

**By Christopher Koch\***

*\* Partner, Georgiana & Koch, Athens & Geneva; member of the ad hoc drafting group of the ICC Task Force on Dispute Boards.<sup>1</sup>*

# ICC's New Dispute Board Rules

## Introduction

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Barely two years after forming a task force to study implementing some model documents for Dispute Boards ('DBs'), ICC adopted a full set of rules governing all aspects of Dispute Board proceedings. The extraordinary rapidity with which the ICC Dispute Board Rules ('the Rules') were conceived and adopted makes it worthwhile recounting their genesis.

On 25 April 2002, the ICC Commission on Arbitration ('the Commission') formed a Task Force on Dispute Boards under the chairmanship of Pierre Genton. The Task Force's initial mandate was merely to draw up standard Dispute Board clauses and a model DB member agreement. However, once work had started, it became apparent that the Task Force would also have to draft a set of rules under which Dispute Boards would operate. The mandate was thus expanded to include the elaboration of procedural rules. The Task Force submitted an initial draft of its ideas to the Commission meeting of 15 May 2003.

The Task Force's basic approach was not only to recommend that users be given the choice of establishing a Dispute Review Board or a Dispute Adjudication Board, but also to propose an entirely new option: the Combined Dispute Board. Following the Commission's approval of this basic approach, a smaller drafting group was formed to work out a full set of rules, standard DB clauses and a model DB agreement. The drafting group was co-chaired by the Chairman of the Commission, Peter Wolrich, and the Chairman of the Task Force, Pierre Genton.

A first draft of the DB documents was submitted to the Commission on 18 November 2003. The many detailed and helpful comments made by ICC national committees either in writing or orally during the Commission meeting led the drafting group to extensively revise the documents. A new draft was submitted to the Commission for discussion on 25 March 2004. While approving the draft in principle, the Commission authorized the drafting group to make further modifications to take into account additional observations made by national committees and interested individuals before submitting it for final approval to the ICC Executive Board in Marrakech on 9 June 2004.

This article is intended to familiarize the reader with the concept of Dispute Boards and to explain in more detail the workings of the new ICC Dispute Board Rules. Following Socrates, who invented the Socratic method some 2 500 years ago, I shall proceed by way of questions and answers in the belief that what worked for him will also work for us. To facilitate the reader's task the sequence of the questions follows the structure of the Rules.

<sup>1</sup> The views expressed in this article are those of the author and do not reflect an official position of ICC, its Commission on Arbitration, or the Task Force on Dispute Boards. The author thanks Peter Wolrich and Pierre Genton for their most helpful suggestions.

## Preliminaries

### 1. What is a Dispute Board?

A Dispute Board is a standing body consisting of one or three independent persons, knowledgeable in the subject matter of the parties' Contract, who are chosen by the Parties to assist them in performing the Contract by making Determinations with respect to Disputes that may arise between them.<sup>2</sup> The Dispute Board is normally established when the Contract is entered into and operates throughout its duration.

### 2. How does a dispute resolution system with a Dispute Board work?

A dispute resolution system with a Dispute Board is a two-tier system. First, all Disputes are submitted to the Board, which issues a Determination. If a Party does not accept the Board's findings, it can refer the Dispute to arbitration for final settlement, if the Parties have incorporated an arbitration agreement in their dispute resolution clause. If they have not, the Dispute must be finally settled by the state courts, which are competent either by virtue of an express choice of forum or by operation of jurisdictional rules.

### 3. Are Dispute Boards successful?

Statistics about the success rate of Dispute Boards are not readily available, as they are usually set up by contract, outside an institutional framework. Practitioners who have been involved with the working of Dispute Boards report a high rate of resolution of contractual difficulties. The anecdotal evidence is backed up by the statistical findings of the Dispute Resolution Board Foundation ('DRBF'). According to the DRBF, out of 1 261 disputes dealt with by Dispute Review Boards in 2003, only 19 – or less than 2% – were subsequently referred to litigation or arbitration.<sup>3</sup>

In a recent ICC/FIDIC joint seminar, Dr Köntges of the International Projects Division of Hochtief reported on the contractor's experience with Dispute Boards. Out of eight contracts that provided for a Dispute Board, arbitration ensued in only two cases. When the contract did not call for a Dispute Board, the parties resorted to arbitration in four out of eight cases. He also found that Dispute Boards settled disputes within 90 to 180 days at a cost of less than 2% of the contract value, while arbitrations lasted anywhere between one and a half and five years and cost more than 5% of the contract value.<sup>4</sup>

These figures show that Dispute Boards are effective in helping Parties to resolve disputes arising under their contract quickly and at a reasonable cost while minimizing disruption to their contractual relationship.

### 4. How do Dispute Boards differ from other forms of ADR?

Conciliators, mediators and Dispute Boards have in common that they do not issue decisions or Determinations that are enforceable as judgments or arbitral awards. If they lead the parties to a settlement of a dispute, the settlement is in the nature of a contractual obligation between the parties. It does not take on the status of an award or judgment.

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In this article the terms 'Contract', 'Determination', 'Dispute', 'Dispute Board' and 'Party', with initial capital letters, have the meanings defined in Article 2 of the Rules. Other capitalized terms also have the meanings assigned to them by the Rules.

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DRBF statistics

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'The Resolution of Disputes under International Construction Contracts', ICC/FIDIC Conference, Paris, 29-30 June 2004, tab 9 of the folder containing the conference papers [unpublished].

The main difference between Dispute Boards and other forms of ADR (e.g. mediation and conciliation) is that Dispute Boards are set up at the beginning of the contractual relationship, often before the Parties have begun to perform the Contract, and remain in existence for its duration.<sup>5</sup> DB Members therefore become familiar not only with the terms of the Contract but also with the persons implementing the agreement. The DB's ongoing knowledge of the project and its familiarity with the people involved in performing the Contract will allow it to deal rapidly and efficiently with Disputes that may arise between the Parties. Moreover, by being able to intervene early, Dispute Boards can propose solutions before the Parties' positions have hardened and sometimes even before the Parties themselves have realized that they are heading towards a problem. Dispute Boards are therefore not only a tool for resolving but also for defusing Disputes.

Mediators and conciliators, on the other hand, are a one-shot deal. They are appointed only after a dispute has arisen to help the parties resolve that dispute. Before their appointment, they have no knowledge of the contract or the parties. Once the mediation or conciliation has occurred, they cease to operate.

### **5. Does ICC need a new set of rules for its ADR services?**

In formulating and adopting the DB Rules, ICC has responded to a growing need of the business community. Dispute Boards have been around for some 40 years. First used in the USA for tunneling projects, they have become increasingly popular around the world as an effective way of resolving contractual disagreements in construction and engineering contracts. The International Federation of Consulting Engineers, known under its French acronym FIDIC, introduced Dispute Boards in its standard contract forms in 1994. Since 1999 they have been a permanent feature of the Red Book.<sup>6</sup> The World Bank also requires that the contracts for engineering and construction projects it finances valued at over 50 million dollars include a Dispute Board in their dispute resolution mechanisms.<sup>7</sup> Many international and domestic construction contracts set up Dispute Boards without reference to either the FIDIC Contract or the terms of the World Bank. While it is difficult to know exactly how many Dispute Boards are established every year, the DRBF figures show an astounding rise in numbers. In 1988 only 19 projects were reported with Dispute Boards, whereas this figure had risen to 1 062 in 2003.<sup>8</sup> There is no escaping the fact that DBs are rapidly gaining in importance as a tool for resolving disputes in certain types of contracts.

Arbitration, conciliation, mediation, expertise and Dispute Boards are not ICC inventions. The international business community first devised each of these methods of resolving disputes, seeking ever more efficient and differentiated ways to settle business disagreements effectively and with minimum disruption. ICC tries to enhance the usefulness of these tools by proposing rules for each of these mechanisms. By doing so it standardizes them and gives them a recognized institutional framework.

### **6. For what types of contract is a Dispute Board useful?**

While Dispute Boards are essentially found in the construction and engineering field, the ICC DB Rules were drafted not to be sector-specific as are the FIDIC rules or those of the World Bank. The ICC Rules can be used in any situation where the complexity

<sup>5</sup> Dispute Boards set up after a Dispute has arisen are known as 'ad hoc Boards'. The FIDIC Conditions of Contract for Plant and Design-Build and for EPC/Turnkey Projects provide for the use of ad hoc Boards (cf. clause 20(2) of both). The ICC DB Rules do not contain special provisions for such ad hoc Boards, which are more akin to conciliation or mediation panels. While the Rules could be adapted to fit ad hoc Boards, I do not recommend their use for this purpose. Similarly, 'adjudication' under the English Housing Grants, Construction and Regeneration Act 1996 is a one-shot process, in which an adjudicator is appointed for each dispute that arises between the parties out of a given contract. Adjudication within the meaning of the Act was primarily designed to deal with payment disputes.

