplates some models for DBs, which some members may actually think (or argue) are not ideal.

It has a list of members, and provides training, but does not restrict who can advertise their services through the Foundation. The emphasis on the word “resolution”⁵¹ rather than review probably highlights the “interest oriented” approach that the DRB members are intended to follow.

The emphasis on the contract is therefore illuminating. One might have thought it was so obvious that it need not be recorded. On the contrary, it is not uncommon these days to hear people speak of “rights based” or “interest based” dispute resolution. The over-concentration on interest at the expense of rights based recommendations should run the risk of not being too successful in the long run; if in the long run it entailed ignoring important provisions in the contract.

In addition, if the DB process were linked too closely with *amiable composition* or deciding *ex aequo et bono*, this would open up another very complicated field of law which varies considerably from country to country.

⁵¹ The Foundation's name was changed in an AGM from Dispute Review Board Foundation to Dispute Resolution Board Foundation in the Autumn of 2001.

We are considering a process

On the other hand, the fact that the Board issues recommendations rather than decisions has a number of implications. In terms of the process, the parties may well be more open with people who are not judges or quasi-judges, and who will not have any power to impose a solution. While the members can speak about contract rights, they cannot impose their view of the proper consequences of the contract rights, and have to strive to reach a view which will be voluntarily enforced by both the contractor and the owner.

The **Process** therefore looks and should feel a lot closer to conciliation than any of the other forms of ADR. When one looks at the homepage of Project Services Inc. in the US, one can see that the emphasis is squarely on the process:

DRB Concept

The DRB is a panel of three experienced, respected and impartial reviewers. The board is organized before construction begins and meets at the job site periodically. DRB members are provided with the contract plans and specifications and become familiar with the project procedures and the participants, and are kept abreast of job progress and developments. The DRB meets with the owner and contractor representatives during regular site visits and encourages the resolution of disputes at the job level.

When a dispute flowing from the contract or the work can not be resolved by the parties, it is referred to the DRB. The board review includes a hearing at which each party explains its position and answers questions from the other party and the DRB. In arriving at a recommendation, the DRB considers the relevant contract documents, correspondence and other documentation, and the particular circumstances of the dispute.

The board's output consists of a written, nonbinding recommendation for resolution of the dispute. The report normally includes an explanation of the board's evaluation of the facts and contract provisions and the reasoning that led to its conclusions. Acceptance by the parties is facilitated by their confidence in the DRB in its members technical expertise, firsthand understanding of the project conditions, and practical judgment as well as the parties opportunity to be heard.

Organization

Typically, and often with the recommendation of the designer, the owner decides to provide for a DRB on a project and incorporates the required provisions in the bidding documents. Soon after contract award, each party proposes one member and those two select the third member. The appointments of all three members are subject to the approval by both parties. The board is finally established through the execution of a three party agreement by both parties and the DRB members. Each member is required to serve both owner and contractor with total impartiality.

The DRB typically conducts an initial organizational meeting at the site when construction is just beginning. It meets with both parties and is supplied with copies of the contract documents. A project briefing acquaints the DRB with the nature of the work and the contractor's plans for executing it. Procedures and timing for the board's regular site visits are established. Procrastination in forming the DRB can reduce the effectiveness of the entire procedure.

Formation of the Board

One can easily imagine that with the right persons acting as DRB members, the whole process could have an important effect on the views and actions of the participants. I have acted in a number of disputes which have been solved by the right person saying the right thing at the right time. Any process which at minimal cost can increase the

chances that nothing will stew long enough to cause the project to fall apart, has to be a good thing.

The fact that it is a process and that these are such important considerations has some obvious implications for the choice of DRB members. The parties would presumably wish to have someone who was not so important and famous that they could never devote appropriate time to their role. This would also seem to rule out the use of lawyers or engineers who have teams of hungry mouths to feed back in their multi-national firms. Consultants or people who (like me) are “of counsel” from smaller organisations and who do not have such team or career building concerns should be better choices.

It is also obvious that the parties must have confidence in the Board they appoint. The first 2 points go directly to this issue:

- *All three members of the DRB are neutral and subject to the approval of both parties.*
- *All members sign a Three-Party Agreement obligating them to serve both parties equally and fairly.*

There is however, no initial emphasis on lack of conflicts of interest here, which is interesting. My work on the ICC Court has convinced me that when people, no matter how well informed, are embarking on the early stages of the formation of a tribunal, they are normally reluctant to cast doubts over the other side’s nominee. This early silence can prove fatal. Normally (and certainly if it is intended to be a secret), it will not be possible for a party to easily establish whether or not the nominee from the other party has a conflict of interest.

There is a Member Guide⁵², which contains very useful materials in relation to Best Practice. The Guide itself places very heavy emphasis on maintaining both actual independence and impartiality, and avoiding even the appearance of bias. The qualities required of members are incorporated by reference in the Model draft 3 way contract, so if the DRBF model is made contractual, parties would have some recourse against offending members.

Consequently, this is a case of “buyer beware”. The contractual documents used for establishing the Board should adhere closely to the DRBF model.

Legal consequences of the recommendation element

The Recommendation aspect of these types of DRBs is also very important, and may have important legal consequences, as the cases on expertise and arbitration cited above tend to show. It is more likely these days that the contractual requirement to submit to the DRB process will be viewed as mandatory by tribunals and the courts, with

⁵² See the website – www.drb.org. As of 15 November 2004 it had not been added to the Site. The contents are: 3. Member Guide 1 Introduction, 2 Discussion of Code of Ethics, 3 Operation of the Board, 4 Advisory Opinions, 5 The Hearing 6 Deliberation and Recommendation, 7 Special Considerations 8 Resignation, Appendix 3A Code of Ethics, Appendix 3B Example of Disclosure Statement, Appendix 3C Example of Operating Guidelines.

the possible side effect that attempts to enforce (perceived) legal rights without first going through the DRB process will not succeed.

In such circumstances, parties who take their advice from cowboy lawyers who wish to shoot first and ask questions later may end up losing quite a bit of money.

The fact that there is no binding determination to be issued by the DB makes the functioning of the DRB definitely not either arbitration nor adjudication, nor an expertise/expert determination. The arbitration legislation will not apply to it, the members will have no immunity (hence the last point in the 9 point list), and each party is free to ignore the DB decision.

The DRBF does not recommend binding recommendations:

Binding Recommendations

Binding recommendations should be used only in special circumstances, where both parties have agreed in advance that they will abide by it. When a binding recommendation is made by the DRB it can change the hearing from a discussion among peers, wherein the parties maintain control of the final outcome, to a contentious, win-lose proceeding, often with lawyers working with and coaching the parties. One of the major reasons for the wide acceptance of the DRB process is that its recommendations are not binding. Accordingly, to change it without a good reason is a mistake, and thus the DRBF does not recommend the use of binding recommendations.

Multinational forms of contract such as FIDIC and World Bank documents mandate the use of binding recommendations on their projects. Typically these contracts are performed in remote locations in countries with legal systems that do not provide for equitable treatment of the parties to a construction contract and do not provide for effective enforceability of litigation awards. The provision for binding recommendations gives assurance to foreign bidders that their rights to recovery under the contract will be protected. If the recommendation is not accepted by the parties it becomes "binding in the interim" and must be complied with until it is overturned in subsequent arbitration. See Section 4, "Multinational Practice" for further discussion.⁵³

Further, the obligation to act in good faith or treat the parties fairly will be a purely contractual obligation, which is not an issue under US law as that law imports a general obligation of good faith, as most civil law does. We all know, however, that this is not the case under English law. The other Commonwealth countries stand somewhere between the two.

The consequence of this paradigm should be that Common lawyers not versed in the impact and application of principles of good faith may well misinterpret some of the provisions/obligations, some of the time. An example may well be whether or not the contractual time limits are binding and enforceable to the detriment of one of the parties.

The style of appointment of the members set out here is no doubt extremely important for the working of the DB and the faith that the parties will have in the process. The legal implication is that if a party knowingly appoints someone who will always be biased in

⁵³ DRBF Practices and Procedures Manual, Section 1 Chapter 5

favour of his or her appointer will probably be themselves in breach of contract, if not liable for a variety of torts as well.

The well meaning and common inclination of some people to appoint a friend who will “never do them wrong” could therefore backfire disastrously. I have been on enough tribunals and in enough cases as arbitrator to tell you that it does not take the other arbitrators long to understand what is happening. A single slipped statement betraying knowledge which should not be in his hands, is enough to give rise to suspicions, and another slip is enough to make his colleagues feel that his word is not worth listening to. The result is he has no influence, which is exactly the opposite result from that intended by his appointers.

The proof is in the pudding

There is little doubt that interested parties will debate the relative merits of binding and non-binding Dispute Boards for years to come. There is an old English saying that the “proof is in the pudding”, in other words, it is the result that counts. The results from the non-binding process oriented US style DB are impressive. By the end of 2001 there had been over 818 projects with DRBs, with the total value of those projects going over 41 Billion dollars. Only 30 projects had seen disputes go beyond the boards.⁵⁴ It may well be that the international versions of DBs cannot claim this high percentage of successes.

However, there are those who question how this has been achieved. The following is an extract on an article on “Assessing 10 years of DRBs at BART”⁵⁵ from the latest issue of Forum, the DRBF Newsletter:

It does not appear, however, that BART is fully enamored with its past DRB experience. A view often voiced is that much of the hard work spent crafting together a contract document to fairly allocate risk between the contractor and BART was undermined by DRB recommendations that appear to seek out any plausible path to support the contractor's view. In essence, this appears to lead BART to question whether the DRB is considering the contract in its entirety or from the perspective that if the contractor has any reasonable interpretation it must be the prevailing view. It may be that BART's expectation that a DRB will strictly enforce a contract is unrealistic and fails to consider that a DRB weighs heavily the risks a contractor takes in preparing its bid. The past experience suggests that the DRB thus gives the contractor wide latitude to demonstrate reasonable interpretations of contracts. However, if DRBs weave together a tenuous thread of logic to come to a conclusion favoring the contractor, BART may well conclude that the process is biased in the contractor's favor and does not serve the public's interest.

(...)

One of the emerging issues is the range of topics to be considered by a DRB. Many of the problems, if not all, are very complicated determinations of what the contract says about an item. In some cases this is determined by the plans and technical specifications; however, in most situations, the general conditions, the supplementary conditions and other contractual content are the focus of the problem. These types of questions are more of a legal nature and one question is whether the DRB should be asked to consider such matters. The Disputes Resolution Board Foundation addressed this very issue in their 2002 Annual Meeting. There does not appear to be any clear way to separate the technical from the contractual elements of a problem, so it is hard to imagine how one could make such a demarcation and limit the DRB's scope of review. One of the concerns is that in making rulings on complex issues, the DRB is at times asked to review matters of law based on case precedent and other rulings of courts in developing their recommendations. Is this asking a DRB composed of practicing construction and design professionals to go outside their areas of expertise? The question of participation by attorneys in the DRB process then emerges.

