



**ESTABLISHING DISPUTE BOARDS –
SELECTING, NOMINATING AND
APPOINTING BOARD MEMBERS**

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Introduction

This paper focuses on selecting, nominating, appointing and establishing dispute boards (DBs). Consideration is given not just to the legal issues and standard form provisions available, but also to the practical issues and difficulties of identifying and appointing board members for international projects.¹ The topics are discussed by reference to the published rules and guidance from the Fédération Internationale des Ingénieurs-Conseils (FIDIC), the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and the Institution of Civil Engineers (ICE), as well as those contained within World Bank procurement procedures. These provisions are compared and contrasted, with a summary in table form as the Appendix at the end of the paper.

From a practical perspective, the challenge for the parties is to establish a DB at the outset of the project, rather than waiting for a dispute to arise. There is a need to identify, consider and agree the appropriate individuals for the project, as well as to consider independence and impartiality, and establish, and be seen to establish, a level playing-field for the contractor and employer or owner.² The identification of individuals with appropriate skills, experience and qualifications, especially in relation to the DB chair, can be difficult and time-consuming. However, the parties must overcome these issues in order to appoint a DB.³

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

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- 1 Much gratitude must be recorded to Charlene Linneman, Assistant at Fenwick Elliott LLP, for her research and help in producing this paper.
 - 2 In this paper the term 'employer' is used to refer to the employer, owner or purchaser of the works (thus adopting FIDIC terminology).
 - 3 In this paper the term 'DB' is used to refer collectively to dispute boards, dispute adjudication boards, combined dispute boards or dispute resolution boards.

Dispute boards: a brief overview

The terms ‘dispute review board’ (DRB) or ‘dispute adjudication board’ (DAB) – collectively ‘dispute boards’ (DBs) – are relatively new. They describe a dispute resolution procedure that is normally established at the outset of a project and remains in place throughout the project’s duration. The board may comprise one or three members, who become acquainted with the contract, the project and the individuals involved with the project in order to provide informal assistance, provide recommendations about how disputes should be resolved, and in some cases binding decisions.

The members of a DB (whether one or three persons) are remunerated throughout the project, usually by way of a monthly retainer, which is then supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents, attending hearings and producing written recommendations or decisions, if and as appropriate.

DABs have more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of DRBs, which originally developed in the domestic US major projects market. According to the Dispute Review Board Foundation (DRBF),⁴ the first documented use of an informal DRB process was on the Boundary Dam and Underground Powerhouse project north of Spokane, Washington, during the 1960s. Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four member ‘Joint Consulting Board’ (JCB), in order that that board could provide non-binding suggestions. The DRBF reported that as a result the recommendations of the JCB were followed, including several administrative procedural changes and the settlement of a variety of claims and also an improvement in relationships between the parties. The project was also completed without litigation.

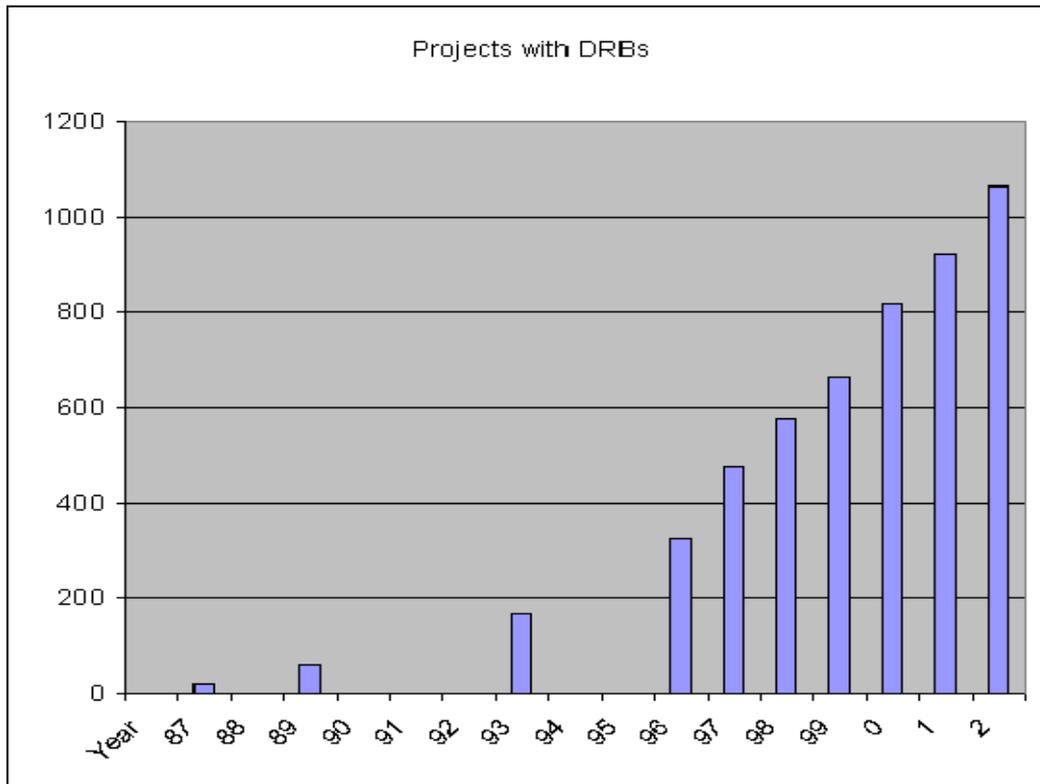
Subsequently in 1972 the Standing Sub-committee No 4 of the US National Committee on Tunnelling Technology conducted a study and made recommendations for improving contractual methods in the US. Further studies were carried out, with the first official use of a DRB made by the Colorado Department of Highways on the second bore tunnel of the Eisenhower Tunnel Project. This was as a result of the financial disaster encountered in respect of the first tunnel between 1968 and 1974.

The DRB was required to make non-binding recommendations about disputes that arose during the project. The Board was constituted at the commencement of the project and followed the duration of the project. The project was extremely successful and as a result the use of DRBs began to spread for large civil engineering projects in the US, but they have also been used internationally. However, DRBs predominantly remain the province of domestic US construction projects.

4 For the DRBF, see www.drb.org.

As adjudication developed, the World Bank and FIDIC opted for a *binding* dispute resolution process during the course of projects, so the DAB was born. The important distinction, then, between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions during the course of the project: these bind the parties and must be implemented immediately.

Growth in US projects with DRBs⁵



The DRBF has catalogued 1,062 projects, representing more than US\$77.7bn worth of project work. The table below shows that in 2003 there were 340 contracts using DRBs. On those projects the boards made 1,261 recommendations and only 28 matters went beyond the DRB process. In other words, only 2.2% of those disputes referred to the DRB progressed to arbitration or litigation. A more positive way of looking at this is that DRBs have a success rate of more than 97.8%. The DRBF has reported a considerable rise in the number of projects using DRBs, as the figure above and table below both show.