<sup>6</sup> FIDIC, Conditions of Contract for Construction ('Red Book'), Clause 20(2)–(8) and Appendix, FIDIC Contracts Guide, 1st ed., 2000.

<sup>7</sup> World Bank, 'Standard Bidding Documents - Procurement of Works', rev. ed. 2003.

<sup>8</sup> DRBF Practices and Procedures Manual, Section 1, Appendix A Tabulation of DRBs (DRBF, 2004). <www.drb.org/manual.htm>.

of the Contract, its duration and the imponderables are such that there is an accrued potential for conflict between the Parties. A one-time sales agreement will not require a standing dispute resolution mechanism, nor is it likely that a supply agreement for a commonly traded commodity needs such a system. However, if the parties must cooperate on a more extensive basis and the contract imposes complex obligations on both sides, an ongoing mechanism to resolve contractual difficulties will be useful. For instance, if a bank were to outsource its IT service requirements to a specialized service provider, such a situation might benefit from a Dispute Board comprising members who are conversant with the functioning and implementation of IT service contracts.

## **Types of Dispute Boards**

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### ***7. What types of Dispute Boards exist?***

Two different types of Dispute Boards have emerged in international practice. The first – Dispute Review Boards (DRBs), which issue non-binding Recommendations – evolved mainly in the USA and go back to 1975 when the first DRB was used in the Eisenhower Tunnel project in Colorado. The second – Dispute Adjudication Boards (DABs), which issue provisionally binding Decisions – may have been influenced by the English experience with binding adjudication under the Housing Grants, Construction and Regeneration Act of 1996, designed to alleviate serious cash-flow problems in the British building industry by providing for a mechanism in which payment disputes were rapidly decided on a provisional basis. Both types of DBs are used in construction and engineering projects. FIDIC and the World Bank have opted for DABs in their standard contract forms, while many agreements in the USA and elsewhere call for the establishment of DRBs.<sup>9</sup> Realizing that each type of DB has distinct characteristics which the Parties may prefer according to their situation, ICC wished to give users the option of both types without favouring one over the other.

In addition, ICC has created an entirely new third option, which is the Combined Dispute Board (CDB). This, as its name suggests, combines elements of a DRB with those of the DAB and seeks to create a DB that unites the advantages of both systems.

### ***8. Why is ICC proposing three different standard DB clauses?***

Since the Rules allow Parties to choose among three different types of Dispute Boards, ICC is suggesting three different standard DB clauses, one for each type of Board. Parties establishing a Dispute Board under the ICC Rules will therefore also have to select which type of Board they wish to set up (Article 3).

### ***9. What is a Dispute Review Board (DRB)? (Article 4)***

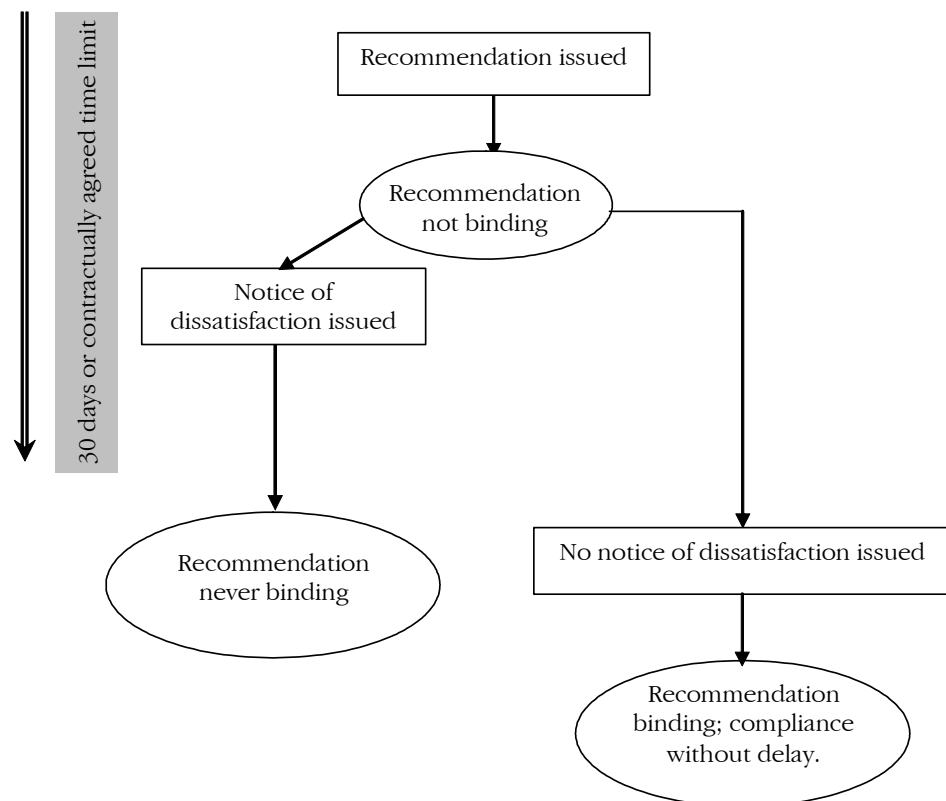
A Dispute Review Board is a Board that issues Recommendations (Article 4(1)). The essence of a Recommendation is that it is a non-binding Determination that, initially at least, the Parties are free to implement or not (Article 4(2)). A Recommendation only becomes binding 30 days (or whatever other period agreed) after it has been issued, if, within that period, none of the Parties has disagreed with the

<sup>9</sup> FIDIC Red Book, clause 20(2).

Recommendation by issuing a notice of dissatisfaction. When a Recommendation becomes binding this means that the Parties become contractually bound to implement the terms of the Recommendation without further delay. They also contractually waive any right to contest the Recommendation or re-submit that particular Dispute to an arbitral tribunal or court (Article 4(3)).

On the other hand, if a Party issues a notice of dissatisfaction within the 30 days foreseen by the Rules or within another contractually agreed time limit, the Recommendation does not become binding and no further obligations arise from it. Thus, by filing a notice of dissatisfaction, a Party may render the DB's Determination ineffective. The other Party, however, may seek to have the Dispute finally resolved by arbitration, if so agreed, or before the ordinary courts.

The system is graphically illustrated below:



Let us take as an example a long-term supply agreement between SellCo and BuyCo. SellCo is to supply BuyCo with widgets for the next ten years. The amount and quality of widgets to be delivered every calendar year as well as their price depends on certain market conditions. The Parties are in dispute about how many widgets have to be supplied in 2004 and at what price. The Dispute Board they have established issues a Recommendation, finding that under prevailing market conditions SellCo must supply 20% more widgets and that BuyCo must pay 10% more for these items for the calendar year 2004. The Parties receive notification of the Recommendation on 1 January 2004. Up to and including 31 January, SellCo is not obliged to deliver

more widgets and BuyCo has no obligation to pay a higher price. However, if neither Party has objected to the Recommendation by 31 January, SellCo must deliver the additional number of widgets and BuyCo pay the increased price as from 1 January. After 31 January neither Party can contest the Recommendation any longer, as they become contractually bound to implement its terms.

On the other hand, if on 15 January SellCo notifies the other Party and the Board that it is dissatisfied with the Recommendation, the Recommendation never becomes binding and neither Party must change its contractual performance. Either Party may then refer the Dispute for final resolution to arbitration, if so agreed, or to the courts.