⁵⁴ <http://pscinc.homestead.com/DRB.html> accessed on 12 November 2004

⁵⁵ By Russel P. Rudden, P.E. Forum Volume 8 Issue 3 August 2003, page 1

Should one of the members of the DRB be a practicing attorney or a similarly qualified legal expert to supplement the experience of the construction professionals on the DRB? Is it desirable to have an outside legal advisor to the DRB, independent of either BART or the contractor, to consult on matters where the DRB is uncertain regarding the law in some matters?⁵⁶

Here we see that there are at least 2 issues to be concerned with. The first is that the Owners/Developers must have confidence in the **people** and the **process**. A truly neutral DB is essential. This is very old news. Even under Roman law people were not allowed to be judges in their own causes⁵⁷.

The other point, quite close to my own heart, is that DBs will often clearly benefit from legally qualified members or chairs, as complicated issues of fact and law are involved. It is also obvious at times that lawyers attempt to intimidate/strongly influence non-lawyers with stern sermons about the law, which may or may not be correct.

It will be interesting in coming years to see how the DRBF results compare to the statistics at the ICC and World Bank. This is all the more so as the DRBF are working hard to give international exposure to DRBs, and have seen them installed on many international projects.

AAA DRB Rules

The American Arbitration Association Dispute Resolution Board Guide Specifications Effective December 1, 2000 are the AAA contribution to DB Rules. They are quite similar in philosophy, but not text, to the DRBF Rules, so I will not canvass them at length here, but rather point out some interesting differences.

Neutrality

The AAA highlight this issue which was also touched upon in the text of Mr Rudden cited above – conflicts of interest in Board members.

2. Neutrality

It is imperative that the Board members be neutral, act impartially and be free of any conflict of interest.

- A. *For purposes of this subparagraph (1.02.B.2), the term "member" also includes the member's current primary or full-time employer, and "involved" means having a Contractual relationship with either party to the Contract, such as by being a subcontractor, architect, engineer, construction manager or consultant.*
- B. *The following are disqualifying relationships for prospective members:*
 - 1. *An ownership interest in any entity involved (with) the Contract, or a financial interest in the Contract, except for payment for services as a member of the DRB;*

⁵⁶ More of the text of this article is found in the appendices below

⁵⁷ Justinian, Digest 4.8.51 cited in Roebuck, supra, page 60

2. *Previous employment by, or financial ties to, any party involved in the Contract, including fee-based consulting services, within a period of 10 years prior to award of the Contract, except with the express written approval of both parties;*
3. *A close business or personal relationship with any key members of any entity involved in the Contract which, in the judgment of either party, could suggest partiality; or*
4. *Prior involvement in the project of a nature that could compromise that member's ability to participate impartially in the Board's activities.*

Before being appointed, a disclosure statement is required from prospective Board members:

4. *Pre-appointment Disclosure*

Prior to their being listed for review by the Owner and the Contractor, proposed Board members shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the project or any past or present relationship with the parties to the Contract, including subcontractors, design professionals and consultants.

Ex Parte (secret) communications with the party that appointed you

The AAA Rules also forbid *ex parte* communications with “your” Board member⁵⁸. *Ex parte* communications with your arbitrator are not uncommon in US domestic arbitrations, and I have turned down one ICSID arbitration offered by an American party through not agreeing to take part in such discussions, so my view is that such a rule really does have to be made plain.

Certainly these are sensible guidelines and a breach of them could result in a (large) suit for damages for breach of contract. It should be borne in mind that in many jurisdictions, knowingly hiding a relationship of the type listed here could amount to fraud. It is also the case in many jurisdictions that a fraudulent act of this sort will invalidate both your insurance policy and the contractual protection offered in the relevant contractual rules.

I should of course point out that I do not think there is anything in these particular rules about disclosure and interest that any DRBF member would have trouble accepting.

⁵⁸ Schedule A Rule 2 “There shall be no *ex parte* communication, advice or other consultation between any Board member and any Party to the contract including subcontractors and suppliers on any matter or issue that is pending or may become before the Board.”

Recommendations

The AAA Board issues recommendations, so they are not legally or contractually binding. The procedures set out in the Guidelines are quite similar to what one might expect in an arbitration hearing. No doubt the AAA give real added value in the administrative assistance they supply. It is not difficult to imagine boards which could fail in their mission through lack of stewardship, and the AAA Guidelines should be helpful in ensuring this does not happen. Schedule B to the Rules sets out relatively complete rules for the hearing, which again should be quite useful. I might mention in passing that no mention is made of what happens to the documents after the hearing, or to admissions against interest by one of the parties, so it may be an idea to draft specific rules.

Detailed Rules

So, in addition to the provisions about disclosure, a distinguishing feature of the AAA Rules is their detail. While this may seem mundane, it is no doubt very important to ensure a DB which will work well. Overall, the Rules are a good rendition of the "American Model", and would be a good set of rules to use for parties who are new to the concept of Dispute Boards, and wish to have recommendations.

THE FIDIC MODEL

The notion of DABs was enthusiastically adopted by both FIDIC and the World Bank so now they are a regular feature of many of the modern forms of contract inspired by those institutions. In the middle of 1995 FIDIC published its "Orange Book" Conditions of Contract for Design-Build and Turnkey which provide for a "Dispute Adjudication Board" ("DAB"). This was followed by the quite brilliant 1999 suite, which make Dispute Boards, mandatory, albeit in a patchy sort of way, for all FIDIC contracts following the standard forms.

So far as I am aware, the first DB (of any type) in Europe was the Panel of consisting of a French Professor of Law and 4 Engineers set up for the administration of Disputes on the Channel Tunnel, as discussed in the legal sections above. That contract was based on FIDIC 3rd edition, and as the text of the dispute provisions was certainly available to the drafters of the FIDIC DB provisions, it is interesting to note how well they resemble each other.

How has it been doing?

It is actually not entirely clear how well the FIDIC versions are operating. I have certainly had (and am still arbitrating) one Egyptian contract where the DAB was named as the Engineer. This is a move which I expect would effectively frustrate the intentions of the drafters of the DAB provisions. I was pleased to note in this case, however, that the Engineers (an American and an Australian) wrote letters totally rejecting the contractor's

claims while acting as Engineers, and then, acting as the DAB, proceeded to admit several million dollars worth of claims. They took their duty to act fairly as a DAB very seriously, even though one of them paid for it with much earlier holidays than he expected.

I will be outlining some problems with DABs from both the practical and legal point of view later in this paper. It would be unfair to single out the FIDIC versions as many of the issues in the FIDIC versions will appear in the others as well. A number of legal issues are actually generic to the Dispute Board model.

PROBLEMS WITH THE CURRENT FIDIC FORM

“Binding” only if there is no Notice of Dissatisfaction

When one reads the wording of Clause 20, it seems reasonable enough, and quite watertight. There is in fact a major possible practical problem in GC 20.4.

Typically, Claimants will come to the DAB with not one, but more, disputes. If it is a dispute over the final valuation, hundreds of individual items may be involved, from initial setting out of the Site, to the final colour of paint. DABs do their best to deal with the disputes in the time they have. The intention of the draftspeople certainly seems to have been that the Decision of the DAB would be binding until overturned in arbitration. Hence, one finds these words in the 4th paragraph of GC 20.4:

The decision shall be binding on both Parties, who shall promptly give effect to it unless and until is shall be revised in an amicable settlement or an arbitral award as described below.

However, the final 3 paragraphs are not as clear as they might be about the effect of a Notice of Dissatisfaction. They state:

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

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board’s Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board’s Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

*If the DAB has given its decision as to a (**emphasis added by Robert Knutson**) matter in dispute to both Parties and no notice of dissatisfaction has been given by either Party within 28 days after it receive the DAB's decision, then **the (emphasis added by Robert Knutson)** decision shall become final and binding upon both Parties.*

This text is written as if there is only ever going to be a single dispute referred to the DAB at any one time. It is possible, but it is more likely that a number of disputes will be referred, especially as the provisions of GC 14 purport to extinguish any rights of the Contractor to claim after the Final Statement and Statement at Completion (see Articles 14.10 to 14.14). So if a number of disputes (let us say 100) are referred, and one party submits a Notice of Dissatisfaction as to a single one of them, are all 100 suddenly no longer final, and no longer have to be given effect to?

Certainly, this could depend on the way in which the Notice of Dissatisfaction is drafted, and/or the Decision is drafted. However, the use of the singular in the final paragraph makes it clear in my opinion that if the various disputes are dealt with as separate disputes, and dissatisfaction is only expressed about one of them, the other 99 should be final and binding. Unfortunately, I know of at least one case⁵⁹ where these subtleties of wording were not picked up by a high quality Tribunal, and it held in effect that if a Notice of Dissatisfaction was issued in respect of one matter, absolutely everything that was claimed was no longer final. The Employer, who had expressed no dissatisfaction at all within the contractual time limits, was effectively allowed, almost 3 years after the DAB decision, to contest the grounds for the Decision on any fanciful grounds his team could dream up in the 3 years they had to ponder the case.

The text should clearly indicate that if there is more than one point at issue, only those which have been the subject of a timely Notice of Dissatisfaction will be subject to revision, and then only at the time of the arbitration award. Even disputed decisions should be binding in the meantime. Otherwise, these conditions will remain a charter for prevaricators. I have heard that FIDIC and the World Bank are close to or at a compromise second edition of the 1999 suite, but do not know if this point will be dealt with.

Amicable Settlement (Clause 20.5)

There had been some discussion in British circles about what, if anything, is required of the parties faced with clauses such as this. Can a clause requiring each party to attempt an amicable settlement require them to negotiate for example? Agreements to negotiate are normally said not to be effective under English law, but as noted above there is recent authority which indicates that mediation agreements are enforceable.⁶⁰

⁵⁹ On the wording of the 1998 test edition, which is identical for these purposes.

⁶⁰ I am grateful to the CEDR website which provided this extract from the judgement of Colman J in *Cable and Wireless v IBM*, [2002] EWHC 2059 (Comm Ct) Queens Bench Division, Commercial court 11 October 2002:

No doubt the clause will have to be dealt with in some fashion and the simplest way of showing that the requirements have been met might simply be to send a without prejudice letter (which under English law would be protected from disclosure to later Judges or Arbitrators) offering to settle the matter at fixed terms.

Alternatively, this may be an opportune moment to introduce a mediator and request his assistance in a genuine attempt to facilitate an amicable settlement. Amicable negotiations are not a necessary precondition to arbitration as is sometimes seen because the Sub-Clause has a 56 day "long stop" after which arbitration may be commenced in any event.

If ICC arbitration is in prospect, a written record of good faith attempts should be prepared, as the Secretariat will almost certainly be aware of the French law authorities referred to above. The requirement to attempt amicable settlement has gained new force.

Conclusion

FIDIC have done a wonderful thing through highlighting DBs and giving them a basis in the daily lives of many international construction processes. Many disputes must have been avoided as a result. It should be time now for a detailed study of the results of DABs in action to now improve the model and build on that success.

WORLD BANK STANDARD BIDDING DOCUMENTS⁶¹

In the January 1995 edition of the World Bank Standard Bidding Documents for Procurement of Works a whole new section⁶² of the document, "Disputes Resolution Procedure" set out a mandatory procedure for the use of DRBs consisting of 3 members for contracts estimated to cost more than US\$50 million. For contracts between US\$10 million and US\$50 million, employers were given the choice of using either a DRB with 3 members, a DRB with a single Disputes Review Expert or the traditional Clause 67 as included in the FIDIC General Conditions of Contract, where, as before in the English style, the Engineer may act as a decision maker as the first step in the procedure. In such cases the World Bank had to accept that this clause be used and that the Engineer was independent.