DRBs are now widely used on a range of substantial civil engineering projects in the US. Their use is no longer limited to the mega-projects, so three- man, or indeed one-man, DRBs are being used on smaller projects.

⁵ Source: DRBF, see note 4.

US contracts (complete and under construction) with DRBs⁶

	projects with DRBs (totals)	contract value (US\$ bn)	disputes settled (totals)
1988	19	1.4	16
1989			
1991	63	3.2	78
1992			
1994	166	9.7	211
1995			
1996			
1997	326	22.1	424
1998	477	28.8	596
1999	576	32.6	758
2000	666	35.4	869
2001	818	41.0	1021
2002	922	46.2	1108
2003	1062	50.3	1261

From DRB to DAB and beyond

The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation. Pierre Genton, adopting the ICC's terminology, suggests that 'the DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions.'⁷

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

- 1 *DRB*: the DRB issues recommendations, so an apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period, the parties agree to comply with the recommendation, which therefore becomes binding if the parties do not reject it.
- 2 *DAB*: its decisions are to be implemented immediately.

⁶ Source: DRBF, see note 4.

⁷ Pierre Genton, Chapter 7: *Dispute Boards*, Bernsteins Handbook of Arbitration and Dispute Resolution, edited by J Tackaberry QC and A Marriot, QC, Sweet & Maxwell, London, 2003, paragraph 7-029.

- 3 *Combined Dispute Board*: the CDB attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests and if the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

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

According to the ICC, the essential feature of the CDB model is that the parties are required to comply with a decision immediately, whereas the parties must comply with a recommendation – but only if the employer and contractor express no dissatisfaction within the time limit. The CDB procedure seems at first glance to be a somewhat cumbersome hybrid between the DRB and DAB, without a clear pathway. Nonetheless, it may prove useful for those parties that cannot decide whether they need a DRB or a DAB.

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

The development of international dispute boards

A limited number of standard form contracts are available, which set out an almost uniform approach to the appointment of DB members. These provisions have arisen primarily from the step-by-step development of adjudication:

1970	A contractual adjudication process is introduced into the domestic subcontractor standard forms in the UK, primarily to resolve set-off issues between subcontractor and main contractor
1994	Sir Michael Latham issues his final report, reviewing procurement, contractual and dispute arrangements in the UK construction industry ⁸
1995	FIDIC introduces a DAB in its Orange Book
1996	FIDIC introduces a DAB as an option in its Red Book
	Housing Grants, Construction and Regeneration Act 1996 (HGCRA) introduced in the UK; its Part II includes mandatory adjudication provisions in section 108

8 Sir Michael Latham, *Constructing the Team*, London, HMSO, 1994.

1998	Part II of the HGCRA comes into force on 1 May, together with the Exclusion Order ⁹ and the Scheme for Construction Contracts ¹⁰
1999	FIDIC adopts a DAB/Dispute Review Expert (DRE) procedure, relying upon the engineer to act as quasi-arbitrator as well as agent of the employer or owner. The DAB procedure becomes mandatory, rather than an option. Three major new model forms include DABs/DREs: ¹¹ <ul style="list-style-type: none"> • <i>New Red Book</i>: Conditions for Construction (a standing DAB comprising one or three members) • <i>New Yellow Book</i>: Plant and Design Build (ad hoc DAB) • <i>Silver Book</i>: Engineer Procure and Construct (Turnkey) (also ad hoc DAB)
2000	AAA publishes its <i>DRB Guide Specifications</i> ¹²
	The World Bank introduces a new edition of its <i>Procurement of Works</i> procedure, making the ‘recommendations’ of a DRB or DRE mandatory unless or until superseded by an arbitrator’s award ¹³
2004	ICC adopts its <i>DB Rules, Model DB Member Agreement and Standard ICC DB Clauses</i> ¹⁴
	The World Bank, together with other development banks and FIDIC, start work towards a harmonised set of conditions for DABs
2005	World Bank issues May 2005 Edition of ‘Procurement of Works & Users Guide’. The most significant change is the adoption of FIDIC and DABs.
2005	ICE publishes its <i>DRB Procedure</i> , including an HGCRA-compliant version ¹⁵

The introduction in the 1970s of the limited contractual adjudication procedure is perhaps now only of historical interest. In the UK, the HGCRA was clearly the major turning-point domestically, but also had significant influence internationally in the area of construction dispute resolution.

In the international arena, FIDIC led the way by the introduction of DABs in its 1999 suite of contracts.¹⁶ In respect of the DAB, the relevant FIDIC standard forms include:

- Clauses 20.2-20.8: functions and constitution of the DAB
- Appendix: *General Conditions of Dispute Adjudication Agreement*
- Annex 1: Procedural Rules

9 The Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648: excludes PFI contracts between a public sector authority and a Project Company (amongst others) from Part II of the HGCRA..

10 The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.

11 FIDIC forms and other publications are obtainable via www1.fidic.org/bookshop.

12 AAA, *DRB Guide Specifications*, December 2000, downloadable from www.adr.org.

13 World Bank, *Guidelines: Procurement under IBRD Loans and IDA Credits*, revised August 2006, downloadable from <http://web.worldbank.org>.

14 ICC DB documents downloadable from www.iccwbo.org.

15 ICE, *DRB Procedure* (2005), obtainable via www.thomastelford.com.

16 See note 11 and linked main text.

- *Dispute Adjudication Agreement* (one- or three-person DAB).

FIDIC DAB (Clause 20)

Clause 20 of the FIDIC form deals with claims, disputes and arbitration. Emphasis is placed upon the contractor making its claims during the course of the works and for disputes to be resolved during the course of the works also. Clause 20.1 requires a contractor seeking an extension of time and/or any additional payment to give notice to the engineer ‘as soon as practicable, and not later than 28 days after the event or circumstance giving rise to the claim’.

Some have suggested that the contractor will lose its right to bring a claim for time and/or money if the claim is not brought within the timescale.¹⁷ Under UK law, timescales in construction contracts are generally directory rather than mandatory.¹⁸ However, Clause 20.1 does go on to state that the contractor will lose its right in the event of a failure to notify within a strict timescale.¹⁹ A contractor would therefore be well advised to notify in writing any requests for extensions of time or money claims during the course of the works, within a period of 28 days from the event or circumstances giving rise to the claim.

The real benefit of the DAB comes from it being constituted at the commencement of the contract, so that its members will visit the site regularly and be familiar not just with the project but with the individual personalities involved. They should, therefore, be in the position to issue binding decisions within the period of 84 days from the written notification of a dispute, as required by Clause 20.4.

The DAB is appointed in accordance with Clause 20.2. It could comprise individuals who have been named in the contract. However, if the members of the DAB have not been identified in the contract then the parties are jointly to appoint a DAB ‘by the date stated in the Appendix to Tender’. The DAB may comprise either one or three suitably qualified individuals, the parties’ choice being specified in the Appendix to the FIDIC contract.