#### ***10. Why go through the process of obtaining a non-binding Recommendation?***

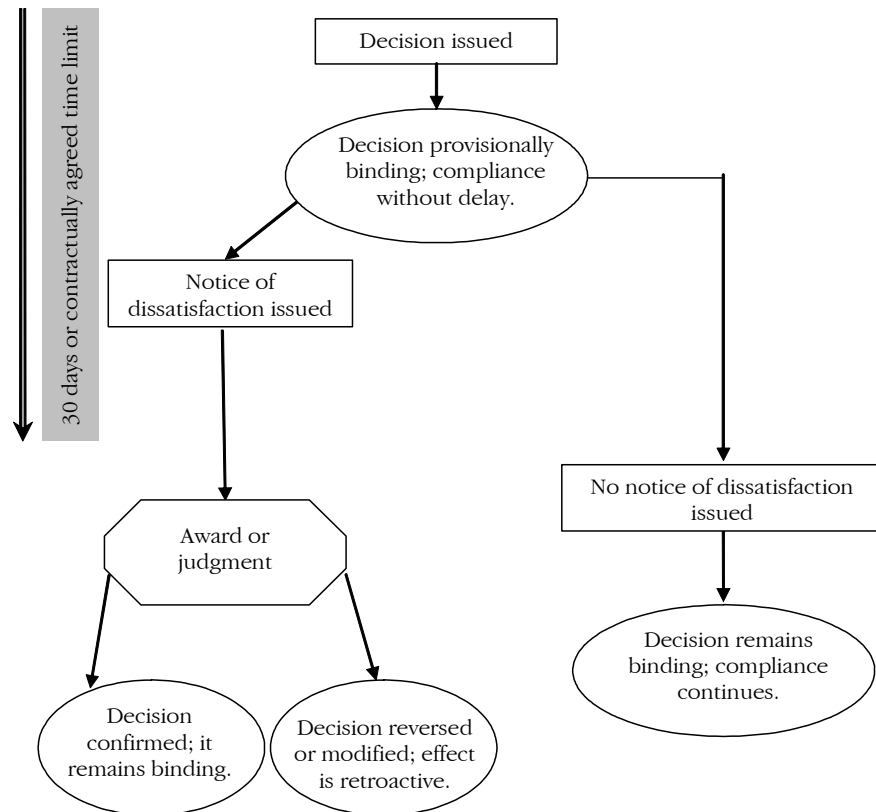
There are some advantages in obtaining a result that does not immediately compel the Parties to comply with it. First, the referral procedure ending in a Recommendation gives the Parties a chance to ‘reality test’ their own positions and arguments without the risk of having to comply immediately with the solution suggested by the DRB. Thus, even if the Parties do not implement a Recommendation, it frequently becomes the starting point of renewed negotiations between them, which ultimately may lead to an agreement. Another advantage of a DRB procedure is that DRBs have more flexibility in crafting solutions. The non-binding nature of the Recommendation allows the DRB to take a more interest-based approach rather than apply a purely contractual rights-based resolution of the Dispute. Finally, the consensual and essentially non-adversarial nature of DRB proceedings may make them more acceptable and attractive to Parties that operate in a culture of compromise, where preserving the personal relationship between contracting parties is of greater importance than contractual certainty.

#### ***11. What is a Dispute Adjudication Board (DAB)? (Article 5)***

A Dispute Adjudication Board is a Board that issues Decisions (Article 5(1)). The essential feature of a Decision is that it is provisionally binding, which means that the Parties are contractually ‘bound’ to comply with it as soon after they receive it as is reasonably possible, i.e. ‘without delay’ (Article 5(2)). A Party that is not happy with the Decision may file a notice of dissatisfaction with the DAB and the other Party within 30 days of receiving it (or within any other time limit agreed). However, the contesting Party remains bound to comply with the Decision until an arbitral tribunal or a court has finally resolved the Dispute and the arbitral award or judgment either modifies or supersedes the terms of the Decision (Article 5(2) and 5(5)).

On the other hand, if neither Party files a notice of dissatisfaction within the 30 days foreseen by the Rules (or whatever other time limit agreed), the Decision remains binding. This means not only that the Parties contractually agree to continue to comply with the Decision but also that they contractually waive any right to contest that Decision before a tribunal or court in the future or to re-submit the Dispute, to the extent that such waiver can be validly made (Article 5(3)). The Decision thus takes on the character of a contractual obligation between the Parties.

Graphically this might look as follows:



Using the example above, if the BuyCo Contract contains a DAB clause the Parties would have to implement the terms of the Decision as of 1 January. However, if BuyCo is not happy with the 10% price increase it has until 31 January to notify all involved of its dissatisfaction and refer the Dispute to arbitration. If the arbitral tribunal decides on 6 June that the economic conditions only warranted a 5% price increase, its award would supersede the prior Decision.<sup>10</sup> If neither Party contests the Decision on or before 31 January, it remains binding as a term of the Contract between them.

The immediately binding effect of Decisions gives DABs considerably more power to force a solution on the Parties, even though it may be but a temporary one. This fundamentally affects the manner in which DAB proceedings are conducted, as the coercive powers of a DAB will generate a process that is considerably more adversarial than DRB proceedings. This, in turn, affects the DB's decision-making process because DABs must ground their decisions solidly within the contractual framework, focusing on a rights-based approach, to ensure to the greatest degree possible the legitimacy and acceptability of the Decision. However, what the DAB loses in flexibility it may gain in predictability. Also, Decisions that are immediately binding may be appropriate in projects where speed is of the essence and it is more important that the Dispute be resolved quickly rather than to the general satisfaction of all the Parties.

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The award would have to make provisions for the excess payments which BuyCo paid SellCo from 1 January to 6 June.

It is not surprising that the Party assuming the greater financial risk in a contract is usually interested in setting up a DAB. When the situation requires an evening-out of the contractual odds, a DAB can quickly adapt the status quo to the new factual situation by applying and provisionally enforcing the relevant contractual provisions. In a construction contract it is typically the contractor that is interested in having a time extension or additional payment provisions in the Contract applied as early as possible when adverse circumstances affect contractual performance.

### **12. What is a Combined Dispute Board (CDB)? (Article 6)**

The Combined Dispute Board (CDB) is an entirely new type of Board that seeks to combine the advantages of both DRBs and DABs. When problems arise in long and medium term Contracts they frequently require a flexible and innovative response from the DB. Often it is more a matter of helping the Parties manage their personal and contractual relationship on an ongoing basis rather than responding to urgent situations. Any problem arising within such a context is best dealt with by issuing non-binding Recommendations. However, it may happen that a Dispute does require quick and decisive action and the power to impose a solution without delay by issuing a Decision. The CDB seeks to accommodate both situations.

A CDB will normally issue Recommendations like a DRB. However, exceptionally and upon the request of a Party, the CDB may issue a Decision (Article 6(1)).

Going back to our example of the supply agreement between SellCo and BuyCo, the determination of the price may indeed be an important issue, but not necessarily a very urgent one, since price changes can be adjusted in the Parties' accounts later on. However, if BuyCo threatens to call SellCo's \$ 1 000 000 performance bond, the latter might wish the CDB to issue a Decision that orders BuyCo not to call the bond.

### **13. When will a Combined Dispute Board issue a Decision? (Article 6(3))**

We have seen that a CDB usually issues a Recommendation. However, it must issue a Decision if a Party requests one and the other Party does not object to or agrees with the request (Article 6(2)).

If the other Party objects to a Decision being issued, the CDB must determine whether the circumstances justify its issuing a Decision rather than a Recommendation. Article 6(3) gives some indication (without limiting the CDB's discretion) of the criteria the CDB can take into consideration for this purpose. Given the fact that CDBs normally adopt the more consensual approach of a non-binding Recommendation and that immediately binding Decisions are exceptional, they become something akin to conservatory measures within the context of a CDB. Thus, Article 6(3) states:

the CDB shall consider, without being limited to, the following factors:

- whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party;
- whether a Decision would prevent disruption of the Contract; and
- whether a Decision is necessary to preserve evidence.



If BuyCo were to call the performance bond, this might result in substantial harm for SellCo, justifying a Decision rather than a Recommendation.

The CDB's finding on the type of Determination it will issue is final. If it renders a Decision, a Party cannot complain about the type of Determination that was given. If a Party disagrees with the Decision once rendered, it may refer the whole Dispute to an arbitral tribunal or a court but has agreed not to contest whether the CDB should have issued a Recommendation rather than a Decision or vice versa.

#### **14. What happens if the Parties fail to specify what type of Board they want?**

According to Article 3, the Parties should specify what type of Board they want when agreeing to set up a Dispute Board in their Contract. What happens if they do not make this choice or if they make an erroneous designation so that it is not readily apparent what kind of Board they intend to establish?

Given that Dispute Boards are set up at the beginning of the contractual relationship between the Parties, the Board should be able to obtain from the Parties the necessary clarification as to its nature. If the Board realizes the deficiency of the DB clause it will have to raise the issue with the Parties and, if possible, suggest a remedy. The Parties will, in all likelihood, agree to the proposed change as they will have little interest in paralysing the Board with a defective clause at this early stage when Parties are usually intent on getting the project going.

The Rules do not contain a default provision that would set up one type of Board rather than another if the Parties' intention is not clearly manifested in the clause. Hence, a serious disagreement between the Parties as to the nature of the Board could possibly lead to a situation where the Dispute Board cannot function. However, if the Parties use the standard ICC Dispute Board clauses, this problem will not arise.

#### **15. What is the difference between Determination, Recommendation and Decision?**

Determination is the general term for both a Recommendation and a Decision. As the Rules deal with both Recommendations and Decisions they refer to them collectively as Determinations (Article 2(ii)).

#### **16. If a Determination becomes 'binding', what is the difference between a DB and arbitration?**

We have seen that Recommendations become binding only if no Party submits a notice of dissatisfaction within the applicable time limit. Decisions, on the other hand, become provisionally binding immediately after the Parties receive them and remain binding when no notice of dissatisfaction is submitted. In the context of Dispute Boards the word binding means *contractually* binding. In other words, the Parties contractually agree to carry out the terms of a Determination that becomes part of the web of contractual obligations between them. If a Party fails to abide by this new obligation, the other may bring the issue of non-compliance directly to arbitration or the courts, without having to submit it to the Board first (Articles 4(4) and 5(4)). The contractually binding nature of Determinations also means that after

the expiration of the time limit to submit a notice of dissatisfaction, the Parties agree that the Determination definitely settles that Dispute as Articles 4(3) and 5(3) state that: ‘The Parties . . . agree not to contest it [the Recommendation/Decision] insofar as such agreement can validly be made.’ This provision acts like a contractual *res judicata* clause.