Interestingly, there was a switch at the World Bank in the late nineties from DRB recommendations to DRB decisions (binding recommendations⁶³). The text of⁶³ the 2000 World Bank Standard Bidding documents states:

"For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in Dunnett v. Railtrack, supra. Accordingly, in the present case I conclude that clause 41.2 includes a sufficiently defined mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediator with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements."

⁶¹ Available to download for free at www.worldbank.org

⁶² section 13

⁶³ Sub-Clause 67.1 Version 1 Conditions of Particular Application

“The Recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as hereinafter provided, in an arbitral award”

The 2004 text states:

“The Recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as hereinafter provided, in an arbitral award. Unless the Contract has already been repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract

Apart from the obvious malapropism involved in binding “Recommendations” this language is strikingly similar to that found in FIDIC and the Channel Tunnel case, which should make the Channel Tunnel case itself more useful as a precedent in any situation where the World Bank form comes to be interpreted by arbitral tribunals or the Courts. As the text of Mr Aruajo’s⁶⁴ speech at the end of 2003 shows, the World Bank has not found everything about DBs to be perfect but it nonetheless sees real practical benefits in their use:

The Bank standard contract is based on the conditions of the FIDIC contract (red book) with several modifications. FIDIC has recently updated its contract (new red book) including the majority of the Bank’s modifications, however, several differences continue to exist, particularly with regard to DRBs: FIDIC expects the engineer to resolve some disputes, and they use different language. From the World Bank’s perspective, DRBs promote speedy resolutions, reduce risk and contract price, and in some countries may reduce the risk of corruption during contract execution.

Furthermore, DRBs reduce the number of issues that go to arbitration (which costs time and money), and they encourage the contractor to keep working while issues are resolved. All of these support the World Bank’s goal of getting the project implemented. The rules for DRBs procedures are included in World Bank contracts. There have been some problems along the way. For example, a board member may not have been knowledgeable or had a conflict of interest, or some parties may have had trouble accepting authority to appoint the DRB members when there is a difference of opinion.

Here again we see the emphasis on the process involved and the benefits that it brings. Sadly for lawyers, there is little apparent attention to the legal implications of those processes. Perhaps this will all be to the good!

All of the points outlined above in relation to FIDIC will also apply to the World Bank versions. I would not be surprised to discover that some of these problems have in fact surfaced in cases other than the ones that I know of.

ICC Dispute Boards⁶⁵

Introductory Points

⁶⁴ Armando Araujo is director of the Procurement Policy and Services Group for the World Bank and is a director of the DRBF. He can be reached at aaaraujo@worldbank.org. This is an extract of a talk he gave in Autumn 2003 which is published in the February 2004 Forum magazine of the DRBF

⁶⁵ See <http://www.iccdisputeboards.org/>. The ICC have given their permission to reproduce these ICC copyrighted materials.

The ICC Dispute Board Rules⁶⁶ are the most recent of the Rules⁶⁷ discussed in this paper, and are no doubt a major contribution to the field. This is so both because of the global impact of the ICC, and the quality of the Rules the ICC has produced.

I have outlined above how the World has been somewhat split between two camps—those who would believe in non-binding “recommendations” and those who wish to have the DB make a binding decision. It was evident from the start that this was going to be a major issue in the ICC Dispute Board Rules formulation. The ICC and Working Group quite neatly finessed this issue by producing 3 integrated sets of Rules, allowing for a DRB format with recommendations⁶⁸, a DAB format which results in Decisions, and a CDB, “Combined Dispute Board” which can issue either recommendations or Decisions⁶⁹. The distinction may however, be more apparent than it is real, because if neither party objects within 30 days, the recommendations (whether issued by the DRB or CDB) become binding.

There is no default provision under Article 3 to deal with what happens if there is no agreement on whether the DB is to be a DAB, DRB or CDB, but presumably this could become clear at the time of the signature of the all member agreement made under Article 10, although the model agreement supplied does not indicate which type of DB it will be.

The ICC can (but does not have to) provide administrative assistance in the formation of the DBs, deciding challenges in relation to DB members, and (as an option) reviewing DB decisions.⁷⁰

Short and to the point

The DB Rules are quite short compared to the other Rules, especially when one considers that they incorporate 3 types of Dispute Boards. They look and feel like the well known ICC Arbitration Rules, and are a facsimile of the Arbitration Rules in a number of respects.

For example, Article 7.1 of the Arbitration Rules states:

“Every arbitrator must be and remain independent of the parties involved in the arbitration”.

Article 8.1 of the DB Rules states:

“Every DB member must be and remain independent of the Parties.”

Under Article 19.6 of the Rules the DB is required to act fairly and impartially and ensure that each Party has a reasonable opportunity to present its case. This is a formulation

⁶⁶ I was a member of the DB Working Group in the ICC, but mainly in a passive sense, as my focus through this period was to advance the new ICC Turnkey Construction Contract, of which the Rules will form a part. For that reason, the Turnkey contract group was very keen to see the Dispute Board Rules. However I was not in the group of those drafting the Rules, and was only a recipient of the Emails and drafts as the work progressed. Accordingly, I cannot give any secrets away. This is a purely personal view based purely on the text of the Rules.

⁶⁷ The date of entry into force was 1 September 2004

⁶⁸ Which become binding after 30 days,

⁶⁹ If one party requests a Decision, the Board makes the final decision about whether or not it issues a Decision.

⁷⁰ Article 1

and structure which is cut and pasted from the Arbitration Rules, and which has both admirers and detractors.

It should be noted that in some of the other Rules, the emphasis on the total impartiality of each member is more conspicuous. To be fair, it should also be noted that the problem with the “laundry list” approach is that it is sometimes treated as exhaustive, even if it is not meant to be⁷¹, and the ICC approach will give a good deal of flexibility to the new Centre created to administer these Rules.

When reading the DB Rules, it is important to bear in mind that the sub-articles are intended to be read in order from the start. A good example is Article 8.3, which makes little sense unless Article 8.2 is read beforehand.

The Boards are empowered

The language of Dispute Board Rule Article 11 “Providing of Information” is more directive and obligatory than some of the equivalent formulations. Thus, the ICC Board will not be kept in the dark as has (anecdotally) sometimes been the case with other types of boards. These provisions should be quite popular with Board Chairmen.

Confidentiality

There are strong provisions relating to confidentiality, and restraints on what the DB members can tell the outside world about the process. It is interesting that the restrictions appear to completely disappear as soon as the Member resigns or otherwise loses his appointment.

We all make mistakes

Another distinguishing feature of these Rules is the power of correction and interpretation, again taken from the Arbitration Rules, but no doubt a useful additional power for the DB.

“Automatic” arbitration on the notice of dissatisfaction

Articles 4.6 provides that:

If any Party submits such a written notice expressing its dissatisfaction with a Recommendation, or if the DRB does not issue its Recommendation within the time limit prescribed in Article 20, or if the DRB is disbanded pursuant to the Rules before a Recommendation regarding a Dispute has been issued, the Dispute in question shall be finally settled by arbitration, **if the parties have so agreed**, (emphasis added by Robert Knutson) or, if not, by any court of competent jurisdiction.

I would comment that this provision, which is similar to Article 5.6, raises 2 issues in my mind. One is that there appears to be “automatic” arbitration required which may or may not be a good thing. If it is required, one can easily see the possibility of multiple arbitrations over similar issues.

⁷¹ The way the Red, Orange and Green lists in the IBA Rules on Conflicts are being treated is a case in point.

The other point is that the insertion of the words “if the parties have so agreed” seems to me to create a little ambiguity. I would hope that this text does not end up being interpreted as requiring another separate agreement at the time a dispute arises, to arbitrate. We know that this is a requirement in some countries, for example Argentina⁷², and I am concerned that the placement of this text where it is, while no doubt necessary, may leave the Rules open to this interpretation.

Summary

The ICC DB Rules are an important contribution to the field and should be popular. We will have to wait some time to find out from former members how well they seem to have worked in the field. The ICC Court is quite good at analyzing and publishing statistics about its work, and we might expect the new Centre to be equally helpful.

ISSUES COMMON TO ALL THE RULES

Sequential Decisions, *Res Judicata* and *Lis alibi pendens*

This is a point I became concerned about during the Channel Tunnel disputes, although it did not clearly arise there, so far as I recall. In that case there were around 20 Panel decisions over a number of years. These questions naturally arise:

1. Is the DAB bound by its own previous decisions?
2. If an Arbitral Tribunal is deciding a point which is also before a DAB, does it have to wait its turn to pronounce?
3. If a point was decided by a DAB, and became final and binding, does it bind a subsequent Arbitral Tribunal as well? If not, why not? That is what the Contract states!
4. If there is more than one Arbitral Tribunal over the years (entirely possible given that disputes must be notified in a finite period of time), does a subsequent tribunal have to follow the decisions of the previous one? This could easily arise in relation to matters such as the calculation of interest, when it runs from and what the rate is.

There are relatively clear general principles of law which govern these matters, but they are found in the realm of arbitral law, such as the *Fomentos* case in the Swiss Federal Court, or Public International Law. I doubt that issues as complicated as these could have arisen prior to the advent of DBs, and believe that a number of new decisions will eventually arise as a result.

What will happen to *Kompetenz-Kompetenz* and separability of the arbitration clause?

⁷² A separate and additional *compromisso* is required, speech by Horatio Grigera Naon, London, November 17, 2004.

This raises a number of very interesting points. Is the whole of Clause 20 an arbitration clause, or only the bits that refer to the ICC? The question was discussed at some length in the House of Lords part of the Channel Tunnel case, but the case was not decided on the point.

How can a DAB be described as an arbitration? If it cannot be, does this mean that it has no power to decide its own jurisdiction? If it cannot be, does this mean that when the contract is repudiated, the DAB provisions fall away but the arbitration provisions do not? It may be that the answer is to describe the whole clause as an arbitration clause, but that seems to stretch the actual text to breaking point.

Obligatory national rules relating to jurisdiction over disputes involving the state

Finally, it is certainly the case that states and their sub-parts are bound by arbitration agreements. This is a rule of public international law, enshrined amongst other places in the New York Convention. It is questionable whether these days any state could derogate from an unqualified commitment to arbitration, although there are still some countries, for example Iran, which make a habit of only entering into qualified arbitration agreements, and reserve to themselves the right to have their parliament or some other domestic body confirm whether it is able to arbitrate once the dispute has arisen.

This being the case, if there is an international contract; states cannot refuse to be bound by contractual commitments freely entered into. It is an instance of sovereignty that states have the freedom and power to bind themselves in contract.

What about Dispute Boards? Depending on the rules involved, the state or its sub-part may have agreed to take part in the DB process, and either be bound by the decision of the DB or to consider recommendations. I cannot see that the latter process would be considered to be a breach of local jurisdictional rules, whether it be in respect of administrative or some other tribunal, but if the state has in effect agreed to be bound by a decision which is not arbitration, one can easily imagine local lawyers trying to argue nonetheless that the DB has no authority to rule on the respective party's rights under the contract as that power is vested in the local body alone.