The FIDIC Appendix does not provide a default number, but Clause 20.2 states that the parties are to agree if the Appendix does not deal with the matter. If the parties cannot agree, then the appointing body named in the Appendix will decide whether the panel is to comprise one or three members.²⁰ The default appointing authority is the President of FIDIC or a person appointed by the President of FIDIC. The appointing authority is

17 Christopher Seppälä, ‘Claims of the Contractor’, paper given at the ICC conference, *The Resolution of Disputes under International Construction Contracts*, Paris, 6-7 February 2003.

18 *Temloc Ltd v Errill Properties Ltd* 39 BLR 30, 12 Con LR 109, 4 Const LJ 63, CA.

19 *Bremer Handels GmbH v Vanden Avenne-Izegem PVBA* (1978) 2 Lloyd’s Rep 109, CA. Cf *City Inn Ltd v Shepherd Construction Ltd* (2003) SLT 885, Ct Sess (Second Division).

20 Clause 20.3.

obliged to consult with both parties before making its final and conclusive determination.

On most major projects a DAB will comprise three persons. If so, then each party nominates one member for approval by the other. The parties may then agree upon a third, who becomes the chairperson. In practice, parties may propose a member for approval, or more commonly propose three potential members, allowing the other party to select one.

Once two members have been selected, it is then more common for those members to identify and agree upon (with the agreement of the parties) a third member. That third person might become the chairman, although, once again with the agreement of all concerned, one of the initially proposed members could be the chairman.

The terms of FIDIC's *General Conditions of the Dispute Adjudication Agreement* are incorporated by reference by Clause 4 of the *Dispute Adjudication Agreement*, which also determines the retainer and daily fees of each member. The employer and contractor bind themselves jointly and severally to pay the DAB member in accordance with these *General Conditions*. Details of the specific FIDIC contract between the employer and contractor also need to be recorded, as it is from this document that (a) the DAB obtains its jurisdiction in respect of the project; and (b) the employer and contractor agree to be bound by the DAB's decisions.

World Bank DB (Clause 20)

Clause 20 of the World Bank procurement procedures²¹ deals with claims, disputes and arbitration. Clause 20.2 provides that a party shall refer a dispute to adjudication in accordance with Clause 20.4 and that the parties shall appoint a DB by the date in the Contract Data. The DB comprises either one or three people (with three as the default).²² If three, then each party appoints one member and these two then recommend (and the parties agree on) the third, who chairs the DB.²³

Procedural rules

International Chamber of Commerce

The ICC issued its *DB Rules* on 1 September 2004, together with *Standard ICC DB Clauses* and a *Model DB Member Agreement*.²⁴ The three alternatives for operation of a DB within the *ICC Rules* are set out above.

21 See note 13.

22 Clause 20.2.

23 Clause 20.2.

24 See note 14.

Institution of Civil Engineers

The ICE *DRB Procedure* was issued in February 2005.²⁵ The rules offer two choices: Alternative One for use on international projects and UK contracts not subject to the HGCRA; and Alternative Two, which is HGCRA-compliant.

The *Procedure* also contains a model tripartite agreement to be entered by the contractor, employer and DRB member. Each DRB member will enter into a separate agreement. The parties can agree the identity of the DRB member if there is to be only one. If there are to be three, each party may nominate one member for approval by the other party. The parties shall then consult both members and agree upon the third member, who shall be the chairperson. This leaves the traditional arbitration procedures in the contract intact (in the case of Alternative One).

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

American Arbitration Association

The AAA *DRB Guide Specifications*²⁶ provide for an independent DRB to ‘assist in and facilitate the timely resolution of disputes ...’²⁷ The focus of the AAA procedure is on party autonomy: the AAA will help the parties to identify potential members for a DRB but will not appoint them in default. The DRB will carry out its task by issuing written non-binding recommendations, without the power to make binding decisions. Three-part agreements are once again used to bind the parties and each member of the DRB to the Rules and to identify remuneration for each of the members.

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

Appointing a dispute board: contractual procedures compared

The provisions requiring the establishment of a DB must be contained in the contract between the employer and the contractor. The usual provisions require the parties to agree the identity of the board within a limited time, then providing a default appointing mechanism where the parties cannot agree upon the identity of a member, or indeed the entire DB. The contract should also contain a mechanism for replacing board members, as well as a default procedure for replacing those who cannot be replaced by agreement. For example, Clause 20.2 of FIDIC provides:

25 See note 15.

26 See note 12.

27 Rule 1.01 General, D Purpose 1.

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

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

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

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

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

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

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 ... shall have become effective.’

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

The *ICE DRB Procedure* provides that the DRB shall be appointed by the date stated in the contract. If no date is stated, then the DRB shall be appointed within 56 days after the contract is formed.²⁸

The *World Bank Procurement Rules* require that if the DB has not been jointly appointed 21 days before the date stated in the contract, then each party shall nominate one member and the two members then nominate the third.²⁹

Article 7 of the *ICC DB Rules* deals with the appointment of DB members. Article 7.1 provides that the DB is to be established in accordance with the provisions of the contract, or if the contract is signed then in accordance with

28 *ICE DRB Procedure*, Clause 2.

29 *World Bank Procurement Rules*, Clause 20.2.

the Rules, which provide a default appointment procedure. The ICC Rules are therefore subordinate to, but complement, the contract between the parties.

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

‘If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer to the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this sub-clause.’³⁰

The parties may therefore refer any dispute whatsoever that arises in connection with or out of the contract, including the opening up and reviewing of notices and certificates. If the DAB comprises three members, then the DAB is deemed to have received the notice of dispute when it is received by the chairperson alone. This means that the parties can simply direct all of their correspondence to the chairperson, but with copies to the other members, as well as providing a copy to the other party and engineer.³¹

Both the employer and the contractor are obliged to provide additional information and further access to the site and its facilities as the DAB may require in order for the DAB to make its decision. The contractor, notwithstanding that a dispute has been referred to the DAB, is to continue to proceed with the works in accordance with the contract (unless abandoned, repudiated or terminated). Both parties are contractually obliged to properly comply with every decision of the DAB. DAB decisions are therefore immediately mandatory, unless or until revised by an arbitral award, litigation or settlement.

The DAB is obliged to provide its written decision within 84 days after receipt of the reference, which must be reasoned and issued under Clause 20.4 of the contract.

Ideally, therefore, the DB members should therefore be selected, and the DB established, before work commences on site. This is not at all easy in practice, and many DBs are established after the work has commenced, some being established late in the construction cycle, even after the work has been completed. Those DBs that are constituted after the work has been completed are usually only established because a dispute has arisen, the parties feeling compelled to establish a DB in order to resolve the disputes that have been left over until after completion of the project, simply because the contracts require

30 Compare the 1995 FIDIC formulation, where Clause 20 of the Red Book required that all disputes ‘shall be referred in writing to the DAB for its decision’, thus making the DAB a mandatory dispute resolution procedure as a condition precedent to arbitration.