Arbitral tribunals, on the other hand, issue arbitral awards. In most countries arbitral tribunals have a quasi-judicial function defined in national arbitration laws. Under these statutes and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention), arbitral awards are final. A court must enforce an arbitral award without reviewing the merits and the issues determined in the award are legally *res judicata* and cannot be brought before any other court or tribunal a second time. Any subsequent court or tribunal would have to decline jurisdiction if it were seized of the same Dispute between the same Parties. Arbitral awards are binding inasmuch as the Parties are obliged to carry out the terms of an award as if it were a court judgment. Moreover, in most countries the courts must enforce foreign arbitral awards under the terms of the New York Convention, with the result that in some jurisdictions foreign arbitral awards are easier to enforce than judgments handed down by foreign courts.

Judgments and arbitral awards are similar in nature in that when they become final and binding the state will enforce them against the losing party, if necessary with the aid of its executive powers. The Determinations of Dispute Boards, on the other hand, never take on more importance than the Parties’ contractual rights and obligations.

## **Establishment of the Dispute Board**

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### ***17. When is the best time to establish a Dispute Board? (Article 3)***

Article 3 provides that the Dispute Board should be established when the Parties enter into the Contract. Merely agreeing to a Dispute Board is not enough: the Board must also be set up and its members appointed. The earlier this happens, the better. For the system to work well, Dispute Boards should be operational before the Parties commence performance of the Contract. This will give DB members sufficient time to familiarize themselves with the contractual documentation and to meet the Parties or their representatives at an early initial meeting. This initial meeting will be a first occasion for the Board to explore with the Parties what they expect from it and to begin discussing organizational and procedural issues. It will allow the Board to be operational early on in the process and will serve to establish a positive atmosphere between the Board and the Parties.

The Parties are also at liberty to agree to set up a Dispute Board after the Contract has been signed and its performance has commenced or even after the first Disputes have erupted. However, the longer the Parties wait before setting up a Board the more they deprive themselves of its essential feature, which is that the DB members have had time to become familiar not only with the Contract and its implementation but also with the people performing it. Indeed, a frequent reason for a DB becoming

dysfunctional is that it is set up too late in the process or not kept informed by the Parties about the evolution of the project.

### **18. How is a Dispute Board established? (Article 7)**

Article 7 deals with the appointment of DB members. The Rules state that a Dispute Board consists of either one or three members (Article 2(iv)). In its standard bidding documents, the World Bank suggests setting up a single-member DB for contracts up to US\$ 50 million.<sup>11</sup> If the Parties agree to a one-member Board, they should agree on that person within 30 days of signing the Contract or within 30 days of the commencement of performance of the Contract if this occurs before its signature. If the Parties cannot agree on the sole DB member, either Party may request the ICC DB Centre to appoint the sole DB member.

If the Parties have not specified in their DB clause how many members the Board should have, the ICC DB Rules provide for the establishment of a Board comprising three members (Article 7(2)).

A three-member Board is established in two steps. To begin with, the Parties must jointly agree on the first two DB members. If they cannot do so within 30 days, either Party may request ICC to appoint *both* DB members (Article 7(3)). Unlike arbitration, in which each side gets to select 'its' arbitrator, in a DB all Parties must agree on the first two DB members.

Secondly, the two DB members initially appointed will, within 30 days of the later of the two appointments, propose to the Parties the third member to act as chair. The Parties have 15 days to agree to the nomination. If the Parties cannot agree on the appointment of the third member proposed or if the two DB members first appointed make no suggestions within the time limit, either Party can ask ICC to appoint the chairman. (7(5))

This system should ensure that the first two DB members have a say in the selection of the chair and can propose for consideration by the Parties such persons as they would feel comfortable working with. However, the Parties have the final say, since it is they who appoint the third member.

### **19. When and how will the ICC DB Centre appoint a DB member?**

The Centre will become involved in appointing a DB member only if a Party requests an appointment. More specifically, the Centre will appoint a sole DB member if the Parties fail to agree on one within 30 days (Article 7(3)). In the case of a three-member Board, it will appoint the first two members if the Parties cannot jointly agree on them (Article 7(4)) and the third DB member if the Parties do not accept the proposal made by the first two members or if the first two cannot make a proposal within 30 days (Article 7(5)).

If a DB member has to be replaced due to death, resignation or the termination of the DB Member Agreement, the replacement will be appointed in the same manner as the departed member. This means that if the Centre appointed the first two members and one of them resigns, the replacement will also be appointed by the Centre, unless the Parties agree otherwise.

Finally, Article 7(7) provides that the Centre will make an appointment upon the request of a Party 'in the event that the Centre is satisfied that there is sufficient basis for doing so'. This catch-all provision would allow the Centre to appoint a Board with more than three members if the Parties had so agreed in their Contract.

When the Centre makes an appointment, Article 7(8) sets out in general terms the criteria for making the selection. The Centre will seek an individual whose professional qualifications match the requirements of the project and will satisfy itself as to the availability of the prospective DB member and the appropriateness of his or her nationality and linguistic abilities. Moreover, before making the selection, the Centre will take into consideration 'any observations, comments or requests made by the Parties'. One should thus expect that the Centre will ascertain from the Parties what characteristics they deem important within the context of their Contract and will make an appointment only after identifying their wishes and needs.

### **20. Will the ICC DB Rules work in a multiparty Contract?**

The Rules can be used for a Contract with more than two Parties, such as a joint-venture agreement between five Parties. The multiparty situation will impinge on two levels: first, when setting up the DB and, second, when bringing claims before the DB.

With regard to setting up the DB, if all five Parties agree to establish a three-member Board, Article 7(4) will require all five of them to agree to the first two DB members. These two will then propose the third to which all five Parties must agree. The situation may be a little trickier if the Contract stipulates a DB with more than three, i.e. five, members. If the Contract does not regulate the situation itself, Articles 7(4) and 7(5) could be used by analogy. Thus, the two-step process would require that all the Parties jointly appoint the first four members. Should they be unable to do this, ICC would appoint all four upon a Party's request. The chairman would then be proposed to all Parties by the four first members and jointly appointed by all five Parties, failing which ICC would appoint him or her.

Alternatively, if the Parties so agree, ICC could simply appoint all members of the Board in accordance with Article 7(7), thus avoiding the two-step process foreseen for a three-member DB.

With regard to procedures for bringing claims before the Board, Article 15(4) states:

If the Contract has more than two Parties, the application of the Rules may be adapted, as appropriate, to apply to the multiparty situation, by agreement of all of the Parties or, failing such agreement, by the DB.

The Rules, therefore, are not only flexible enough to deal with the appointment of DBs with more than three members, but also expressly allow the DB and the Parties to adapt the procedural rules to fit a multiparty situation.

### **21. Who should be a DB member?**

There is no doubt that in order to be effective the DB members must be thoroughly knowledgeable in the field in which the Contract is performed. They should not only be skilled technicians but also possess first-hand experience of the type of Contract at

hand. Thus, a DB for a tunneling project would require engineers well versed in tunneling projects, while a DB set up for a complex service agreement should consist of persons familiar with this type of agreement and the problems to which it may give rise.

However, it may be to the benefit of the DB and the Parties for at least one of the DB members to be legally trained and familiar with the conduct of adversarial procedures. One commentator has found that ‘[t]he ideal composition of a DB for a long-term Contract seems to be two engineers and one lawyer’.<sup>12</sup>

## Obligations of DB members

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### **22. Do Dispute Board members have to be independent? (Article 8)**

Yes, they do. Article 8(1) requires that DB members be and remain independent of the Parties to the Contract. They must attest to their independence by signing a statement of independence. A DB member is obliged to inform the Parties of any facts that might, in the eyes of a Party, cast doubt on his or her independence (Article 8(2)). If such facts arise after the DB member’s appointment, the DB member must inform the Parties accordingly (Article 8(3)). In keeping with ICC practice in such matters, the concept of independence encompasses both independence and impartiality.

### **23. Can a DB member be disqualified for lack of independence? (Article 8(4))**

Article 8(4) provides for a challenge procedure in the event that facts or circumstances come to light that cast doubt on the independence of a DB member. A Party may challenge that person by submitting to the Centre a written statement of the facts underlying the challenge. It has only 15 days from the moment it learns of the incriminating facts in which to do so. The Centre will decide whether or not to accept the challenge after obtaining the reactions of the other Parties and all DB members. The Centre’s decision is final.