If it is an obviously international contract, I am not sure that such an argument would work, at least when it came to be considered by an arbitration tribunal. This assumes also that there are no public policy arguments with force, such as allegations of fraud. However, if it is an international contract which has been domesticated, for example through registration of the foreign party as a local company and use of domestic arbitration, it could well be that the DB would be infringing the jurisdiction of a local court or other body.

I would finally add that this is not an issue for civil law jurisdictions only. It comes up frequently in many jurisdictions, for example India, as a result of the local Company Law regulations.

Conflicts of Interest

These are dealt with at length in the DAB “General Conditions of Dispute resolution Agreement”. The only questions which remain relate to how much attention is paid to them by the contracting parties in the field.

CONCLUSION

I have tried in this paper to demonstrate that whether jurisdictions are “civil” or “common” they should give effect to DB agreements, and that the legal roots of such agreements actually go back thousands of years. With the new status of DBs in all their forms and no doubt, forms to be invented, they are sure to be a feature of dispute resolution in the Middle East for years to come. I have made some references in this paper to Roman law and Roman times. The author of Justinian’s Institutes, some think, was born in Beirut at a time when Britannia, where I live, was a cold little island on the edge of civilisation.

The Romans taught the rule of “*pacta sunt servanda*” - Contracts will be observed - to all their citizens across their empire, and the rule is still with us all. Of course, in my copy of the Koran one can read “Oh ye believers, honour your contracts⁷³”. My final message today is one of unity - “The contract is the law of the parties⁷⁴” is a part of our common heritage and should be maintained for its beneficial effect on the settlement of economic disputes, both here, and everywhere else they are used.

Whatever type of international commerce you are in, if you have long term relationships you wish to preserve, and want effective dispute resolution in the Middle East, DBs should be a part of the solution.

End of Text Robert Knutson 18.11.04

⁷³ Quran, Al Maaytah 5 (The Table) verse 1 Oxford University Press 1964, 1982

⁷⁴ Egyptian Civil Code Article 147

APPENDICES TO ROBERT KNUTSON PAPER DATED 18.11.04⁷⁵**DRB Board Concept from the DRBF**

The DRB is a panel of three experienced, respected, and impartial reviewers. The Board is organized before construction begins and meets at the jobsite periodically. The Board is usually formed by the owner selecting a member for approval by the contractor, the contractor selecting a member for approval by the owner, with the two thus chosen selecting the third to be approved by both parties. The three DRB members then select one as chair with the approval of the owner and contractor.

DRB members are provided with the contract documents, become familiar with the project procedures and the participants, and are kept abreast of job progress and developments. The DRB meets with owner and contractor representatives during regular site visits and encourages the resolution of disputes at the job level. The DRB process helps the parties head off problems before they escalate into major disputes.

When a dispute flowing from the contract or the work cannot be resolved by the parties, it can be referred to the DRB. The Board review includes a hearing at which each party explains its position and answers questions. In arriving at a recommendation, the DRB considers the relevant contract documents, correspondence, other documentation, and the particular circumstances of the dispute.

The Board's output consists of a written, non-binding recommendation for resolution of the dispute. The report includes an explanation of the Board's evaluation of the facts, contract provisions and the reasoning which led to its conclusion. Acceptance by the parties is facilitated by their confidence in the DRB-in its members technical expertise, first-hand understanding of the project conditions, and practical judgment; as well as by the parties opportunity to be heard.

While the DRB recommendation for resolution of a dispute is non-binding, the DRB process is most effective if the contract language includes a provision for the admissibility of a DRB recommendation into any subsequent arbitration or legal proceeding.

Nine Elements of a Dispute Review Board

According to the *Construction Dispute Review Board Manual*¹ there are nine essential elements necessary for a DRB to be successful. If any of these elements are missing, success is jeopardized. These elements are:

- *All three members of the DRB are neutral and subject to the approval of both parties.
- *All members sign a Three-Party Agreement obligating them to serve both parties equally and fairly.
- *The fees and expenses of the DRB members are shared equally by the parties.

⁷⁵ The Extracts from the DRBF, ICC and AAA are reprinted with the kind permission of those organisations.

- *The DRB is organized when work begins, before there are any disputes.
- *The DRB keeps abreast of job developments by means of relevant documentation and regular site visits.
- *Either party can refer a dispute to the DRB.
- *An informal but comprehensive hearing is convened promptly.
- *The written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation.
- *The members are absolved from any personal or professional liability arising from their DRB activities.

¹ Matyas, R. M., A. A. Mathews, R. J. Smith and P. E. Sperry. Construction Dispute Review Board Manual, McGraw-Hill, 1996.

DRB Frequently Asked Questions (DRBF Website www.DRBF.ORG)

Does it really work? How effective is it?

DRBs have proved to be exceptionally effective. In the U.S., alone, DRBs have been employed in over 1,000 projects, aggregating some \$43 billion in construction cost. Roughly 1,150 Board recommendations have been issued, and, of these, all but a handful have been adopted by the parties, thereby avoiding costly and time consuming arbitration and litigation.

Does the mere presence of a Board encourage contractor claims and disputes?

No, the experience has been quite to the contrary. The presence of a Board has had a prophylactic effect, deterring the assertion of Contractor claims and disputes. On construction projects having Boards, the average number of disputes taken to the Board has been only 1.1 per project. This is considerably less than the average number of disputes taken to court or arbitration on projects without Boards.

How much does a Board cost? Does it add value?

DRB costs range from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with disputes. Considering only projects that refer disputes to the Board or that had difficult problems, the cost ranges from 0.04% to 0.26% with an average of 0.15% of final construction contract cost, including an average of four dispute recommendations.

The cost to both parties of arbitrating or litigating one relatively simple scope-of-work dispute can be in excess of \$50,000; the cost to both parties of arbitrating or litigating a dispute with several scope-of-work claims, a differing site conditions claim, and a delay claim can be well in excess of \$1 million. Therefore, Boards have proved to be exceptionally cost effective and have added real value to the projects on which they have been established.

Do Boards promote acrimony or posturing among the parties?

No. In fact Boards have proved to *reduce* acrimony and posturing among the parties. The greatest source of acrimony among the parties to a construction project is festering, long unresolved claims and disputes. This has a cumulative effect and makes the resolution of relatively simple issues increasingly more difficult as time

progresses. Win or lose, parties find it more productive to resolve claims and disputes as they arise, so they can progress the construction without carrying the baggage of unresolved issues.

Do Boards interfere with timely completion of the project?

No, they do not. Board hearings are typically conducted right on the project site. Board members are familiar with the project by virtue of their having attended regular quarterly status meetings and having reviewed monthly progress reports. They were selected in the first instance based upon their experience in construction of similar projects. Board procedures are informal and simplified in comparison with court or arbitration proceedings. Attorneys are generally encouraged not to attend hearings and, if they do attend, they are rarely permitted to make presentations or participate in the proceedings. As a result, Board hearings rarely disrupt construction or adversely impact job progress.

What are the types of DRBs?

There are two types of Boards recommended by the Foundation. The first is a three-member Board with the owner choosing a member, the contractor choosing a member and then these two members choose the third member of the DRB. All members have to be approved by both the owner and the contractor. The Board members then all work as a three member neutral Board. The second type of Board is a single advisor Board. Both the contractor and owner agree on a single advisor to work as a neutral party to help resolve construction disputes.

Is there a DRB that would work for smaller projects such as a school, mall, or small building?

Yes, single advisor boards are used on smaller projects under \$10 million in costs. Projects that are larger than \$10 million in construction costs should use the standard three-member DRB board.

Are there statistics on the success rate of projects that have used DRBs?

The DRB Foundation publishes annually the “Tabulation of Dispute Review Boards,” which is a compilation of statistics on DRB projects reported over the years from our membership

Why should we use a DRB on our project?

A DRB is designed to help resolve disputes before they become large claim issues. It helps the owner and contractor work together to solve claims issues and keeps the project moving forward. The impartiality and years of experience represented by Board members can be a very useful tool for quickly resolving potential disputes.

Who pays for the DRB Board?

The owner and contractor each pay 50% of the costs of the DRB Board.

Extract from Home page of Project Services Inc.**DRB Concept**

The DRB is a panel of three experienced, respected and impartial reviewers. The board is organized before construction begins and meets at the job site periodically. DRB members are provided with the contract plans and specifications and become familiar with the project procedures and the participants, and are kept abreast of job progress and developments. The DRB meets with the owner and contractor representatives during regular site visits and encourages the resolution of disputes at the job level.

When a dispute flowing from the contract or the work can not be resolved by the parties, it is referred to the DRB. The board review includes a hearing at which each party explains its position and answers questions from the other party and the DRB. In arriving at a recommendation, the DRB considers the relevant contract documents, correspondence and other documentation, and the particular circumstances of the dispute.

The board's output consists of a written, nonbinding recommendation for resolution of the dispute. The report normally includes an explanation of the board's evaluation of the facts and contract provisions and the reasoning that led to its conclusions. Acceptance by the parties is facilitated by their confidence in the DRB in its members technical expertise, firsthand understanding of the project conditions, and practical judgment as well as the parties opportunity to be heard.

Organization

Typically, and often with the recommendation of the designer, the owner decides to provide for a DRB on a project and incorporates the required provisions in the bidding documents. Soon after contract award, each party proposes one member and those two select the third member. The appointments of all three members are subject to the approval by both parties. The board is finally established through the execution of a three party agreement by both parties and the DRB members. Each member is required to serve both owner and contractor with total impartiality.

The DRB typically conducts an initial organizational meeting at the site when construction is just beginning. It meets with both parties and is supplied with copies of the contract documents. A project briefing acquaints the DRB with the nature of the work and the contractor's plans for executing it. Procedures and timing for the board's regular site visits are established. Procrastination in forming the DRB can reduce the effectiveness of the entire procedure.

Results

The final 2001 tabulation of the DRB Foundation shows that the number of contracts under construction with DRB's continues to grow with an increase of 22% in 2001. This compares to an increase ranging from 15% to over 40% for each of the four previous years. To the end of 2001, there had been 818 projects that have used DRBs with a total contract value of \$41.0 billion. In all of those projects, 1021 recommendations were given by the DRBs with only 30 issues going beyond the DRB process.

DRBs are now recognized as a regular and necessary adjunct to many construction projects throughout the USA and the world. The use of DRBs is recognized and endorsed by the American Arbitration Association, the Construction Industry Dispute Avoidance and Resolution Task Force, the CPR Institute for Dispute Resolution, the Construction Industry Institute, the Construction Industry Presidents Forum, the Associated General Contractors of America, the American Underground Association, the Institution of Civil Engineers of the United Kingdom, the International Committee on Large Dams, the International Tunneling Association, the World Bank,

the Asian Development Bank, and the European Bank for Reconstruction and Development. Some organizations including the World Bank go further and now **require** the use of DRB in certain projects.

Extracts from FORUM, the DRBF Newsletter

Summary from Annual Meeting
Breakout Session Group 3
Process Integrity—Legal Developments

A. Board Member Selection

The perception of bias of the members is the most critical issue facing the selection process. In many areas of the construction industry, particularly underground construction, board members know the contractors. This can give owners a “perception of bias.” Reasonable steps should be taken prior to the first meeting to diffuse the perception. Board members should focus on establishing a relationship and common ground with the owner’s representatives.