31 FIDIC Clause 20.4 and Procedural Rule 4.

it.³² Whether it is worth constituting a three-person DB to resolve disputes in this sort of context is questionable.

The main benefit of the DB is that the members become familiar with the project during its course. Once the work is completed, the DB members will be no more familiar with the project or the individuals involved within it than an arbitration tribunal. Further, the disputes that arise at the end of or after completion of the project are usually more complicated or substantial and would perhaps more appropriately be referred to a final dispute resolution process such as arbitration.

Selecting dispute board members

The Appendix to the FIDIC *General Conditions of Dispute Adjudication Agreement* provides a *Dispute Adjudication Agreement* which is tripartite – in the sense that it is entered into by the employer, contractor and the sole member (or each of the three individual members) of the DAB. The establishment of the DAB takes effect on the latest of:

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

The last two points reflect the fact that parties are not required to use FIDIC's own *Dispute Adjudication Agreement*, but may instead enter into an effective dispute adjudication agreement of their own drafting.

The obligations and qualities of dispute board members

The engagement of a member for the DAB is a personal appointment. The focus, therefore, is on the individual rather than the organisation that any particular DB member might be employed by. The DRBF *User Guide* takes the view that in order to be eligible for election, a board member must not:

- 1 Have any financial ties to any party either directly or indirectly involved in the contract;
- 2 Be currently employed by any party directly or indirectly in respect of the contract;
- 3 Have been a full-time employee of any party directly involved in the contract (unless the other party consents);
- 4 Have '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';

³² See note 30.

- 5 Have any financial interest in the project or contract (except of course in respect of the DRB services); or
- 6 Have 'any prior substantial involvement in the project, in the judgment of either party.'³³

'Directly involved' means the employer, contractor or joint venture partners in respect of the project. 'Indirectly involved' includes subcontractors, suppliers, designers, architects or other professional service firm or consultant or any party on the project – a relatively wide category. Finally, 'financial ties' include, but are not limited to, any ownership interest, loans, receivables and/or payment.

The DRBF *User Guide* then goes on to provide guidelines for DB members during the course of their service on the DB. They must not:

- a. Be employed, either full-time or as a consultant, by any party that is *directly* involved in the contract, except for service as a DRB member on other contracts.
- b. Be employed, either full-time or as a consultant, by any party that is *indirectly* involved in the contract, unless specific written permission from the other party is obtained.
- c. Participate in any discussion regarding future business or employment, either full-time or as a consultant, with any party that is *directly or indirectly* involved in the contract, except for services as a DRB member on other contracts, unless specific written permission from the other party is obtained.'³⁴

A FIDIC DAB member warrants that he or she is and shall remain impartial and independent of the employer, contractor and engineer. A member is required to promptly disclose anything that might impact upon their impartiality or independence.³⁵

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

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

33 DRBF, *Practices and Procedures, User Guide*, chapter 2, section 2 (2004), downloadable from www.drb.org.

34 See note 33.

35 FIDIC *General Conditions of the Dispute Adjudication Agreement*, Clause 3 (Warranty).

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

Under Clause 5, the employer and contractor are obliged not to request a member to breach any of the obligations set out above. Nor is the employer or the contractor able to appoint a member as arbitrator under the contract or call a member as a witness to give evidence concerning any dispute arising under the contract. Further, the employer and contractor jointly and severally grant immunity to the DAB member against any claims for anything done or omitted to be done in the purported discharge of the member's functions, unless carried out by the member in bad faith.

The AAA *DRB Guide Specifications*³⁶ require DRB members:

- To be neutral
- To be free from any conflict of interest
- To be impartial
- Not to be previously employed or have any financial ties including fee based consultancy within a period of 10 years prior to the award of the contract
- Not to have a prior involvement that might suggest lack of impartiality.

The ICC *DB Rules*³⁷ require independence, and expressly oblige disclosure in writing of any facts or circumstances which might be of such a nature as to call into question the dispute board member's independence in the eyes of the Parties.

Eight key aspects of the obligations of a DB member can be distilled from the rules of FIDIC, ICC, AAA and ICE. These are:

- 1 Neutrality
- 2 Impartiality
- 3 Independence

³⁶ See note 12.

³⁷ See note 14 and linked main text.

- 4 Disclosure
- 5 Qualifications
- 6 Experience
- 7 Availability and
- 8 Confidentiality.

1 Neutrality

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

In practice, a party nominating a member or identifying a list from which a nomination might be made, might indeed hope that the final selection might favour that party, not because they have been proposed by the party or are in fact biased, but because of cultural similarities, professional respect and/or outlook in terms of the type of organisation or their perspective in the marketplace. In this light, one might assume that contractors seek DB members who have been directors of contracting organisations or are engineers who predominantly have worked for contractors, whereas employers might seek engineers from professional practices that tend to advise employers in terms of procurement and provide independent engineers. This view is only based on anecdotes. Research into the actual selection, from a neutrality perspective, would need to be carried out internationally in respect of DBs.

2 Impartiality

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

The leading case in English law is the House of Lords decision in *Porter v Magill*.³⁸ Here a local government auditor found two councillors guilty of wilful misconduct by devising or implementing a policy of targeting designated sales of council property. These sales were in marginal wards, in order to increase the Conservative Party vote in the 1990 local authority elections. As a result the auditor imposed a surcharge on the councillors personally related to the sales. The Court of Appeal allowed the appeal on liability, but the House of Lords restored the auditor's original decision.

The key question, according to the House of Lords, was not whether the councillors were in fact biased, but whether the decision, at the time the decision-maker in question gives it, is such that a fair-minded and independent observer, having considered the facts, might conclude that there was a real possibility that the decision-maker was biased. The test is a useful one in that

38 *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

it draws a distinction between the need to prove actual bias and the appearance of a potential bias based upon the circumstances at the time when the decision was made. In practice, this means that the judge or judges considering the issue of impartiality have to decide whether an independent and fair-minded observer would consider the decision-maker biased, but of course this assessment will be based upon the judge's (or judges') perceptions.

Porter v Magill related to council members, but is equally applicable to tribunals. In respect of judges, the test for apparent bias is whether the circumstances would lead a fair-minded and informed observer to come to the conclusion that there was a real possibility that the tribunal was biased.³⁹ If this principle of judicial impartiality has been, or would be, breached, then a judge would be automatically disqualified from hearing a case or dealing further with the case.

More recently, the Court of Appeal has made it clear that this is not a discretionary case management decision reached by balancing the various factors applicable to the case. If there are any doubts, then the judge must excuse him or herself from further dealings with the case.⁴⁰

In the notorious case involving General Augusto Pinochet, the House of Lords ruled that the links between Lord Hoffmann – who sat on the original panel that ruled to allow General Pinochet's extradition – and the human rights group, Amnesty International, were too close to allow the original panel's verdict to stand.⁴¹ Lord Hoffmann had failed to declare his links with Amnesty International before ruling in the original hearing: he was chairman and a director of Amnesty International Charity Ltd. Lord Hope stated that in view of Lord Hoffmann's links, 'he could not be seen to be impartial'. Although it was not suggested that Lord Hoffmann was actually biased, his relationship with Amnesty International was seen to be such that, he was, in effect, acting as a judge 'in his own cause'. This is then a natural justice point: a central limb of natural justice is that a person cannot be a judge in his or her own cause.