If the challenge is successful, the DB Member Agreement is immediately terminated. The vacancy on the DB will be filled in the same manner as the original member was appointed, unless the Parties agree otherwise (Article 8(5)).

A Party wishing to challenge a DB member must pay a registration fee of US\$ 2 500 when making its written submission to the Centre, failing which the Centre will not examine or proceed with the challenge. Once the process has commenced, the Centre will determine the full administrative fee for the challenge, which cannot exceed US\$ 10 000. The registration fee will be fully credited to the administrative fee (Article 2 of the Appendix, Schedule of Costs).

### **24. Is the work of the DB members confidential? (Article 9)**

Article 9(2) contains a very explicit confidentiality requirement. Any information obtained by the DB members during the course of the DB’s activities must be treated

<sup>12</sup> P.M. Genton, ‘Dispute Boards’ in J. Tackaberry & A. Marriott, *Bernstein’s Handbook of Arbitration and Dispute Resolution Practice* (Sweet & Maxwell, 2003) § 7-050.

as confidential and may be used solely for the purposes of the DB's activities. The next paragraph explicitly excludes DB members from acting as arbitrators or judges in any proceedings relating to any Dispute they may have dealt with as DB members, unless, of course, the Parties agree otherwise.

The Rules do not specifically deal with the question of whether DB members can be questioned as witnesses before an arbitral tribunal or a court to which a Dispute might ultimately be referred. My personal inclination would be to allow testimony by DB members directly related to the Determinations they have issued that may be in evidence in such proceedings. However, the duty of confidentiality incumbent upon DB members should prevent them from testifying about matters lying outside the scope of the Determinations, unless all Parties to the arbitral or judicial proceedings agree.

### **25. What is the DB Member Agreement? (Article 10)**

The DB Member Agreement is the agreement that each DB member must sign with all Parties to the Contract. It completes the provisions of the Rules by specifying such items as the Daily Fee, the Monthly Retainer Fee and termination conditions.

Article 10(1) states that the terms of all DB Member Agreements should be substantially the same. This should ensure that all DB members have equal weight and standing before the Parties. In particular, there should not be major discrepancies between the remuneration of individual DB members. If the project is located in a developing country, the Parties might want to pay a DB member from that country at the local rates, which are certainly going to be a fraction of those charged by a DB member from a developed country. However, a substantial difference between the fees of the DB members could diminish the stature of the local member in the eyes of the foreign Party and may also impact negatively on the internal relationship among the members of the Dispute Board. DB Members who have been appointed by ICC will also have to agree with all Parties about their fees and other details and sign the DB Member Agreement with them.

The Parties may jointly terminate a DB Member Agreement at any time, with immediate effect. However, they remain liable to pay the Monthly Retainer Fee for three months following such termination. DB members can also terminate the Agreement at any time, but they must give three months' notice. No Party can unilaterally change the composition of a Dispute Board, but if all are unhappy with a DB member they can remove him or her immediately. Conversely, a DB member may withdraw at any time, but must give the Parties sufficient notice so that a replacement can be found without disrupting the operation or schedule of the Board.<sup>13</sup>

Annexed to the Rules is a Model DB Member Agreement. The DB Member Agreement can modify the notice and payment periods for termination as set out in Articles 10(2) and 10(3) of the Rules. The DB Member Agreement will define the amount of the Daily Fee and the multiplier for calculating the Monthly Retainer Fee. The Model Agreement also contains an arbitration agreement with a sole arbitrator for any disputes that may arise between the DB member and the Parties to the Contract.

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The fact that a DB member can terminate the DB Member Agreement at any time is a fundamental difference with arbitration. In most jurisdictions arbitrators cannot resign from an arbitral tribunal except for good cause. (See B. Berger, 'Jederzeitiges Kündigungsrecht des Schiedsrichters?' (2002) 20 ASA Bulletin 5.)

## **Obligation to cooperate**

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### ***26. How are Dispute Boards informed about the progress of the Contract? (Article 11)***

For a Dispute Board to be able to operate successfully, it must be regularly informed about how the implementation of the Contract is progressing. This is done in two ways: firstly by providing the DB members with necessary documentation about the Contract and its performance and secondly through regular meetings or site visits.

According to Article 11(1), the Parties and Board must cooperate to ensure that the DB members are 'fully informed about the Contract and its performance by the Parties'. A Dispute Board does not have to content itself with the information spontaneously provided by the Parties but may demand such information as it deems necessary to do its job. In consultation with the Parties, the Board may thus determine the nature of the information required, the format in which it should be presented and the frequency with which reports should be provided (Article 11(3)).

Obviously, the Board will also need working space and all necessary tools such as means of communication and computers when making a site visit. The Parties are obliged to provide these facilities if requested by the Dispute Board (Article 11(4)). On a construction site, the contractor will generally supply such infrastructure and space spontaneously.

### ***27. How often should the Dispute Board visit the site or meet with the Parties? (Article 12)***

While receiving the relevant documentation about the Contract and its implementation is important, nothing will inform a Dispute Board better about the evolution of a contractual relationship and the actual state of contract performance than visiting the site where the project is being constructed or meeting with the Parties. According to Article 12(1), site visits and meetings should be scheduled on a regular basis at the very outset of the Board's operation. This is especially important, given that DB members often have busy schedules.

The frequency of site visits or meetings should be 'sufficient to keep the DB informed of the performance of the Contract and of any disagreements' (Article 12(1)). In the case of a construction Contract where there is a site, there should be a minimum of three visits per year. In other types of Contracts there may be no central site where performance occurs. Here, the Board will have to ascertain progress through meetings with the Parties, the frequency of which should be sufficient to give the Dispute Board a good understanding of how the implementation of the Contract and the relationship between the Parties are progressing.

### ***28. Why do the Rules prescribe a minimum number of site visits?***

Experience has shown that while the going is good Parties are sometimes reluctant to have the Board come and visit the site. Site visits can be expensive and their

usefulness not readily apparent if no Disputes have arisen and the implementation of the Contract is progressing smoothly. However, if the Board is not kept fully informed of progress and allowed to see things with its own eyes, it might not be able to deal rapidly and efficiently with a problem when it does occur.<sup>14</sup> By setting a minimum number of visits the Rules endorse the need for the Board to have regular access to the site.

## Operation of the Dispute Board

### *29. When does the Dispute Board begin and end its activities? (Article 14)*

According to Article 14, a Dispute Board begins its activities after all the DB members and the Parties have signed the DB Member Agreements, and ends them upon a joint decision of the Parties to disband the DB.

This, of course, begs the question of what happens if the Parties cannot agree to disband the Board? The pragmatic answer is that the Board will continue to function as long as there are funds and the members are paid. If one of the Parties has an interest in maintaining the Board in existence even after a project has been completed (e.g. during a warranty period), it can block the disbanding of the Board. However, it is unlikely that a Dispute Board will remain functional if the Parties do not pay its members. Unless all Parties agree to continue paying the Monthly Retainer Fee or one Party covers the entire amount, the DB Members are likely to suspend their work under Article 31(3) of the Rules and then terminate the DB Member Agreement by giving three months' notice pursuant to Article 10(3).<sup>15</sup>

### *30. Who determines the procedure before the Dispute Board?*

Since Dispute Boards are creatures of consent and contractual cooperation, it is logical that Article 15 should stipulate that the procedures before the Board shall be governed by the Rules and, where those are silent, by any rules agreed by the Parties. The Parties may, of course, agree to vary any of the provisions contained in the Rules. Where the Rules are silent and the Parties do not agree on a procedure, the Dispute Board has full powers to determine any procedural issues that might arise. Article 15 contains a non-exhaustive list of the DB's powers in this respect. In the absence of an agreement of the Parties, the DB may:

- determine the language of the proceedings;
- require the Parties to produce documents which are necessary to issue a Determination;
- call meetings, site visits and hearings;
- decide on all procedural issues that may arise during a hearing, meeting or site visit;
- question Parties and any witnesses called by the Parties;
- issue Determinations and, generally,
- take all measures necessary to fulfil its function as a Dispute Board.

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Article 1 of the Annex to the Red Book states that site visits should be at least 70 but not more than 140 days apart. The World Bank's 'Standard Bidding Documents – Procurement of Works', s. XIII (Dispute Settlement Procedure), §8(a), provides for three visits per 12-month period.

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When the Rules were being drafted, it proved extremely difficult to determine objective criteria for ending the activities of a DB. While one would expect the DB to end its functions once the Contract has been performed, the difficulty is to know when that is the case. Is

a Contract performed upon completion of the works or at the end of the warranty period? As the ICC DB Rules, unlike the FIDIC Red Book, are not designed for only one type of Contract containing precise contractual notice periods and certifications, its drafters decided not to lay down a general rule about contract completion.