B. Ex Parte Communication

Ex Parte communications are another potential source of “perception of bias.” Board members, and the chairman in particular, must be mindful of *ex parte* communications, particularly during site tours. Although *ex parte* communications are prohibited by the DRB Rules, it is important to reinforce the rules during the process. Board members should make sure they spend equal time with the owner and contractor representation during the site tour.

C. Admissibility of DRB Recommendations

Several recent court cases in Massachusetts have addressed the admissibility of the DRB recommendation. The courts have generally given great weight to the recommendations. The consensus of the members at the meeting was that the process would be undermined if the recommendation was not admissible in a later proceeding.

D. DRBs Deciding Legal, Non-Technical Contract Issues

The conclusion reached was that the DRBs should hear and make recommendations on all issues brought to the board, including legal, non-technical issues.

E. Participation in the Hearing by Attorneys and Consultants

The conclusion reached was that attorneys should be allowed to be present at the hearings, but should only participate in an active sense at the request of the board. Participation by true technical experts should be encouraged.

Consultants who act as just “claim consultants” should not be encouraged to participate.

F. Binding Nature of the DRB Recommendation

The group’s consensus was that the recommendation should not generally be binding. The reasoning is that DRBs are in the business convincing business not the mandating business.

G. Advisory Opinions

Advisory opinions by the boards are excellent tools. The advisory process should be inserted in the contract documents. This is a priority issue that should be addressed quickly by the Foundation.

H. The Hearing Itself

Cross examination should not be permitted. If one party does not attend, should the hearing go forward?

The consensus was if the conduct of a hearing is a condition precedent to taking the next step in the disputes process, then the hearing should be conducted even in the absence of one party.

I. Enforcement of the Contract

It was decided that the board had to fairly enforce the terms of the contract and could not resort to fireside equity.

J. Payment of Board Members

The consensus was that it would be best if all members were paid from the same source of funds. Payment by individual parties fosters the idea of “my member” versus “your member.”

K. Report Content

The report should be strictly factual and should avoid any editorial comments about the parties or their positions. The report should be sufficiently detailed so that it convinces the parties of the strengths and weaknesses of their positions. If there is a minority report it should be anonymous.

L. Variations of the DRB Process

Variations of the DRB process should be discouraged. The process works. Variations are really not DRBs.

M. Training

Training members continues to be of paramount importance for effective boards. □

DRBF Selection of Members Chapter 2 Section 2 (From the DRBF)

2 – 2 Member Selection

Selection of Board members is critical to the entire DRB process. This chapter discusses the appropriate time period for establishing the DRB, includes the criteria for DRB membership, describes how the selection process works, and points out potential problems to be avoided.

When to Establish the DRB

Board members should be selected and the DRB established before site work commences. Many times the relationship between the parties becomes strained soon after award of the contract, when issues relating to submittals, site preparation and utilities are discovered. It is important that the DRB be activated as soon as possible after award of the contract to be available as a resource to help facilitate communications and resolve issues.

Delay in the selection and approval of the Board members can affect the review of disputes generated during mobilization and the early stages of the work. If the DRB is not established, it will be unable to respond in a timely manner and hearings of disputes generated in that time period will be conducted by a DRB lacking contemporaneous knowledge of the circumstances of the dispute. Success of the DRB process also depends in part on the parties and the Board members developing rapport, and getting to know and trust each other takes time.

The first DRB meeting should be set as soon as possible after site work begins. Early Board member selection and DRB startup cannot be over-emphasized.

The Importance of Member Impartiality and Neutrality

An essential element in the DRB process is that each contracting party be completely satisfied with every Board member. Both parties must carefully investigate nominees to ensure that each nominee is experienced and technically qualified. More importantly, each party must be satisfied that the nominees are impartial and have no conflicts of interest.

If either party is uncomfortable with a nominee, it not only has the right to reject that nominee, it must reject that nominee, or the DRB process may not be effective.

Identifying Experienced and Impartial Candidates

Frequently, the contractor and owner will know one or more qualified candidates. If a party does not have such knowledge, it can obtain information from someone who has had DRB experience or from the resumes on the DRBF web site. Alternatively, look at the tabulation of DRBs on the web site and inquire of owners or contractors who have had DRBs. In some cases, owner agencies solicit letters of interest in trade journals prior to contract procurement.

Avoiding the Perception of Bias

For the purposes of this section, the following definitions apply:

1. Party directly involved: The owner, the contractor and all joint-venture partners on the project

2. Party indirectly involved: A subcontractor, supplier, designer, architect, or other professional service firm, or a consultant to any party on the project
3. Financial ties: any ownership interest, loans, receivables or payables, etc.

Because of the importance of Board member impartiality and the serious consequences that conflicts of interest have on the dispute resolution process, the following guidelines are recommended.

1. To be eligible for selection, Board members must not have:
 - a. Financial ties to any party directly or indirectly involved in the contract.
 - b. Be currently employed by any party directly or indirectly involved in the contract.
 - c. Been previously a full-time employee of any party directly involved in the contract, unless specific written permission from the other party is obtained.
 - d. 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.
 - e. Any financial interest in the contract or project, except for DRB services.
 - f. Any prior substantial involvement in the project, in the judgment of either party.
2. While serving on the DRB, Board members must not:
 - a. Be employed, either full-time or as a consultant, by any party that is directly involved in the contract, except for services 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.

The repeated selection of the same individual by either (1) a particular owner or contractor, or (2) only owners or only contractors can lead to the perception of bias. While individuals in these categories may be completely impartial and neutral, it is the perception of bias that is the concern. The important point is that both parties should avoid selecting Board members that may engender the perception of bias.

It is difficult to envision a specification that addresses all possibilities of perceived bias. However, the parties are in control of this situation and each party must remember that the other party needs to feel comfortable with every Board member if they are going to trust these individuals to recommend resolution of their disputes.

TEXT OF BART ARTICLE

By Russel P. Rudden, P.E.

The San Francisco Bay Area Rapid Transit District (BART) undertook three major capital programs in the 1990s: trackway extensions in the East Bay and the West Bay, and rehabilitation of the core system. As part of these major capital programs, BART not only updated its technical design to contemporary standards but also included contracting features intended to avoid litigation and work more effectively with contractors.

The objectives were better schedules, fewer budget surprises and better quality performance. Among the techniques added to BART's family of contracting tools were: partnering, dispute resolution boards (DRBs), escrowed bid documents, delegation of authority to lower level staff and design-build contracting. BART made provisions for DRBs in 17 of 63 construction and procurement contracts in the capital programs. The contracts where DRBs were used ranged in bid construction value from approximately \$10,000,000 to \$525,000,000 and included conventional design-bid-build, design-build and design-furnish and install contracts. On the 17 contracts where DRBs were allowed under the terms of the BART contracts, only 13 actually formed DRBs. In the four cases where there were no DRBs, BART and the contractor mutually agreed to waive the formation of the DRB after award of the contract. Further, three other contracts had DRBs formed, but the DRBs were deactivated shortly after formation as BART and the contractor agreed to suspend their use. One additional contract formed the DRB only at the end of the contract to resolve a global close out issue. Therefore, of the 17 contracts where DRBs were allowed only nine actually performed the functions of a DRB as described in the contract documents. A total of 15 hearings occurred between 1992 and 2003.

LESSONS LEARNED

When a DRB program was first considered in 1990, BART intended to adopt a process that would avoid the use of litigation to resolve commercial matters for construction and procurement contracts. Looking back over the last decade, BART has been successful in that objective as there has been no litigation on construction and procurement contracts. DRBs have clearly contributed to such success; however, they were not the only element in achieving this objective. BART widely embraced partnering which facilitated communication between the BART and contractor principals, and BART management adopted an attitude of resolution rather than confrontation which was reciprocated by the contractors. BART has also included partnering provisions in most of its contracts. Together these items, plus traditional good design practice and active BART support of contracts, has led to the litigation free result. It does not appear, however, that BART is fully enamored with its past DRB experience. A view often voiced is that much of the hard work spent crafting together a contract document to fairly allocate risk between the contractor and BART was undermined by DRB recommendations that appear to seek out any plausible path to support the contractor's view. In essence, this appears to lead BART to question whether the DRB is considering the contract in its entirety or from the perspective that if the contractor has any reasonable interpretation it must be the prevailing view. It may be that BART's expectation that a DRB will strictly enforce a contract is unrealistic and fails to consider that a DRB weighs heavily the risks a contractor takes in preparing its bid. The past experience suggests that the DRB thus gives the contractor wide latitude to demonstrate reasonable interpretations of contracts. However, if DRBs weave together a tenuous thread of logic to come to a conclusion favoring the contractor, BART may well conclude that the process is biased in the contractor's favor and does not serve the public's interest.

Among the lessons learned, BART has found that careful choices of DRB members are vital to the effectiveness of the DRB and the selection process should be similar to the process of other professional services. DRBs should be formed early in the contract to be most useful. On mid sized contracts (i.e. \$20 million) DRB costs on the order of 0.05% of the contract amount should be expected. Regular status meetings should be held quarterly. In preparing for a hearing, a well-crafted position paper is essential and a thoroughly rehearsed, clear; convincing presentation is vital to communicate views.

FUTURE DIRECTIONS

With a decade of DRB experience, where is BART headed? DRBs have not been a panacea for resolving contract issues, but they have served a purpose in avoiding litigation and forcing parties to come to grips with issues. BART has provided for mediation in its smaller contracts and that is one method that could be expanded to larger undertakings. The use of DRBs on future contracts has not been ruled out. The DRB process will be reviewed on a case-by-case basis comparing it to other alternative forms of dispute resolution for particular contracting situations. One of the emerging issues is the range of topics to be considered by a DRB. Many of the problems, if not all, are very complicated determinations of what the contract says about an item. In some cases this is determined by the plans and technical specifications; however, in most situations, the general conditions, the supplementary conditions and other contractual content are the focus of the problem. These types of questions are more of a legal nature and one question is whether the DRB should be asked to consider such matters. The Disputes Resolution Board Foundation

addressed this very issue in their 2002 Annual Meeting. There does not appear to be any clear way to separate the technical from the contractual elements of a problem, so it is hard to imagine how one could make such a demarcation and limit the DRB's scope of review. One of the concerns is that in making rulings on complex issues, the DRB is at times asked to review matters of law based on case precedent and other rulings of courts in developing their recommendations. Is this asking a DRB composed of practicing construction and design professionals to go outside their areas of expertise? The question of participation by attorneys in the DRB process then emerges. Should one of the members of the DRB be a practicing attorney or a similarly qualified legal expert to supplement the experience of the construction professionals on the DRB? Is it desirable to have an outside legal advisor to the DRB, independent of either BART or the contractor, to consult on matters where the DRB is uncertain regarding the law in some matters? In forming DRBs, should there be more restrictions regarding members' prior working relationships with one or both of the parties? In addition to having no working relationship with either party the DRB members should also not have provided any DRB services to either party for a period of some years. Do we want DRB members to be completely free of prior relationships to bring that sort of objectivity? On the other hand, where there are multiple contracts constituting a single program it may be advantageous to have one DRB hear all such matters. In such a case, the DRB will have a commonality of understanding between the various pieces of a program that might lead to more equitable decisions. The future direction of DRBs at BART is unclear. BART has not ruled out the use of DRBs on future contracts but will likely review on a case-by-case basis whether other methods will be used. Revisions to the criteria for member selection are likely and the role of attorneys and legal advisors may be revisited. BART may also consider advisory options rather than hearing recommendations as an alternative way to tap the expertise of DRB members to resolve issue. **Note:** This article is a summary of a paper Rus Rudden presented in June 2003 to the the American Public Transportation

Association (APTA). Rus was seconded to BART from URS as BART's manager for the construction of the Line, Trackwork and Systems contract for the SFO Extension from 1998-2003. During the course of this work and prior BART consulting CM assignments from 1992-1998, he represented BART in regular DRB meetings and presented BART's case before DRBs in nearly half the DRB hearings that occurred over the last 10 years. He can be reached by e-mail at rus_rudden@urscorp.com. □

The World Bank's Policy and Practice with Respect to DRBs(Forum February 2004)

The following is an excerpt from the keynote address given by Armando Araujo at the DRBF Annual Meeting on October 18, 2003.