In respect of adjudication, this approach has been applied in *Amec Capital Products Ltd v Whitefriars City Estates Ltd*.⁴² Here Amec applied under Part 8 of the Civil Procedure Rules to enforce an adjudicator's decision. The JCT98 With Contractor's Design form provided for the appointment of a named adjudicator. Clause 30A.3 stated:

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

39 *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, applying *Porter v Magill* (see note 38) and *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, HL. .

40 *AWG Group Ltd (formerly Anglian Water Plc) v Morrison* [2006] EWCA Civ 6, [2006] 1 WLR 1163.

41 *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*: see note 39.

42 *Amec Capital Products Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, [2005] 1 All ER 723, [2005] BLR 1, 96 Con LR 142, (2005) 21 Const LJ 249.

The clause then sets out two further ways to appoint an adjudicator. Appendix 1 provided that the adjudicator was to be a Mr George Ashworth of a particular firm, but no such person of that name worked at the firm. However, a person of a similar name, a Mr ‘Geoffrey’ Ashworth was engaged at that firm. The RIBA appointed a Mr Biscoe as adjudicator, but on 19 September 2003 Judge Humphrey LLoyd QC decided that Mr Biscoe had no jurisdiction and his decision was a nullity. A further notice of adjudication was served, but unfortunately Mr Geoffrey Ashworth had by that time sadly died. The RIBA once again appointed Mr Biscoe.

The issues that arose at the Court of Appeal were:

- 1 The scope of the appointment clause in the contract;
- 2 Whether there was a breach of natural justice by the adjudicator deciding something that he had already decided;
- 3 Whether there was an appearance of apparent bias carrying forward legal advice from the first decision to the second;
- 4 Whether the adjudicator had failed to deal with an issue in respect of Clause 27 in his decision;
- 5 Whether a telephone conversation amounted to an appearance of bias;
- 6 Whether advice in respect of his jurisdiction amounted to an appearance of apparent bias; and
- 7 Whether the possibility of a claim against the adjudicator could amount to the appearance of bias on behalf of the adjudicator.

The Court of Appeal held that the words ‘referred to him’ meant that a dispute had to be referred to the adjudicator before the two further ways of appointing a substitute adjudicator could apply. As the dispute had not been referred to the adjudicator before his death, Clause 30A.3 of the contract did not apply. The contract therefore did not provide for the appointment of an adjudicator in the event that the adjudicator named in the contract was unavailable. The Scheme⁴³ therefore applied and the appointment by the RIBA was valid.

The carrying forward of a decision in respect of principally the same dispute (though the first decision was a nullity) did not in itself create an appearance of bias. Dyson LJ stated:

‘The question that falls to be decided in all such cases is whether the fair-minded and informed observer would consider that the tribunal could be relied on to approach the issue on the second occasion with an *open mind*, or whether he or she would conclude that there was a real (as opposed to fanciful) possibility that the tribunal would approach its task with a closed mind, *predisposed* to reaching the same decision as before,

43 See note 10 and linked main text.

regardless of the evidence and arguments that might be adduced.⁴⁴
[emphasis added]

An adjudicator must approach the question the second time with an ‘open mind’ and consider the evidence submitted in the second referral and should not be ‘predisposed’ to reach the same conclusion. The judge went on:

‘In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. ... It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. ... He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct.’⁴⁵

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

The legal advice that he had received in the first decision did not deal with Clause 27, and therefore an informed third party would not consider that the adjudicator was biased because this issue was not dealt with in the initial legal advice, nor in his decision: there was therefore there was no basis upon which any bias could be found. Whitefriars had not made any submissions on this clause during the adjudication and so could not raise the issue now.

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

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

‘A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. ... The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decision which can

44 See note 42 at paragraph [19].

45 See note 42 at paragraph [20].

affect parties' rights. Procedural fairness does not require that parties should have their rights to make representations in relation to decisions which do not affect their rights, still less in relation to 'decisions' which are nullities and which cannot affect their rights. Since the 'decision' of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make a 'decision' after giving the parties an opportunity to make representations.⁴⁶

Nonetheless the judge warned that it will be appropriate for an adjudicator to allow both parties to make representations before coming to a conclusion about his or her jurisdiction.

Finally, the Court of Appeal considered whether the threat of a claim against the adjudicator for continuing with the adjudication when perhaps the adjudicator did not have jurisdiction might support an allegation of bias. Dyson LJ referred to paragraph 26 of the Scheme,⁴⁷ which provides that an adjudicator is immune from a claim, save in respect of bad faith. He therefore concluded that a fair-minded third party observer would not consider that a threat of litigation against the adjudicator would make the adjudicator biased, because the adjudicator enjoyed immunity from litigation save in exceptional circumstances.

In 2004 the IBA produced its *Guidelines on Conflicts of Interest in International Arbitration*.⁴⁸ These set out the general standards to be attained, and then list examples. The examples are divided between three types of situation: the red list, orange list and green list. The green list sets out situations where no conflict would exist. The orange list provides examples of situations where, from the parties' perspective, there are justifiable doubts as to the arbitrator's impartiality or independence. The red list contains examples of situations where there would be a conflict. That list is then further subdivided between waivable and non-waivable examples; some conflicts can be waived by the parties, but some clearly should not be.

It is, of course, quite feasible that the integrity of an appropriately qualified professional is such that he or she could still act in an impartial manner when acting as a DB member, despite professional relationships. The difficulty here is of course defining the proximity of those professional relationships. The *DRBF User Guide* uses the term 'close professional or personal relationships'.⁴⁹ One may assume that a close professional relationship might affect the judgment of a DB member. While it is probably correct, the difficulty is in defining precisely what a close professional relationship might be. The difficulty of course is that a vague or tenuous professional relationship that is not considered and disclosed, but later discovered, could be used to mount a challenge on the basis of a perception of bias.

46 See note 42 at paragraph [41].

47 See note 10 and linked main text.

48 IBA, *Guidelines on Conflicts of Interest in International Arbitration* (2004); downloadable from www.ibanet.org.

49 See note 33 and linked main text.

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

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

3 Independence

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

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

Article 8 of the ICC *DB Rules*⁵⁰ introduces an obligation of independence. Article 8.1 requires every DB member to be and remain independent of the parties. The members of the DB are required to provide written statements to that effect, as required by Article 8.2:

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

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

⁵⁰ See note 14 and linked main text.