Clause 20(2) of the Red Book provides that the Board's term expires when the discharge has become effective. The discharge is defined in clause 14(12) as the time when the Contractor acknowledges that the Employer owes him no further moneys. By choosing not to include such detailed provisions relating to the underlying Contract, the ICC DB Rules have adopted a more flexible, albeit less predictable, approach.



### **31. What is the difference between a disagreement and a Dispute?**

Article 2(iii) defines Dispute as ‘any disagreement arising out of or in connection with the Contract which is referred to a Dispute Board for a Determination under the terms of the Contract and pursuant to the Rules’. This means that if a contractual problem arises between the Parties, it is a disagreement as long as neither Party refers the issue to the Board under Article 17 of the Rules requesting a Decision or Recommendation.

The distinction is important for two reasons: (1) If a disagreement has not risen to the level of a Dispute, i.e. the issue has not been referred to the Board under Article 17, that disagreement cannot be submitted to arbitration or the courts for final resolution according to Articles 4(6) and 5(6). (2) A Board can informally assist Parties to settle a disagreement (as distinct from a Dispute) pursuant to Article 16.

### **32. Why provide for informal assistance with disagreements? (Article 16)**

One of the great benefits of standing Boards is their ability to perceive and help defuse difficulties at a very early stage. Being present from the inception of the Contract and regularly advised of progress allows DB members to play an important role in actively helping Parties sort out their differences at an early stage when a problem first emerges. Such early intervention is characterized by the informal nature of the dialogue between the Board and the Parties. The provision of an informal process alongside a more structured one gives ICC Dispute Boards the greatest possible flexibility in dealing with contractual problems.

Article 16 allows the Board to initiate informal discussions on its own if it notices something that it believes could become the source of a Dispute. A Board may thus be able to defuse a potential Dispute before the Parties even realize that they are heading for trouble. Of course, either of the Parties may request such informal assistance with a disagreement. However, it is important to note that a Board may engage in the kind of process contemplated by Article 16 only if all Parties agree to the process and to the method of assistance used by the Board.

As regards the manner in which the informal assistance is provided, Article 16(2) lists various possibilities. Such assistance may take the form of a conversation with both Parties, caucusing (meetings between one Party and the Board) if all Parties agree, informal opinions of the Board, or any other way that may help the Parties resolve the disagreement.

If such informal assistance is not successful and the Dispute is referred to the Board for a Determination, the DB members are not bound by any views they may have expressed during the informal stage of the process (Article 16(3)).

### **33. How are Disputes formally referred to the Dispute Board? (Articles 17 & 18)**

The formal referral of a Dispute starts with the filing of a Statement of Case, which is sent to the other Party and all members of the Dispute Board. Article 17 stipulates that the Statement of Case should be sufficiently detailed to allow the other Party to know upon what facts and what contractual basis the referring Party is seeking what remedy. It should also include the supporting documentation on which the referring

Party wishes to rely. In the context of a CDB, if the referring Party wishes the Board to issue a Decision rather than, as normal, a Recommendation, it should also set out the facts and reasons which in its opinion justify the CDB's doing so.

Unlike some other systems in which the formal referral of disputes begins with a brief notice of referral that is then followed up with a full statement of the facts, the ICC process provides for only one written submission from the referring Party.

The day on which the DB chairman or sole DB member receives the Statement of Case is the Date of Commencement of the referral (Article 17(2)). This is the date from which the 90-day time limit for the Dispute Board to issue its Determination starts to run (Article 20(1)).

The other Party must respond within 30 days of receiving the Statement of Case by submitting a Response, the contents of which are listed in Article 18(1). This submission should again be sufficiently detailed for the other Party and the Board to be able to discern the responding Party's position on the alleged facts, contractual basis and position of the referring Party. If the responding Party has its own claims, those should be set out in detail in a separate Statement of Case pursuant to Article 17. In the case of a CDB, the Response should also set out the Party's position as to the nature of the requested Determination. If it is the responding rather than the referring Party that seeks a Decision, that Party should also set forth the reasons why it believes the CDB should issue a Decision rather than a Recommendation.

#### **34. When and how are hearings held? (Article 19)**

A hearing will be held once a Dispute has been referred unless the Parties and the Board agree that none is necessary. By default, this hearing must take place within 15 days after the Response has been submitted, unless the Board decides otherwise. In practice, however, it is more likely that the Board will seek to reduce costs and disruption to the established schedule by fitting a hearing into its regularly scheduled meetings or site visits, unless this is incompatible with the requirement that the Determination be rendered within 90 days of the Date of Commencement or unless a Party requests an urgent hearing. In the latter case the Board should do what it can to satisfy the request. Article 12(4) provides that the members of the Board should undertake best efforts to make themselves available within 30 days of receiving a request for an urgent meeting or site visit.

As a general rule, hearings are held in the presence of all DB members. However, it may be appropriate to proceed with a hearing even if a DB member is not present. The decision to proceed lies with the other two DB members, who must consult with the Parties according to Article 19(3). It may thus be appropriate to hold a hearing if a DB member falls ill at the last minute and the travel arrangements made by the other members cannot be changed. This possibility would also forestall any attempt by a DB member to block or derail a hearing by simply failing to attend. The last sentence of Article 19(3) deals with the particular situation where a DB member must be replaced and the replacement has not yet been appointed. In that case, a hearing with only the sitting members of the Board can be held only if all Parties agree. In any case, the hearing ought to take place if it is a Party that refuses or fails to show up for the event (Article 19(4)).

The Dispute Board must conduct the hearing fairly and impartially and allow all Parties a reasonable opportunity to present their cases (Article 19(6)). Apart from these strictures of natural justice, the Board determines how the hearing will be conducted and is generally in full charge of the proceedings (Article 19(5)). By way of guidance to Parties and Boards, the Rules set out a procedural sequence of events:

- ① Commencing with the referring Party, both Parties present their cases.
- ② The DB then identifies matters which it believes need further clarification.
- ③ The Parties deal with the matters raised by the Board, hopefully clarifying those issues.
- ④ To the extent that such clarifications raise new issues, the Party that has not yet had the opportunity to comment on the new issues can respond.

## **Determinations of the Dispute Board**

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### ***35. When must a Dispute Board render its Determination? (Article 20)***

Unless the Parties agree to an extension, the Board must issue its Determination within 90 days after the referral has commenced.<sup>16</sup> If the Board fails to issue the Determination within the time limit stipulated by the Rules or subsequently agreed by the Parties, any Party could thereupon immediately submit the Dispute to arbitration or to the courts for final resolution according to Articles 4(6) and 5(6).

In practice, Parties will more often than not agree to justified requests for an extension of the time limit, as neither would benefit from a hastily drafted Determination that is issued before the Board has had enough time to fully consider and weigh all evidence and arguments adduced by the Parties before and during the hearing.

### ***36. Will the ICC DB Centre review all Determinations? (Articles 21)***

The short answer is no. The Centre never reviews Recommendations and it can review Decisions *only if the Parties have expressly agreed to such review*. This would normally be done in the Dispute Board clause, but the Parties could also agree to such review at a later stage. In that case, when selecting a DAB or a CDB Parties must also stipulate that any Decisions issued by those Boards are to be reviewed by ICC. For this purpose, ICC suggests including the following sentence in the DAB or CDB clause:

The DAB/CDB shall submit each Decision to ICC for review in accordance with Article 21 of the Rules.

If the clause contains nothing to this effect, ICC will have no power to review Decisions unless the Parties subsequently agree to such review.

When the Centre does review a Decision, it may require the Board to make modifications as to form. Article 22 indicates the contents of a Determination. While, formally, a Determination must include the date on which it is issued and state the findings of the Board as well as the reasons for those findings, the other components

<sup>16</sup> Clause 20(4) of the FIDIC Red Book allows 84 days.

mentioned in Article 22 are not mandatory but intended as a guide to Boards. ICC's long-standing practice of scrutinizing arbitral awards under the ICC Rules of Arbitration<sup>17</sup> and reviewing expert reports under the Rules for Expertise<sup>18</sup> has shown the benefit of such a procedure. It weeds out a certain number of errors, which might affect the efficacy of the Decision. An error of form would be to forget the date of the Decision or obvious clerical mistakes such as  $2+2 = 6$ . While the Centre's staff may not be equipped to examine the substance of Decisions, particularly if the subject matter is technical, its review may well help Boards produce Decisions that are intelligible to the parties as well as the Board and also, should the need arise, to an arbitral tribunal or a court.