Up to this point, the World Bank's policy has been to "recommend" DRBs on all projects. The organization is about to make it mandatory for all projects over \$50 million. The World Bank is currently financing \$25 billion worth of projects each year, and they have leverage with the borrower. Our main objective as a development entity is not to loan money, but to see a project implemented. Therefore, it is critical that the borrower and contractor work well together to resolve disputes. The World Bank has been working hard to harmonize their contracts with those of other multilateral financing agencies. The Bank standard contract is based on the conditions of the FIDIC contract (red book) with several modifications. FIDIC has recently updated its contract (new red book) including the majority of the Bank's modifications, however, several differences continue to exist, particularly with regard to DRBs: FIDIC expects the engineer to resolve some disputes, and they use different language. From the World Bank's perspective, DRBs promote speedy resolutions, reduce risk and contract price, and in some countries may reduce the risk of corruption during contract execution.

Furthermore, DRBs reduce the number of issues that go to arbitration (which costs time and money), and they encourage the contractor to keep working while issues are resolved. All of these support the World Bank's goal of getting the project implemented. The rules for DRBs procedures are included in World Bank contracts. There have been some problems along the way. For example, a board member may not have been knowledgeable or had a conflict of interest, or some parties may have had trouble accepting authority to appoint the DRB members when there is a difference of opinion. The challenges ahead include:

- New performance based contracts are expected to bring new kinds of disputes.
- How to handle new long

term contracts (like in concessions for 20 years).• Auditing for quality assurance – this can be tough to accept if you don't believe the process is fair. To review all of the World Bank's DRB documents, visit www.worldbank.org and look under "procurement." **Note:** Armando Araujo is director of the Procurement Policy and Services Group for the World Bank and is a director of the DRBF. He can be reached at aaraujo@worldbank.org. □

WORLD BANK DOCUMENTS (WWW.WORLDBANK.ORG)

[SUB-CLAUSE 67.1-VERSION 1](Conditions of Particular Application)
Disputes Review Board

Delete Sub-Clause 67.1 and replace with the following:

"If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of the Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate, or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board ('the Board').

"The Board shall be established when each of the three Board Members has signed a Board Member's Declaration of Acceptance as required by the DRB's Rules and Procedures (which, along with the Declaration of Acceptance form, are attached to these Conditions of Particular Application).¹⁴

"The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. If either of these Members is not so selected and approved within 28 days of the date of the Letter of Acceptance, then upon the request of either or both parties such Member shall be selected as soon as practicable by the Appointing Authority specified in the Appendix to Bid.¹⁵ The third Member shall be selected by the other two and approved by the parties. If the two Members selected by or on behalf of the parties fail to select the third Member within 14 days after the later of their selections, or if within 14 days after the selection of the third Member, the parties fail to approve that Member, then upon the request of either or both parties such third Member shall be selected promptly by the same Appointing Authority specified in the Appendix to Bid who shall seek the approval of the proposed third Member by the parties before selection but, failing such approval, nevertheless shall select the third Member. The third Member shall serve as Chairman of the Board.

"In the event of death, disability, or resignation of any Member, such Member shall be replaced in the same manner as the Member being replaced was selected. If for whatever other reason a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman then either of the other Members) shall inform the parties and such nonserving Member shall be replaced in the same manner as the Member being replaced was selected. Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board, failing which the replacement shall be made by the Appointing Authority in the same manner as described above. Replacement shall be considered completed when the new Member signs the Board Member's Declaration of Acceptance. Throughout any replacement

process the Members not being replaced shall continue to serve and the Board shall continue to function and its activities shall have the same force and effect as if the vacancy had not occurred, provided, however, that the Board shall not conduct a hearing nor issue a Recommendation until the replacement is completed.

"Either the Employer or the Contractor may refer a dispute to the Board in accordance with the provisions of the DRB's Rules and Procedures, attached to these Conditions of Particular Application.

"The Recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as hereinafter provided, in an arbitral award. Unless the Contract has already been repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either the Employer or the Contractor is dissatisfied with any Recommendation of the Board, or if the Board fails to issue its Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation, then either the Employer or the Contractor may, within 14 days after his receipt of the Recommendation, or within 14 days after the expiry of the said 56-day period, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

"If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 14 days after the parties received such Recommendation from the Board, the Recommendation shall become final and binding upon the Employer and the Contractor.

"Whether or not it has become final and binding upon the Employer and the Contractor, a Recommendation shall be admissible as evidence in any subsequent dispute resolution procedure, including any arbitration or litigation having any relation to the dispute to which the Recommendation relates.

"All Recommendations that have become final and binding shall be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer."

[END OF VERSION 1]

[SUB-CLAUSE 67.1-VERSION 2]
Disputes Review Expert

DISPUTES REVIEW BOARD'S RULES AND PROCEDURES (WORLD BANK)

(see Clause 67 of the Conditions of Particular Application)

1. Except for providing the services required hereunder, the Board Members shall not give any advice to either party or to the Engineer concerning conduct of the Works. The Board Members:

(a) shall have no financial interest in any party to the Contract, or the Engineer, or a financial interest in the Contract, except for payment for services on the Board;

(b) shall have had no previous employment by, or financial ties to, any party to the Contract, or the Engineer, except for fee-based consulting services on other projects, all of which must be disclosed in writing to both parties prior to appointment to the Board;

(c) shall have disclosed in writing to both parties prior to appointment to the Board any and all recent or close professional or personal relationships with any director, officer, or employee of any party to the Contract, or the Engineer, and any and all prior involvement in the project to which the Contract relates;

(d) shall not, while a Board Member, be employed whether as a consultant or otherwise by either party to the Contract, or the Engineer, except as a Board Member, without the prior consent of the parties and the other Board Members;

(e) shall not, while a Board Member, engage in discussion or make any agreement with any party to the Contract, or with the Engineer, regarding employment whether as a consultant or otherwise either after the Contract is completed or after service as a Board Member is completed;

(f) shall be and remain impartial and independent of the parties and shall disclose in writing to the Employer, the Contractor, the Engineer, and one another any fact or circumstance which might be such as to cause either the Employer or the Contractor to question the continued existence of the impartiality and independence required of Board Members; and

(g) shall be fluent in the language of the Contract.

2. Except for its participation in the Board's activities as provided in the Contract and in this Agreement none of the Employer, the Contractor, and or the Engineer shall solicit advice or consultation from the Board or the Board Members on matters dealing with the conduct of the Works.

3. The Contractor shall:

(a) Furnish to each Board Member one copy of all documents which the Board may request including Contract Documents, progress reports, variation orders, and other documents pertinent to the performance of the Contract.

(b) In cooperation with the Employer, coordinate the Site visits of the Board, including conference facilities, and secretarial and copying services.

4. The Board shall begin its activities following the signing of a Board Member's Declaration of Acceptance by all three Board Members, and it shall terminate these activities as set forth below:

(a) The Board shall terminate its regular activities when either (i) the Defects Liability Period referred to in Sub-Clause 49.1 (or, if there are more than one, the Defects Liability Period expiring last) has expired, or (ii) the Employer has expelled the Contractor from the Site pursuant to Sub-Clause 63.1, and when, in either case, the Board has communicated to the parties and the Engineer its Recommendations on all disputes previously referred to it.

(b) Once the Board has terminated its regular activities as provided by the previous paragraph, the Board shall remain available to process any dispute referred to it by either party. In case of such a referral, Board Members shall receive payments as provided in paragraphs 7(a)(ii), (iii) and (iv).

5. Board Members shall not assign or subcontract any of their work under these Rules and Procedures. However, the Board may in its discretion decide to seek independent expert advice on a particular specialized issue to assist in reaching a Recommendation, and the cost of obtaining any such expert opinion(s) shall be shared equally by the Employer and the Contractor in accordance with the procedure specified in paragraph 7 (d) below.

6. The Board Members are independent contractors and not employees or agents of either the Employer or the Contractor.

7. Payments to the Board Members for their services shall be governed by the following provisions:

(a) Each Board Member will receive payments as follows:

(i) A retainer fee per calendar month equivalent to three times the daily fee established from time to time for arbitrators under the Administrative and Financial Regulations of the International Centre for Settlement of Investment Disputes (the ICSID Arbitrator's Daily Fee), or such other retainer as the Employer and Contractor may agree in writing. This retainer shall be considered as payment in full for:

(A) Being available, on 7 days' notice, for all hearings, Site visits, and other meetings of the Board.

(B) Being conversant with all project developments and maintaining relevant files.

(C) All office and overhead expenses such as secretarial services, photocopying and office supplies (but not including telephone calls, faxes and telexes) incurred in connection with the duties as a Board Member.

(D) All services performed hereunder except those performed during the days referred to in paragraph (ii) below.

(ii) A daily fee equivalent to the ICSID Arbitrator's Daily Fee, or such other daily fee as the Employer and Contractor may agree in writing. This daily fee shall only be payable in respect of the following days, and shall be considered as payment in full for:

(A) Each day up to a maximum of two days of travel time in each direction for the journey between the Board Member's home and the Site or other location of a Board meeting.

(B) Each day on Site or other locations of a Board meeting.

(iii) Expenses. In addition to the above, all reasonable and necessary travel expenses (including less than first class air fare, subsistence, and other direct travel expenses) as well as the cost of telephone calls, faxes and telexes incurred in connection with the duties as Board Member shall

be reimbursed against invoices. Receipts for all expenses in excess of US\$25.00 (U.S. Dollars Twenty Five) shall be provided.

(iv) Reimbursement of any taxes that may be levied in the country of the Site on payments made to the Board Member (other than a national or permanent resident of the country of the Site) pursuant to this paragraph 8.

(b) Escalation. The retainer and fees shall remain fixed for the period of each Board Member's term.

(c) Phasing out of monthly retainer fee. Beginning with the next month after the Taking Over Certificate referred to in Clause 48 (or, if there are more than one, the one issued last) has been issued, the Board Members shall receive only one-third of the monthly retainer fee. Beginning with the next month after the Board has terminated its regular activities pursuant to paragraph 4(a) above, the Board members shall no longer receive any monthly retainer fee.