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

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

4 Disclosure

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

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

A duty of disclosure requires a person to disclose all material facts known to them and not to misrepresent any of the material facts. This will include statements which are true but which are misleading because they are incomplete.⁵¹

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

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

The contractor and owner rely on the representation made in disclosure (or lack of it). While an owner and contractor can investigate a potential member

51 *Aaron's Reefs v Twiss* [1896] AC 273, HL.

it will be extremely difficult to identify professional relationships and evaluate the extent of those relationships. This is why the requirement to give full and accurate disclosure is given such a high emphasis.

5 Qualifications

Categories of qualifications will include:

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

Article 8 of the ICC *DB Rules* states:

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

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

6 Experience

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

The blend of qualifications and experience of the three-person DB can provide a powerful combination of decision-making abilities. In this respect the selection of the three-person DB should be more refined than the selection of three arbitrators for an arbitral tribunal. The arbitral tribunal will be hearing a possibly substantial dispute, most usually many years after the end of the project. A three-person DB will be on hand during the course of the project and will need to interact with individuals with key decision-making powers during the course of the project.

Identifying available and appropriate DB members will become more difficult as the use of DBs increases. Those with some experience will be preferred, making it more difficult for those that have not sat as DB members to gain DB

experience. One solution would be the introduction of a mentoring system. In the UK the Association of Independent Construction Adjudicators (AICA) has adopted this approach in order to develop and improve the quality of adjudicators.⁵² Recently qualified adjudicators on the AICA list are assisted by an experienced mentor adjudicator. This approach could be adopted by the international DB appointing bodies. The three-person DB lends itself to such as process, as the more experienced chairperson can guide the two wing members and assist them to develop their DB skills.

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

7 Availability

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

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

8 Confidentiality

Article 9 of the ICC *DB Rules* provides that DB members shall keep confidential any information obtained by the DB member during the course of their activities as a board member. Further, and as a related matter, a DB member is not to act in any judicial, arbitral or similar proceedings relating to any dispute arising from the project. This means that they cannot act as a judge, arbitrator, expert, representative or advisor of any party.⁵³

The duty restricts a DB member from fulfilling certain other roles in respect of the same project that would most likely lead to the perception of bias. The

⁵² See www.aica-adjudication.co.uk.

⁵³ ICC *DB Rules*, Article 9.3.

duty to keep confidential, however, restricts a member's ability to make the full disclosure that might be required in respect of his or her nomination to another DB. Care will be needed to ensure that full disclosure is given without breaching the requirement of confidentiality.

How are board members selected in practice?

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

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

A list of potential attributes, based upon the above factors and a list provided by the DRBF,⁵⁴ should include:

- 1 [Ideally] complete objectivity, neutrality and impartiality as a fact;
- 2 Independence (in the objective, freedom from financial ties, sense);
- 3 No conflict (in other words, passing the 'perception of bias' test, which could be said to be distinct from the fact position in 1 and 2 above);
- 4 Experience with the type of project (for example, experience in the construction of hydro-electric power stations, as distinct from other forms of power station);
- 5 Experience with the types of construction technique (which may be peculiar to that particular project);
- 6 Have eg 10 years experience in a 'senior position';
- 7 Experience with interpretation of contract documentation, the standard forms that might be applicable and sufficient legal understanding to deal with bespoke forms or amendments or interpretation issues;
- 8 Experience in substantive law [desirable, although not necessary for all panel members];
- 9 Experience with the procedural rules of the DB;
- 10 Experienced training and understanding of the DB process;

54 See note 33.

- 11 Experience with the resolution of construction disputes;
- 12 Availability;
- 13 A dedication to the objectives of the DB process;
- 14 Membership of a recognised DB panel;
- 15 A qualification from a recognised DB training centre; and
- 16 Well-developed communication skills, both orally and written.

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

Identifying potential board members

Potential board members could be identified from:

- 1 Existing DB members or other appropriate professionals who might be able to serve as DB members, identified by the employer or contractor or the project team;
- 2 Requests to the employer, contractor or project team organisations in order to see whether any individuals may have experience of appropriate DB members. This may result in a recommendation, which may be that such a person is appropriate or, indeed, inappropriate;
- 3 Contacting one's own professional institution;
- 4 Considering the published lists (or websites) of potential DB members from the DRBF, ICC, FIDIC and/or the ICE [the ICE list in preparation in 2006].

The process of selection

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

The ideal situation is for the employer and contractor to agree upon all three members. This would usually require employer and contractor to identify their own shortlists of individuals and exchange these in order to select and appoint a panel of three.

In an ideal world, at least one of the names on each shortlist would be the same, so that person could perhaps be the chairperson, the two 'wing members' then being agreed from the remaining individuals. This is rarely happens in practice.

Selection of final board members

There are three recognised ways to identify the final board members: (1) the parties select jointly; (2) the parties agree on two and those two nominate the third or the parties select from a range, or (3) the selected two nominate the third.

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

1 Parties' joint selection

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

The parties may decide which of the members is to be the chairperson, or leave that responsibility to the members themselves. There are several advantages in allowing the panel of three to decide who is to be the chair. One apparent advantage is that it will be difficult for any particular member to have allegiance to any particular party. Further, if the board is unable rapidly and easily to agree upon its chair, then it is highly unlikely that the board will be able to resolve difficult construction disputes during the course of the project. One would therefore hope that the board would quickly and easily establish the chairperson without any difficulty.

2 Parties agree on two, those two nominating the third

Each party nominates a member for approval by the other parties. This may be done once again by the exchange of lists and rejections, until two members are approved. Once approved, those two members will then be appointed. The two appointed members will then nominate the third member, who requires the approval of the employer and contractor. The third member then most usually serves as chairperson. This procedure is more likely to lead to a board member being referred to as 'the contractor's representative' or 'the owner's representative'. This method appears to be the most frequently used.

3 Parties select from a range, the selected two nominating the third

The contractor and the employer each propose a list of prospective board members, containing a minimum of three prospective board members. The contractor will then select from the employer's list, while the employer selects from the contractor's list. Difficulties can arise when the entire list is rejected; then a further list must be submitted. The best potential candidates may therefore be lost in this initial round. Once the two board members have been selected, then those board members will, subject to the approval of both

parties, nominate the final board member. Most frequently, this third person serves as chairperson.

Selecting the chair

The chairperson could therefore either be identified by the agreement of the parties, or by agreement by the first two DB members nominated, or by agreement between the three appointed DB members. Ideally, the chairperson should have DB experience, although the majority of DB members acting as chairpersons have most frequently obtained their dispute resolution experience by acting as arbitrators.

Should lawyers be board members?

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

Many involved in DRBs, in the US in particular, take the view that DRBs – and now DABs – are practical dispute resolution procedures to be used during the course of projects, so should comprise construction professionals, most usually engineers. The challenges for DABs and DRBs are, without doubt, different from those faced by an engineer when making decisions during the course of the project. That is not to say that an engineer has an easy task, but a DB is a legalistic and most frequently adversarial process that may lead to a binding decision being imposed on the parties. The key question is not whether a lawyer should be involved, but whether the experience and qualifications of all three members provide a sufficient blend of appropriate skills that is the best for the project in question.