When a DB submits a draft Decision for review, it must also pay a registration fee of US\$ 2 500. No Decision will be reviewed until the registration fee has been paid (Article 3 of the Appendix, Schedule of Costs). Once it has received the Decision, the Centre will determine an administrative fee for its review, which cannot exceed US\$ 10 000. As long as the administrative fee has not been paid the Centre will not approve the Decision (Article 32(4)). As ICC's review will affect the time it takes to provide the Parties with the Decision, Article 20(2) states that the Centre should complete its review within 30 days of receiving the Decision or, if later, full payment of the administrative fee. Should additional time for review be necessary, the Centre will inform the Parties thereof and also when they may expect the Decision to be issued.

Given that the payment of the fee for reviewing a Decision could seriously affect the time it will take to communicate a Decision to the Parties, it would be advisable for Boards to contact the Centre in order to coordinate the timely payment of the reviewing fee by the Parties, particularly if notification of the Decision to the Parties is urgent.

### **37. Why is a dissenting DB member required to give the reasons for the dissent? (Article 23)**

Determinations are issued by a unanimous Board or by the majority of DB members. If there is no majority then the chairman alone issues the Determination. Article 23 goes on to state:

Any DB Member who disagrees with the Determination *shall* give the reasons for such disagreement in a separate written report that shall not form part of the Determination but shall be communicated to the Parties. Any failure of a DB Member to give such reasons shall not prevent the issuance or the effectiveness of the Determination.<sup>19</sup>

The Rules thus require a dissenting DB member to give the reasons for his or her dissent. They thereby seek to discourage frivolous dissent, but more importantly they seek to provide the Parties with the full range of opinions of all members of the Board. If the Dispute continues and is ultimately referred to final settlement before an arbitral tribunal or a court, both the majority Determination and the dissenting opinion may be useful evidence (Article 25). It is therefore in the Parties' interest for the Rules to have a DB member who does not agree with the other members of the Board explain why he or she differs. The DB member, however, will not be able to hold up the issuance of the Determination by not submitting the dissenting opinion, because the majority may issue its Determination regardless. The failure to produce the dissenting opinion constitutes a breach of the DB Member Agreement, entitling

<sup>17</sup> Article 27  
<sup>18</sup> Article 12(6)  
<sup>19</sup> Emphasis added.

the Parties to withhold Daily Fee payments for the work done on that referral until they receive the dissent.

## **Compensation of DB members**

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### ***38. How are DB members paid?***

The Parties pay DB members directly. The ICC DB Centre has no role either in fixing fees or in administering the finances of the Dispute Board. As there is no fee scale, DB members must negotiate their fees with the Parties when entering into a DB Member Agreement with them. The Rules lay down two basic principles that must be respected. The first is that the Board's expenses and fees should be paid by the Parties in equal proportions (Article 26(1)). This will disassociate the members of the Board from either Party and help assure that they remain independent of the Parties throughout the project. The second is that all DB members should receive similar remuneration (Article 26(2)). This should ensure that all DB members have equal standing amongst themselves and in the eyes of the Parties.

DB members receive two kinds of remuneration: a Monthly Retainer Fee and a Daily Fee.

### ***39. What is the Monthly Retainer Fee? (Article 27)***

The Monthly Retainer Fee is paid by the Parties to the DB members for their being and remaining available to attend all meetings between the DB and the Parties, site visits and internal meetings of the DB. It also includes remuneration for the DB members' becoming and remaining conversant with all contractual documentation and progress reports. The Monthly Retainer Fee also covers a DB member's overhead expenses at his or her place of residence. The list set out in Article 27 should be considered exhaustive. The Monthly Retainer Fee does not cover specific services rendered by a DB member but is rather a global payment for DB members to be on duty and keep themselves abreast of the project.

According to Article 27(2), the Monthly Retainer Fee is three times (or any other agreed multiple of) the Daily Fee as determined in the DB Member Agreement. The Monthly Retainer Fee is normally invoiced and paid in advance on a quarterly basis (Article 31(1)).

### ***40. What is the Daily Fee? (Article 28)***

The Daily Fee covers everything that is not remunerated under the Monthly Retainer Fee. In particular, it will cover time spent on specific work performed by a DB member. Thus, the actual time spent at meetings, site visits, hearings and travelling would be paid under the Daily Fee, as would the time taken to study documents submitted by the Parties within the context of referrals or informal assistance with disagreements. The Daily Fee will also cover time spent preparing and drafting reports and Determinations and, particularly for the DB chairman, coordinating and organizing the operation of the Board. The list contained in Article 28 is not

exhaustive, since DB members may spend time on other matters such as responding to a challenge by a Party.

Daily Fees and expenses are invoiced on an ongoing basis and paid after they have been incurred (Article 31(1)).

***41. What happens if the DB members' fees and expenses are not paid? (Article 31(4))***

If a Party fails to pay its share of the DB members' fees and expenses, two things may happen. First, Article 31(3) allows DB members to suspend their services if their invoices are not paid within 30 days and to claim interest on the outstanding amounts. Given that much of the Board's activity, such as regular site visits, is planned in advance, this provision will be a powerful tool, as DB members will be able to put pressure on the Parties to pay the outstanding invoices before the next scheduled meeting. If both Parties fail to pay the DB members' invoices, the DB members would be entitled to terminate the DB Member Agreement under Article 10(3) with three months' notice to the Parties. In such case, the Board members would have a claim for their outstanding invoices and three times the Monthly Retainer Fee. If only one Party fails to pay, Article 31(4) allows the other to advance all outstanding fees and expenses so that the Board can continue operating. It can then claim reimbursement from the non-paying Party.

## **The final settlement of Disputes**

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***42. When can a Party refer a Dispute to arbitration or to the courts for final settlement? (Articles 4(6) and 5(6))***

As we have seen, the referral of Disputes to a Dispute Board is the first step in a two-step process. Since the Board's Determination is not necessarily the final word in the matter, the Rules also have to define under what conditions the Parties can proceed to the second step that will result in a final settlement of their Dispute.

If the Parties have not agreed upon arbitration as the method of final settlement, the matter will have to be referred to the state court having jurisdiction under the procedural laws to which it is subject. The focus here will be rather on the situation in which Parties have agreed to obtain a final settlement of their disputes by arbitration.

Articles 4(6) and 5(6) of the Rules state:

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

Generally, the following five conditions must be met for a Party to be able to submit a Dispute to arbitration:

1. The Dispute has been referred to a Dispute Board.
2. (a) The Dispute Board has issued a Determination concerning that Dispute, or (b) the Dispute Board has failed to issue a Determination within the applicable time limit.
3. In the case of 2(a) above, the dissatisfied Party has notified its dissatisfaction to the other and the Dispute Board.
4. The DB chairman has received the notice of dissatisfaction within the time limit stipulated in the Contract or the Rules.
5. The Parties have agreed upon arbitration for the final settlement of Disputes.

Thus, if a Party were to submit a contractual disagreement concerning additional payments directly to an arbitral tribunal without having submitted it to the Dispute Board, the arbitral tribunal should decline jurisdiction upon the objection of the other Party.

If the third condition is not fulfilled, because the dissatisfied Party has not notified its dissatisfaction within the time limit foreseen in the Rules or the Contract, then that Party is contractually barred from contesting the Recommendation (Article 4(3)) or Decision (Article 5(3)). The arbitral tribunal would have jurisdiction to enforce the Determination as any other term of the Contract between the Parties.

#### ***43. Can a Party commence arbitration without having referred a Dispute to the Dispute Board?***

There are three situations in which a Party may refer to an arbitral tribunal directly in connection with a Dispute without first having obtained a Determination from the Board or without having to refer the specific issue first to the Dispute Board.

1. If the Dispute Board does not issue its Determination within the 90 days stated in Article 20(1) or such other time as agreed by the Parties, any Party may refer the Dispute to arbitration before the Determination has been issued. While it is unlikely that a Party will commence arbitration without knowing the Board's Determination, this provision gives the Parties some leverage over a particularly slow Board.
2. If the Dispute arises after the Board has been disbanded by agreement of the Parties under Article 14(2), Articles 4(6) and 5(6) allow a Party wishing to bring the Dispute to arbitration to do so without first establishing a new Board. If, for example, during a five-year guarantee period a Dispute arises and the Board was disbanded shortly after completion of the Contract, then that Dispute could be referred directly to arbitration. Logically, this rule should also extend to the situation in which all DB members have resigned (e.g. for lack of payment) and the Parties have not reconstituted the Board. In my view it would be abusive for a Party that has itself contributed to or been responsible for the demise of the Dispute Board to contest arbitral jurisdiction on the ground that the Dispute has not first been referred to the Board.
3. If a Party fails to comply with a Determination that has become binding, the Party benefiting from the Determination may directly 'refer the failure itself to

arbitration' (Articles 4(4) and 5(4)). The non-performance of a Determination that has become binding is not, *sensu stricto*, the same Dispute that was submitted to the Board in the first place, since the first Dispute was about whether a Party was entitled to what it was requesting. Without this provision in the Rules, a Party wishing to enforce a binding Determination against a non-complying Party might have to refer that 'new' Dispute to the Board before initiating arbitration. It is clear from the wording of Articles 4(4) and 5(4) ('the failure itself') that the enforcing Party does not have to re-argue the underlying Dispute before the arbitral tribunal. Indeed, it would be counterproductive if a Party could cause the entire Dispute to be re-opened simply by failing to comply with a binding Recommendation or Decision. By limiting the scope of the submission to the failure itself, the Rules seek to protect the Party benefiting from a Determination that has become binding by offering a short-cut to an award allowing it to enforce compliance with the Determination.