(d) Payments to the Board Members shall be shared equally by the Employer and the Contractor. The Contractor shall pay Members' invoices within 30 calendar days after receipt of such invoices and shall invoice the Employer (through the monthly statements to be submitted in accordance with Sub-Clause 60.1 of the General Conditions) for one-half of the amounts of such invoices. The Employer shall pay such Contractor's invoices within the time period specified in the Construction Contract for other payments to the Contractor by the Employer.

(e) Failure of either the Employer or the Contractor to make payment in accordance with this Agreement shall constitute an event of default under the Contract, entitling the non-defaulting party to take the measures set forth, respectively, in Clause 63 or Clause 69.

(f) Notwithstanding such event of default, and without waiver of rights therefrom, in the event that either the Employer or the Contractor fails to make payment in accordance with these Rules and Procedures, the other party may pay whatever amount may be required to finance the operation of the Board. The party making such payments, in addition to all other rights arising from such default, shall be entitled to reimbursement of all sums paid in excess of one-half of the amount required to maintain operation of the Board, plus all costs of obtaining such sums.

8. Board Site Visits:

(a) The Board shall visit the Site and meet with representatives of the Employer and the Contractor and the Engineer at regular intervals, at times of critical construction events, at the written request of either party, and in any case not less than 3 times in any period of 12 months. The timing of Site visits shall be as agreed among the Employer, the Contractor and the Board, but failing agreement shall be fixed by the Board.

(b) Site visits shall include an informal discussion of the status of the construction of the Works, an inspection of the Works, and the review of any Requests for Recommendation made in accordance with paragraph 10 below. Site visits shall be attended by personnel from the Employer, the Contractor and the Engineer.

(c) At the conclusion of each Site visit, the Board shall prepare a report covering its activities during the visit and shall send copies to the parties and to the Engineer.

9. Procedure for Dispute Referral to the Board:

(a) If either party objects to any action or inaction of the other party or the Engineer, the objecting party may file a written Notice of Dispute to the other party with a copy to the Engineer stating that it is given pursuant to Clause 67 and stating clearly and in detail the basis of the dispute.

(b) The party receiving the Notice of Dispute will consider it and respond in writing within 14 days after receipt.

(c) This response shall be final and conclusive on the subject, unless a written appeal to the response is filed with the responding party within 7 days after receiving the response. Both parties are encouraged to pursue the matter further to attempt to amicably settle the dispute.

(d) When it appears that the dispute cannot be resolved without the assistance of the Board, or if the party receiving the Notice of Dispute fails to provide a written response within 14 days after receipt of such Notice, either party may refer the dispute to the Board by written Request for Recommendation to the Board. The Request shall be addressed to the Chairman of the Board, with copies to the other Board Members, the other party, and the Engineer, and it shall state that it is made pursuant to Clause 67.

(e) The Request for Recommendation shall state clearly and in full detail the specific issues of the dispute to be considered by the Board.

(f) When a dispute is referred to the Board, and the Board is satisfied that the dispute requires the Board's assistance, the Board shall decide when to conduct a hearing on the dispute. The Board may request that written documentation and arguments from both parties be submitted to each Board Member before the hearing begins. The parties shall submit insofar as possible agreed statements of the relevant facts.

(g) During the hearing, the Contractor, the Employer, and the Engineer shall each have ample opportunity to be heard and to offer evidence. The Board's Recommendations for resolution of the dispute will be given in writing to the Employer, the Contractor and the Engineer as soon as possible, and in any event not less than 56 days after receipt by the Chairman of the Board of the written Request for Recommendation.

10. Conduct of Hearings:

(a) Normally hearings will be conducted at the Site, but any location that would be more convenient and still provide all required facilities and access to necessary documentation may be utilized by the Board. Private sessions of the Board may be held at any cost effective location convenient to the Board.

(b) The Employer, the Engineer and the Contractor shall be given the opportunity to have representatives at all hearings.

(c) During the hearings, no Board Member shall express any opinion concerning the merit of the respective arguments of the parties.

(d) After the hearings are concluded, the Board shall meet privately to formulate its Recommendations. All Board deliberation shall be conducted in private, with all Members'

individual views kept strictly confidential. The Board's Recommendations, together with an explanation of its reasoning shall be submitted in writing to both parties and to the Engineer. The Recommendations shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

(e) The Board shall make every effort to reach a unanimous Recommendation. If this proves impossible, the majority shall decide, and the dissenting Member may prepare a written minority report for submission to both parties and to the Engineer.

11. In all procedural matters, including the furnishing of written documents and arguments relating to disputes, Site visits, and conduct of hearings, the Board shall have full and final authority. If a unanimous decision on any such matter proves impossible, the majority shall decide.

12. After having been selected and, where necessary, approved, each Board Member shall sign two copies of the following declaration and make one copy available each to the Employer and to the Contractor:

AAA GUIDELINES

**American Arbitration Association
Dispute Resolution Board
Guide Specifications
Effective December 1, 2000**

1.01 General

A. Definitions

1. American Arbitration Association - Neutral not-for-profit provider of Dispute Resolution Board (DRB) services, internationally.
2. Board - See Dispute Resolution Board (DRB).
3. Contract - The construction Contract of which this Specification section is part.
4. Dispute - A claim, change order request, or other issue that remains unresolved following negotiation between authorized representatives of the Owner and Contractor.
5. Dispute Resolution Board (DRB) - Three neutral individuals mutually selected by the Owner and Contractor to consider and recommend resolution of Disputes referred to it.

B. Summary

1. A Dispute Resolution Board (DRB) will be established to assist in the resolution of Disputes in connection with, or arising out of, performance of the work of this Contract.
2. Either the Owner or Contractor may refer a Dispute to the Board. Such referral should be initiated prior to the initiation of other dispute resolution procedures or filing of litigation by either party.
3. Promptly thereafter, the Board will impartially consider the Dispute(s) referred to it. The Board will provide a non-binding written recommendation for resolution of the Dispute to the Owner and the Contractor.

C. Scope

1. This Specification describes the purpose, procedure, function and features of the DRB. A Three-Party Agreement among the Owner, Contractor and the three Board members using the form and content of Attachment A will formalize creation of the Board and establish the scope of its services and the rights and responsibilities of the parties. In the event of a conflict between this Specification and the Three-Party Agreement, the latter governs.

D. Purpose

1. The Board, as an independent third party, will assist in and facilitate the timely resolution of disputes between the Owner and the Contractor.
2. Creation of the Board is not intended to promote Owner or Contractor default on the responsibility of making a good-faith effort to settle amicably and fairly their differences by indiscriminate referral to the Board.

E. Three-Party Agreement

1. All three DRB members and the authorized representatives of the Owner and Contractor shall execute the DRB Three-Party Agreement within 14 days after the selection of the third member.

F. Continuance of Work

1. Both parties shall proceed diligently with the work and comply with all applicable Contract provisions while the DRB considers a Dispute.

2.

G. Tenure of Board

1. The Board will be deemed established on the date of establishment stated in the Three-Party Agreement.
2. The Board will be dissolved as of the date of final payment to the Contractor or, should any disputes be pending as of that date, the date on which the Board issues its recommendations regarding those disputes, unless earlier terminated or dissolved by mutual agreement of the Owner and Contractor. The Board's jurisdiction will continue for a period of thirty days beyond the date of its recommendations for the limited purpose of responding to a request for clarification or in the event that a party introduces new evidence.

1.02 Membership

c. General

1. The DRB will consist of one member nominated by the Owner and approved by the Contractor, one member nominated by the Contractor and approved by the Owner, and a third member nominated by the first two members and approved by both the Owner and the Contractor. Unless otherwise agreed by the Owner and Contractor, all members shall be selected from a list provided by the American Arbitration Association, compiled from its International Roster of DRB Members. The third member will serve as Chair unless the Owner and Contractor otherwise agree.

d. Criteria

1. Experience
 - a. It is desirable that all DRB members be experienced with the type of construction involved in the project, interpretation of Contract documents and resolution of construction disputes.
 - b. The goal in selecting the third member is to complement the experience of the first two and to provide leadership of the Board's activities.
2. Neutrality
 - a. It is imperative that the Board members be neutral, act impartially and be free of any conflict of interest.
 - b. For purposes of this subparagraph (1.02.B.2), the term "member" also includes the member's current primary or full-time employer, and "involved" means having a Contractual relationship with either party to the Contract, such as by being a subcontractor, architect, engineer, construction manager or consultant.

- c. The following are disqualifying relationships for prospective members:
 1. An ownership interest in any entity involved (with) the Contract, or a financial interest in the Contract, except for payment for services as a member of the DRB;
 2. Previous employment by, or financial ties to, any party involved in the Contract, including fee-based consulting services, within a period of 10 years prior to award of the Contract, except with the express written approval of both parties;
 3. A close business or personal relationship with any key members of any entity involved in the Contract which, in the judgment of either party, could suggest partiality; or
 4. Prior involvement in the project of a nature that could compromise that member's ability to participate impartially in the Board's activities.

E. Selection of the Board

1. Request for Assistance
 - a. Within 14 days of the effective date of the Contract, the Owner and Contractor shall file a Request for Dispute Resolution Board (DRB) Assistance with the American Arbitration Association. The Request for DRB Assistance shall include a description of the construction project including name, location and approximate Contract price and Contract time; guidelines regarding DRB member compensation and expenses, if any, the names, mail and email addresses, telephone and facsimile numbers of the Owner and the Contractor and their representatives, the names and addresses of all design professionals, consultants and first-tier subcontractors then known, together with the AAA filing fee.
2. AAA Inquiry
 - a. Upon receipt of a properly filed Request for DRB Assistance, the AAA shall promptly schedule a telephone conference call with the Owner and Contractor to discuss desired qualifications of DRB members.
3. List of proposed Board members
 - a. Within 14 days after the information is provided by the Owner and Contractor, the AAA shall send the Owner and Contractor an

identical list of persons selected from its International Roster of DRB members, including detailed biographical information and disclosures regarding each listed person.

4. Pre-appointment Disclosure
 - a. Prior to their being listed for review by the Owner and the Contractor, proposed Board members shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the project or any past or present relationship with the parties to the Contract, including subcontractors, design professionals and consultants.
5. Nomination and acceptance of first two members
 - a. Unless agreed otherwise, the Owner and the Contractor shall each nominate a proposed Board member from the list and convey the nominee's name to the AAA and the other party within 14 days after receipt of the list from the AAA.
 - b. The Owner and the Contractor shall have 14 days within which to accept, in writing to AAA and the other party, the other party's nominee.
 - c. No reasons for non-acceptance need be stated. In the event of non-acceptance, the nominating party shall submit another nomination within 14 days of receipt until two mutually acceptable members are named.
6. Nomination and acceptance of third member
 - a. Upon acceptance of both of the first two members, the AAA will notify them of their appointment, request that they begin selection of the third member and furnish them with the list of persons, biographical statements and disclosures originally sent to the parties. The first two members will endeavor to nominate a third member who meets all the criteria listed above. The third member shall be nominated within 14 days after the first two members are notified to proceed with his/her selection. The nominee's name will be conveyed to the AAA, who will notify the Owner and Contractor. The Owner and the Contractor shall have 14 days within which to accept, in writing to AAA and the other party, the third nominee. No reasons for non-acceptance need be stated. In the event of non-acceptance, the first two members will be requested to submit another nomination within 14 days of receipt of notice of non-acceptance from the AAA.
 - b. In the event of an impasse in selection of the third member from nominees of the first two members, the third member shall be selected by mutual agreement of the Owner and the Contractor

within 14 days of the last non-acceptance notice. In so doing, they may, but are not required to, consider nominees offered by the first two members.