Constituting the board: back to the contract

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

Default appointments

All contracts that include contractual DB provisions should provide a default appointment mechanism, should the parties be unable to agree on the identity of any or all of the board members. The final paragraph of Clause 20.3 of FIDIC provides that that person named in the Appendix to the Tender may appoint ‘after due consultation with both parties’ any member of the dispute

adjudication board. An appointment would be final and conclusive. The default procedure applies in four situations:

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

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

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

The default procedure in the ICC *DB Rules* is triggered either by the signing of the contract or a performance of the contract. In any case either party may request the ICC to appoint the DB member within 30 days. A similar appointment procedure is provided in Article 7.4 in respect of a three-person DB, which anticipates that the parties are to jointly appoint the first two DB members. In default of appointment of one or both of those members, then either party may once again ask the ICC to appoint within 30 days of the same two trigger events.

Article 7.5 provides that the third DB member is to be proposed by the two appointed DB members within 30 days of the appointment of the second DB member. The parties are then to appoint the DB member within 15 days from receipt of the proposal. If they do not, or the two appointed DB members fail to propose a third member, then either party can request the ICC to appoint the final DB member. Finally Article 7.5 provides that the third DB member is to act as the chairman 'unless the DB members agree upon another chairman with the consent of the Parties'.

The ICE *DRB Procedure* default appointment system applies in the following situations:⁵⁵

⁵⁵ ICE *DRB Procedure* (see note 15), Clause 3.1.

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

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

The AAA adopts a different approach. The DRB 'assistance' terms provide:

- 1 Within 14 days of the effective date of the contract, the contractor and the owner file a request with the AAA to identify a list of potential DRB members;
- 2 The AAA arranges a telephone conference with the parties to identify the qualifications required of the DRB members;
- 3 The AAA produces a list for review within 14 days of the telephone conference;
- 4 Those on the list carry out disclosure;
- 5 The owner and contractor each have 14 days to propose a person from the list; and
- 6 There are then 14 further days for the owner and contractor to accept the other party's proposal.

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

The AAA does not at any stage impose its choice on the parties. That is because under the AAA process the DRB makes recommendations that the owner and contractor may adopt; it does not give binding decisions. There would therefore be little benefit in imposing a panel on the parties. The owner and contractor need to agree the identity of a board that they respect in order for the parties to feel compelled to accept the recommendations of the DRB.

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

FIDIC 1999 editions	The President of FIDIC, or a person appointed by the President
World Bank	The appointing entity, or an official named in the Contract Data
ICE <i>DRB Procedure</i>	The ICE
ICC <i>DB Rules</i>	The ICC

Replacing dispute board members

A DB member might need to be replaced as a result of death, disability, termination or resignation.

Clause 20.2 of FIDIC states that the contract with a board member can only be terminated by the mutual agreement of both parties. The FIDIC *DAB Agreement* provides that the employer or contractor may, acting jointly, terminate the DAB by giving 42 days' notice.⁵⁶ If the member fails to comply with the Agreement, or the employer or contractor fails to comply with it then those affected may terminate the tripartite Agreement. If a member breaches the Agreement then he or she will not be entitled to any further fees. Any disputes arising under the tripartite Agreement are to be dealt with by ICC arbitration comprising a single arbitrator.⁵⁷

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

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

Article 7.6 of the ICC *DB Rules* provides:

‘When a DB Member has to be replaced due to death, resignation or termination, the new DB Member shall be appointed in the same manner as the DB Member being replaced, unless otherwise agreed by the Party. All actions taken by the DB prior to the replacement of a DB Member shall remain valid. When the DB is composed of three DB Members and one of the DB Members is to be replaced, the other two shall

⁵⁶ Clause 7 (Termination).

⁵⁷ Clause 9 (Disputes).

continue to be DB Members. Prior to the replacement of the DB Member, two remaining DB Members shall not hold hearings or issue determinations without the agreement of all of the parties.’

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

Similar provisions regarding termination exist in the *ICE DRB Procedure*: a DB member’s appointment may be terminated by mutual agreement of the parties by giving the member 84 days’ notice.⁵⁸

Selling one’s services

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

The initial dispute board meeting

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

The Annex to the General Conditions of the *FIDIC Dispute Adjudication Agreement* sets out procedural rules for the DAB. The DAB is to visit the site ‘at intervals of not more than 140 days’ and should visit the site during critical construction events. Consecutive visits should not be less than 70 days apart.⁵⁹ The timing and the agenda for each site visit should be agreed between the DAB and the parties.⁶⁰

In practice the DAB sets out the agenda, the chairperson putting it to the parties, and unless an objection is received from either of the parties the board then proceeds upon that basis. At the conclusion of the site visit, the DAB is to prepare a report setting out its activities during the site visit and identifying those individuals who attended the site visit.⁶¹

Clause 4 of the Annex requires the parties to furnish the DAB with a complete copy of the contract, progress reports, variation instructions, certificates and

58 *ICE DRB Procedure* (see note 15), Clause 2.6.

59 Annex, Procedural Rule 1.

60 Annex, Procedural Rule 2.

61 Annex, Procedural Rule 3.

other documents which are ‘pertinent to the performance of the Contract’, and communications between the DAB, employer and/or contractor are to be copied to the other party and all the members of the DAB.

Clause 6 of the General Conditions of the *Dispute Adjudication Agreement* deals with payment. There are two main elements to payment. The first is the retainer fee, which is paid on a monthly basis in consideration for the member being available for site visits and hearings, becoming conversant with the project and providing general services. The second aspect of the fee comprises a daily payment for travelling to and from the site (a maximum of two days travelling in each direction), as well as for each day spent working on site, the hearings, preparing decisions and reading submissions. Reasonable expenses together with taxes properly levied are then to be paid in addition. The retainer fee is paid from the last day of the month in which the DAB becomes effective until the last day of the month in which the taking-over certificate is issued for the whole of the works. After that date, the retainer fee is reduced by 50% until the DAB is terminated or a member resigns.

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

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

If the contractor does not pay, then the employer is obliged to pay the amount due. If a member has not received payment within 70 days from receipt of invoice by the contractor, then that member may suspend his or her services until the payment is received; and/or resign.