**44. Why do Articles 4(6) and 5(6) refer to arbitration as well as to any court of competent jurisdiction?**

The standard ICC DB clauses propose a two-tiered process: submission of the Dispute to a Dispute Board in the first instance and then to arbitration. However, the Rules also need to be applicable in situations where the Parties have *not* agreed to subsequent arbitration, either because they wish to have more than two levels in the dispute resolution process or because they have chosen to litigate unresolved Disputes before the courts. It may also happen that Parties simply forget to address the question in their dispute resolution clause. For this reason, Articles 4(6) and 5(6) are worded as follows:

the Dispute in question shall be finally settled by arbitration, if the Parties have so agreed, or, if not, by any court of competent jurisdiction.

**45. Does arbitration have to be started within a fixed time limit?**

There is no time limit stipulated in the Rules within which a Party must commence arbitration if it has given notice of its dissatisfaction with a Determination issued by a Board. The Rules thus leave Parties entirely free to decide upon the timing themselves. They may wish to wait until the Contract has been completed and group all Disputes in a single arbitration, or they may wish to proceed immediately against an adverse Determination. If the Rules were to require the commencement of arbitration within a certain time limit, this could have the unfortunate effect of forcing the Parties to commence multiple arbitrations with different tribunals dealing with different Disputes under the same Contract.

**46. Does the arbitral tribunal act as an appeals panel?**

When a Party refers an unresolved Dispute to an arbitral tribunal, the tribunal does not act as an appeals body examining whether or not the Board's Determination is valid. If the Dispute remains unresolved after the Board's Determination, the entire Dispute is submitted to the arbitral tribunal. Consequently, the Parties are free to submit new evidence, change the legal grounds upon which they rely, and are in no way limited by the arguments they submitted to the Dispute Board. This does not mean that the Board's Determination becomes worthless or that it cannot be produced in the



arbitration. Indeed, Article 25 expressly states that a Determination is admissible as evidence in arbitral or judicial proceedings unless the Parties have agreed otherwise. As a first opinion by an independent body of well-informed specialists on the merits of a Party's position, a Determination (along with any dissenting opinion) will be important evidence helping the arbitrators to better understand the Dispute and the issues and, if well reasoned, is likely to be given weight by the arbitral tribunal.

## **Conclusion**

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ICC's new DB Rules seek to provide the business community with a coherent and effective framework for establishing and operating Dispute Boards in every economic sector where such Boards may be useful for resolving disputes between Parties. They incorporate current best practices concerning the establishment and operation of Dispute Boards and offer users a variety of choices to tailor the Board to the needs of the project. The Rules also seek to provide Boards and Parties with guidance in structuring and operating Dispute Boards. ICC hopes that, having opted for Rules that are not sector-specific, Dispute Boards will also become an important dispute resolution tool in other industries besides construction and engineering.

Readers who feel inclined to test the didactic value of this presentation will find below a multiple choice questionnaire allowing them to test their newly acquired knowledge with a touch of fun.

## **Multiple Choice Questionnaire on Dispute Boards**

*(There is only one completely correct answer to each question.)*

- 1) DB stands for
  - a)  Dominant Brand.
  - b)  Dispute Board.
  - c)  Dangerous Bend.
- 2) DAB stands for
  - a)  Dispute Adjudication Board.
  - b)  Digital Audio Broadcasting.
  - c)  Dispute Alternation Body.
- 3) A DB member must be
  - a)  a nice person.
  - b)  independent and impartial.
  - c)  a good engineer.
- 4) A Decision is
  - a)  immediately final.
  - b)  immediately final and binding.
  - c)  provisionally binding upon receipt by the Parties.
- 5) Recommendations
  - a)  have to be complied with after 30 days.
  - b)  have to be implemented immediately.
  - c)  become binding if neither Party issues a notice of dissatisfaction within the time limit set out in the Rules or agreed by the Parties.
- 6) In a DB
  - a)  each Party can choose its own DB member.
  - b)  all Parties must agree on Party-selected members
  - c)  ICC always chooses all members.
- 7) The DB Centre reviews Decisions if
  - a)  the Parties have agreed to review in their DB clause.
  - b)  the project is worth more than 50 million dollars.
  - c)  the Decision is more than five pages long.
- 8) The DB Centre is
  - a)  a place where the disabled get benefits.
  - b)  a section of the secret service.
  - c)  the secretariat within ICC dealing with Dispute Boards.
- 9) CDB stands for
  - a)  Council and Districting Board.
  - b)  Combined Dispute Board.
  - c)  Confused Data Bureau.

- 10) DRB stands for
- a)  Drive and Breakfast.
  - b)  Dispute Resolution Board.
  - c)  Dispute Review Board.
- 11) A CDB issues a Decision
- a)  if nobody says anything.
  - b)  if there is a request and the other Party does not object.
  - c)  when it feels like it.
- 12) The third DB member is
- a)  appointed by the Parties, failing which by ICC.
  - b)  appointed by the first two DB members.
  - c)  always appointed by ICC.
- 13) Meetings and site visits should be
- a)  held when necessary.
  - b)  organized when sufficient funds are available.
  - c)  planned in advance at regular intervals.
- 14) Determinations must be issued
- a)  90 days after the last hearing is held on that Dispute.
  - b)  180 days after the signing of the Contract.
  - c)  90 days after commencement of the referral.
- 15) The DB ends its activities
- a)  upon the Parties' joint decision to disband the DB.
  - b)  when the DB members are tired of the project.
  - c)  when the Contract has been completed.
- 16) A dissenting DB member
- a)  is free to communicate his or her reasons to the Parties.
  - b)  shall never communicate his or her reasons to the Parties.
  - c)  must communicate his or her reasons to the Parties.
- 17) The costs of the DB are
- a)  paid by each Party for its DB member, while the costs of the third member are shared.
  - b)  paid equally by the Parties.
  - c)  paid by the contractor.
- 18) The Monthly Retainer Fee is
- a)  normally calculated as a multiple of the Daily Fee.
  - b)  based on the time spent by the DB member.
  - c)  whatever the market pays.
- 19) The Daily Fee covers
- a)  reading the contract and getting to know the project.
  - b)  fees for time spent on such things as meetings, travel, study of documents for a referral, preparation of Determinations, coordinating and organizing DB operations.
  - c)  relaxing vacations after hard DB work.

- 20) A DB member is paid
  - a)  out of the advance held by ICC.
  - b)  by the Parties after receipt of the DB member's invoices.
  - c)  at the end of the Contract.
  
- 21) Parties can refer a Dispute to arbitration if
  - a)  they do not like the courts.
  - b)  a notice of dissatisfaction is issued within the time limit.
  - c)  the DB Centre gives leave to proceed to arbitration.
  
- 22) Disputes may be referred to arbitration without a Determination if
  - a)  it is in the interest of the claimant.
  - b)  the DB does not issue the Determination within the time limit agreed by the Parties or stipulated in the Rules.
  - c)  if the arbitral tribunal so decides.
  
- 23) DB members must
  - a)  publish or perish.
  - b)  sign a confidentiality statement with the Parties.
  - c)  keep information relating to DB procedures confidential.
  
- 24) Determinations are
  - a)  admissible evidence in subsequent proceedings.
  - b)  always confidential between the Parties.
  - c)  admissible evidence only if the Parties agree.

***Answers to MCQ***

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- |              |              |              |              |
|--------------|--------------|--------------|--------------|
| 21. <b>B</b> | 22. <b>B</b> | 23. <b>C</b> | 24. <b>A</b> |
| 17. <b>B</b> | 18. <b>A</b> | 19. <b>B</b> | 20. <b>B</b> |
| 13. <b>C</b> | 14. <b>C</b> | 15. <b>A</b> | 16. <b>C</b> |
| 9. <b>B</b>  | 10. <b>C</b> | 11. <b>B</b> | 12. <b>A</b> |
| 5. <b>C</b>  | 6. <b>B</b>  | 7. <b>A</b>  | 8. <b>C</b>  |
| 1. <b>B</b>  | 2. <b>A</b>  | 3. <b>B</b>  | 4. <b>C</b>  |

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Tel. +33 1 49 53 29 52

Fax +33 1 49 53 57 74

E-mail: [bulletin@iccwbo.org](mailto:bulletin@iccwbo.org)

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38 cours Albert 1er, 75008 Paris, France

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