F. Alternative Procedure for Selection of Single-member Board

1. General

- a. If the Contract specifies, or the Owner and the Contractor agree, a single-member Board will be established as provided in this Section 102.D

2. Procedure

- a. Upon receipt of a properly filed Request for DRB Assistance detailing the agreement of the Owner and the Contractor to a single-member Board, the AAA shall promptly schedule a telephone conference call with the Owner and the Contractor to discuss desired qualifications of the Board member.
- b. Within 14 days after the information is provided by the Owner and Contractor, the AAA shall send the Owner and Contractor an identical list of persons selected from its International Roster of DRB members, including detailed biographical information and disclosures regarding each listed person.
- c. Proposed Board members shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the project or any past or present relationship with the parties to the Contract, including subcontractors, design professionals and consultants.
- d. The Owner and the Contractor shall each have 14 days in which to strike names not preferred, number the remaining names in order of preference, and return the list to the AAA. The Owner and the Contractor may strike up to three (3) names each.
- e. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of the Board member.
- f. If, for any reason, an appointment cannot be made from the original list, the AAA shall have the authority to send an additional list. If no names are available from that list, the AAA shall have the authority to make the appointment from among other members of its International Roster of DRB members, without the submission of additional lists.

G. **Post-Appointment Disclosure**

Board members have a continuing duty to disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the project or any past or present relationship with the parties to the Contract, including subcontractors, design professionals and consultants. Upon receipt of such information, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the Board members and others.

F. **Board Member Challenge Procedure**

Any objection for cause of the Owner or Contractor to the continued service of a Board member shall be made to the AAA. The AAA shall determine whether the Board member should be disqualified and shall inform the Owner and Contractor of its decision, which shall be conclusive.

G. **Vacancies**

If for any reason a Board member is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. The new Board member(s) shall be selected in the same manner as the original member. In the event of a vacancy after a dispute has been submitted and hearings commenced, the remaining Board members may continue with the hearing and determination of that dispute, unless the parties agree otherwise.

1.03 Operation

A. **General**

1. The DRB shall adopt the operating procedures detailed in the attached Schedule A or formulate new or revised operating procedures consistent with this Specification. Notice of adoption of Schedule A or the Board's proposal for new/revised DRB Operating Procedures shall be provided by the Dispute Resolution Board to the Owner and the Contractor within 28 days after the effective date of the Three-Party Agreement.
2. Any DRB proposal for new/revised procedures shall be discussed and concurred in by all parties at the first Board Meeting.

B. **Reports and Information**

The Board will be kept informed of construction activity and other developments by means of timely transmittal of relevant information prepared by the Owner and the Contractor in the normal course of construction, including but not limited to periodic reports and minutes of project progress meetings.

c. Periodic Meetings and Visits

1. The Board will visit the project site and meet with representatives of the Owner and the Contractor at regular intervals. The frequency and scheduling of these visits will be every three months or as agreed upon among the Owner, the Contractor and the Board, depending on the progress of the work.
2. Each meeting shall consist of an informal roundtable discussion and field observation of the work. The roundtable discussion will be attended by authorized representatives of the Owner and Contractor. During the discussion, the Board may facilitate conversation among and between the parties in order to resolve any pending claims which may become disputes.
3. The field observations shall cover all active segments of the work. The Board shall be accompanied by authorized representatives of both the Owner and Contractor.

1.04 Review of Disputes**A. General**

1. The Owner and the Contractor will cooperate to ensure that the Board considers disputes promptly, taking into consideration the particular circumstances and the time required to prepare appropriate documentation.

B. Prerequisites to Review

A dispute is subject to referral to the Board when:

1. Either party believes that bilateral negotiations are not likely to succeed or have reached an impasse, and,
2. If the Contract provides for a prior decision(s), such a decision(s) has been issued. The parties shall cooperate to timely comply with any pre-review requirements and may waive such requirements by written agreement.

C. Requesting Review

1. Either party may refer a Dispute to the Board. Requests for Board Review shall be submitted in writing to the Chair of the Dispute Resolution Board within 14 days of the final decision required prior to Board review. The Request for Board Review shall set forth in writing the nature of the dispute, the factual and contractual basis of the dispute and all remedies sought, together with all documents that support each element of the claim.
2. A copy of the Request for Board Review shall be simultaneously provided to the other party by the referring party.

3. Within 28 days after the Request for Board Review has been filed, the opposing party shall submit in writing to the Chair of the DRB a Response to Request for Board review, including the factual and contractual basis of any defense, together with all documents that support each element of the defense. If the responding party wishes to counterclaim, the responding party shall, within 28 days after the Request for Board review has been filed, submit, in writing to the Chair of the DRB, a Counterclaim setting forth in writing the factual and contractual basis of the counterclaim and all remedies sought, together with all documents that support each element of the Counterclaim. A copy of the Response and/or Counterclaim shall be simultaneously provided to the other party by the responding party. Within 28 days after a Counterclaim is filed, the party opposing the Counterclaim shall submit, in writing to the Chair of the Dispute Resolution Board, a Response to the Counterclaim setting forth the factual and contractual basis of any defense, together with all documents which support each element of the Response to the Counterclaim. A copy of the Response to the Counterclaim shall be simultaneously provided by the filing party to the other party.

D. Scheduling Review

1. Within seven days receipt of the Response to Request for Board Review or Response to Counterclaim, whichever comes later, the Chair will, in consultation with the Owner and the Contractor, establish dates for any additional pre-hearing submissions and schedule a hearing date. The hearing will generally be conducted at the time of the next regularly scheduled Site visit.
2. In addition, the DRB may convene a preliminary hearing by conference call for the purpose of addressing information exchange, the order of proceedings at the hearing, bifurcation of merit and quantum issues and such other matters that the DRB believes will expedite the hearing process.

E. Hearing Location

1. Normally, the hearing will be held at the job Site. Any location that would be convenient and have the necessary access to facilities and documentation would also be acceptable.

F. Hearing Procedures

1. The Dispute Resolution Board shall adopt the Hearing Procedures detailed in the attached Schedule B or develop new or revised Hearing Procedures consistent with this Specification. Hearing Procedures shall be provided by the Dispute Resolution Board to the Owner and the Contractor within 28 days of the effective date of the Three-Party Agreement.

G. Hearing Attendance

1. The Owner and the Contractor shall have authorized representatives at all hearings. The Dispute Resolution Board may establish rules for the participation of legal counsel and experts at hearings. Unless the DRB permits, counsel may not (a) examine directly or cross-examine any participants; (b) object to questions or factual statements during the hearing or (c) make motions or offer arguments.

H. **Deliberations**

1. After the hearing is concluded, the Board will confer to formulate its recommendations. All Board deliberations shall be conducted in private, with all individual views kept strictly confidential from disclosure to others.

I. **Recommendation**

1. The Board's recommendation for resolution of the dispute will be provided in writing to both the Owner and the Contractor within 14 days of the completion of the hearings. In difficult or complex cases, and in consideration of the Board's schedule, this time may be extended by mutual agreement of all parties.

J. **Acceptance or Rejection**

1. Within 14 days of receiving the Board's recommendation, or such other time specified by the Board, both the Owner and the Contractor shall provide written notice to the other and to the Board of acceptance or rejection of the Board's recommendation. The failure of either party to respond within the specified period shall be deemed an acceptance of the Board's recommendation. If, with the aid of the Board's recommendation, the Owner and the Contractor are able to resolve their dispute, the Owner will promptly process any required Contract modifications.

K. **Clarification and Reconsideration**

1. Should the dispute remain unresolved because of a bona fide lack of clear understanding of the Board's recommendation, either party may request that the Board clarify specified portions of its recommendation.
2. If new information has become available, either party may request that the Board reconsider its recommendation in light of the new information.

L. **Admissibility**

1. If the Board's recommendation does not resolve the dispute, the written recommendation, including any minority report, will [not] be admissible as evidence [to the extent permitted by law] in any subsequent dispute resolution proceeding or forum [.] [to establish (a) that the Dispute Resolution Board considered the dispute, and (b) the Board's recommendation that resulted from the process.]

1.05 Alternative Dispute Resolution

- A. The Owner and Contractor may, by agreement at any time during review of a Dispute by the Board, refer the dispute to the American Arbitration Association for mediation or any other form of alternative dispute resolution. In such an agreement, the Owner and Contractor shall specify the Dispute that is being referred and, in the event of settlement, shall advise the Board regarding such settlement, after which the Board shall have no further authority to proceed with that matter.

1.06 Board Member Fees and Expenses

- A. The fees and expenses of the three members of the Board shall be shared equally by the Owner and the Contractor. Unless otherwise agreed by the parties and the Board, the Contractor shall pay the invoices of all Board members after approval by both parties. The Contractor will then bill the Owner for 50 percent of such invoices.
- B. The Owner will, at its expense, prepare and mail progress reports and provide conference facilities and copying services as reasonably required for Board operations.
- C. If the Board desires special services such as legal or other consultation, accounting, data research and the like, both parties must agree, and the costs will be shared by them as mutually agreed.

1.07 Administrative Assistance of AAA

A. **AAA Administration**

AAA will prepare and provide notices of meetings, transmit meeting minutes and Board recommendations and collect and disburse Board member fees and expenses in accordance with attached Schedule C.

EXTRACTS FROM FIDIC CLAUSE 20 – CLAIMS, DISPUTES AND ARBITRATION

20.2

Appointment of the Dispute Adjudication Board

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.

The DAB shall comprise, as stated in the Particular Conditions, 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.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member (“adjudicator”) or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons 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. The replacement shall be appointed in the same manner as the replaced persons was required to have been nominated or agreed upon, as described 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 DAB has given its decision on the dispute referred to it under Sub-Sub-Clause 20.4, unless other disputes have been referred to the DAB by that time under Sub-Clause 20.4, in which event the relevant date shall be when the DAB has also given decisions on those disputes.

20.4

Obtaining Dispute Adjudication Board’s Decision

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 Employer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [*Appointment of the DAB*] and 20.3 [*Failure to Agree DAB*], either Party may refer the dispute in writing to the DAB for its decision, with a copy to the other Party. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all information, access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision of such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or the advance payment referred to in Clause 6 of the Appendix – General Conditions of the Dispute Adjudication Agreement, whichever date is later, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. However, if neither of the Parties has paid in full the invoices submitted by each Member pursuant to Clause 6 of the Appendix, the DAB shall not be obliged to give its decision until such invoices have been paid in full. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

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

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties and no notice of dissatisfaction has been given by either Party within 28 days after it receive the DAB's decision, then the decision shall become final and binding upon both Parties.

20.5

Amicable Settlement Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicable before the commencement of arbitration. However, unless both Parties agree

otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6

Arbitration

Unless settled amicably any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of (or on behalf of) the Employer, and any decision of the DAB, relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.