Annex Clause 7 (Procedural Rules) states that the DAB has the power to act inquisitorially. Further, the DAB is to establish the procedure before deciding a dispute and may refuse admission to the hearings and proceed in the absence of any party who has received notice of the hearing. The DAB may also decide upon its own jurisdiction, conduct any hearings as it thinks fit, take the initiative and ascertain the facts, make use of its own specialist knowledge, decide upon the payment of interest if any, provide provisional or interim relief, as well as open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer.⁶²

62 Annex, Procedural Rule 8.

Once a hearing has been concluded, the DAB meets in private in order to discuss and prepare its decision.⁶³ Decisions should be reached unanimously, but if this ‘proves impossible’, then a decision may be made by the majority. In practice, a single decision is usually issued by the DAB: a majority decision and a further section where the minority member sets out his or her written report. If a member fails to attend the hearing then the other two members may proceed to a unanimous decision, unless the employer and contractor agree otherwise or the absent member is the chairperson and he or she instructs the other members not to proceed. The contractor and employer could of course ask the other two members to proceed and make a unanimous decision.⁶⁴

The move towards legislation for international adjudication

The legislation in the UK, and other jurisdictions introducing adjudication, has merely dealt with the domestic position. However, it has been radically suggested that adjudication legislation could be provided by a two-part statute.⁶⁵ The first part would deal with the domestic territorial position, whilst the second part could provide for adjudication in respect of a construction contract anywhere in the world.

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

Any international adjudication statute should bear the following points in mind:

- 1 Be drafted on a ‘minimum interference, maximum enforceability’ basis;
- 2 Adopt the New York Convention for the purposes of enforcement;
- 3 Provide for the local courts to identify an adjudicator or nominate an adjudicator-nominating body in the appropriate part of the world. This could be done by a judge on a documents only (email) basis;
- 4 Provide a limited ability for challenges. There would always be the ability to challenge on the basis of no jurisdiction, but how restricted should challenges be based upon grounds of natural justice?

63 Annex, Procedural Rule 9(a).

64 Annex, Procedural Rule 9(c).

65 Robert Fenwick Elliott.

- 5 A decision would be binding, unless or until subsequent arbitration, litigation or settlement; and
- 6 Detailed procedural rules would need to be included.

The advantages of such an approach would be that international projects could make use of adjudication procedures in any country supported by a competent court system – not always the case in some developing countries where considerable construction projects are being carried out. Further, the parties could choose a particular adjudication system that appears to be more effective than others, or a system whose procedures appear to suit their project or their needs to a greater extent than their domestic adjudication process, if any.

Conclusions

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

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

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Appendix – PROCEDURAL RULES COMPARED

	AAA	FIDIC Red Book	ICC	ICE	World Bank
Who appoints?	Parties, from a list provided by AAA – <i>1.02</i>	Parties, by date in appendix to tender – <i>Clause 20.2</i>	Parties, in accordance with contract or if contract is silent, in accordance with ICC Rules – <i>Article 7(1)</i>	Parties, by date in contract data; if no date stated, then within 56 days after contract formed – <i>Rule 2.2</i>	Parties, by date in contract data – <i>Clause 20.2</i>
How?	Each party nominates 1 member – <i>1.02</i> .	Jointly, by date in appendix to tender <i>or</i> each nominates 1 member – <i>Clause 20.2</i>	Jointly, for sole member DBs; each party nominates 1 member for 3-member DBs – <i>Article 7(3)</i>	For 1 member DB, by agreement between parties; for 3 member DB, each party nominates 1 member – <i>Rules 2.3 and 2.4</i>	Jointly, 21 days before date in contract data or after this time, each nominates one member – <i>Clause 20.2</i>
Who appoints chair?	2 members nominate chair and parties approve – <i>1.02</i>	Members nominate chair and parties agree – <i>Clause 20.2</i>	2 members nominate chair and parties agree – <i>Article 7(5)</i>	2 members nominate chair and parties agree – <i>Rule 2.4</i>	2 members nominate chair and parties agree – <i>Clause 20.2</i>
By when?	Within 14 days after receipt of list of persons from AAA – <i>1.02</i>	By date in Appendix to Tender – <i>Clause 20.2</i>	Within 30 days after appointment of 2nd DB member – <i>Article 7(5)</i>	Date specified in contract data or if no date is specified, within 56 days after contract formed – <i>Rule 2.1</i>	21 days or less before date stated in contract data – <i>Clause 20.2</i>
How do you replace Board?	Either party may object for cause to AAA; if, for any reason a Board member is unable to perform duties of office, AAA may declare office vacant – <i>1.02</i>	<ol style="list-style-type: none"> 1. On a member's: <ul style="list-style-type: none"> - death - disability - resignation - termination of appointment. 2. Contractor and employer acting jointly – <i>Clause 20.2</i> 	<p>On a member's:</p> <ul style="list-style-type: none"> - death - resignation - termination of appointment <p>– <i>Article 7(6)</i></p>	<ol style="list-style-type: none"> 1. On a member's: <ul style="list-style-type: none"> - death - disability - resignation 2. Parties agree and give member 84 days notice of termination <p>– <i>Rules 2.6 and 2.7</i></p>	<ol style="list-style-type: none"> 1. On a member's: <ul style="list-style-type: none"> - death - disability - resignation - termination of appointment. 2. Contractor and employer acting jointly <p>– <i>Clause 20.2</i></p>
Replacing Board	As original appointment procedure – <i>1.02</i>	As original appointment procedure – <i>Clause 20.2</i>	Same manner as replaced DB member – <i>Article 7(6)</i>	As original procedure – <i>Rule 2.8</i>	As original appointment procedure – <i>Clause 20.2</i>

	AAA	FIDIC Red Book	ICC	ICE	World Bank
Default appointment	No default procedure	<p>Third party can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> - for 1-member DBs, if parties fail to agree by date in contract data - for 3-member DBs, if either party fails to nominate member by date in contract data - chair: parties fail to agree on appointment by date in contract data - fail to replace within 42 days of death, disability, resignation or termination <p>– <i>Clause 20.3</i></p>	<p>ICC can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> - for 1-member boards: if parties fail to appoint with 30 days after signing contract or within 30 days after commencement of any performance of contract, whichever occurs earlier - for 3-member boards: if either party fail to appoint one of both DB members with 30 days after signing of contract or within 30 days after commencement of any performance under contract, whichever occurs earlier <p>– <i>Article 7</i></p>	<p>Third party can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> - for 1-member DBs: if parties fail to agree by date in contract data - for 3-member DBs: if either party fails to nominate a member or fails to approve a nominated member by date in contract data - chair: parties fail to agree on appointment by date in contract data - fail to agree upon replacement within 42 days after existing member’s appointment terminated - there is no DRB in place for any reason <p>– <i>Rule 3</i></p>	<p>Third party can appoint if DB not appointed by parties:</p> <ul style="list-style-type: none"> - for 1-member DBs: if parties fail to agree by date in contract data - for 3-member DBs: if either party fails to nominate a member or fails to approve a nominated member by date in contract data - chair: parties fail to agree on appointment by date in contract data - fail to replace within 42 days of death, disability, resignation or termination. <p>– <i>Clause 20.3</i></p>
Who appoints in default?	n/a	Person named in contract data after consultation with both parties – <i>Clause 20.3</i>	ICC	ICE, within 5 days of request of either/both parties (for HGCRA-affected projects) and within 14 days of request of either or both parties (for international projects and UK contracts not subject to HGCRA) – <i>Rule 3</i>	Appointing entity or official named in contract data upon request of either or both parties and after consultation with parties – <i>Clause 20.3</i>

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