
McGill Journal of Dispute Resolution



Revue de règlement des différends de McGill

Volume 5 (2018-2019), Number 3

Article

**On Construction Adjudication, the
ICC Dispute Board Rules, and the
Dispute Board Provisions of the
2017 FIDIC Conditions of Contracts**

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On Construction Adjudication, the ICC Dispute Board Rules, and the Dispute Board Provisions of the 2017 FIDIC Conditions of Contracts

Volker Mahnken*

Dispute Boards ('DBs') have become relevant as a means of dispute avoidance and settlement in large infrastructure and plant projects. Peculiar features of DBs are that they are set-up permanently for the duration of the project, that they issue recommendations or preliminarily binding decisions based on summary proceedings, and that they consist of lawyers and non-lawyers. This article briefly describes their development over the last several decades and also considers the relevance of statutory construction adjudication introduced by several common law jurisdictions. It then discusses the Dispute Board Rules of the International Chamber of Commerce, which were revised in 2015, and the Dispute Board provisions of the FIDIC Conditions of Contract, the second edition of which came out in late 2017. This includes their comparison with each other and other publicly available Dispute Board rules, and an evaluation. Finally, it assesses the concepts of Dispute Boards and construction adjudication generally.

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Les Dispute Boards ('DB') sont désormais un outil précieux afin de prévenir et de régler les différentes disputes au sein de projets de réalisation de grandes infrastructures et d'usines. Parmi leurs caractéristiques les plus importantes, il faut souligner la durée de vie prolongée, qui s'étend durant toute la durée du projet, ainsi que la nature des décisions préliminaires rendues (qui sont basées sur une procédure sommaire) et le fait qu'elles soient composées tant par des juristes que par des non-juristes. Cet article se penchera sur la naissance et le développement des Dispute Boards au cours des dernières décennies, ainsi que sur la législation en matière de règlement des litiges de construction, phénomène visible dans plusieurs pays de common law. Par la suite, l'auteur traitera des règles du Dispute Board de la Chambre de Commerce Internationale (CCI), qui fut révisées en 2015, et les dispositions du Dispute Board des Conditions Contractuelles du FIDIC, dont la deuxième édition est sortie en fin 2017. L'auteur évaluera ces dernières dispositions et les comparera avec d'autres règles des Dispute Boards publiquement disponibles. L'auteur s'attardera finalement sur le règlement CCI, et sur les notions de Dispute Board et les notions de litiges de construction.

I. Introduction

Shortcomings of litigation and arbitration proceedings, especially their duration and considerable cost, have meant Dispute Boards ('DBs') have gained popularity as a means of dispute avoidance and settlement in large construction projects over the past several decades. A number of international dispute settlement institutions now offer DB rules. The Fédération Internationale des Ingénieurs-Conseils ('FIDIC'), for instance, has been using DBs since the 1990s, and revised the dispute settlement provisions of its conditions of contract in late 2017. The International Chamber of Commerce ('ICC') introduced its DB Rules in 2004 and revised them in 2015.

This article explains the characteristics of DBs and compares the ICC DB Rules and the FIDIC DB provisions. It then describes and assesses the novelties of the 2015 ICC DB Rules, the 2017 FIDIC DB provisions, and DBs generally.

II. The Development of Dispute Boards

A. Dispute Review Boards as a Starting Point

Dispute Review Boards ('DRBs'), also referred to as Dispute Resolution Boards, originated in the United States.¹ Though it had another designation, some regard the 1960s Joint Consulting Board set up during the Boundary Dam project in Washington State as the first DRB.² In the 1970s, a DRB was also installed for the second bore of the Eisenhower Tunnel in Colorado.³ The first DRB outside the US was constituted at the beginning of the 1980s for the El Cajon hydropower project in Honduras.⁴

Since their inception, DRBs have been used primarily in large infrastructure projects where there can be conflicts abound. Issues typical to these construction disputes are whether the quality of the contractor's work

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1 See e.g. Dispute Resolution Board Foundation (DRBF), "DRBF Practices and Procedures", available online at: www.drb.org/manual_access.htm [DRBF Manual].

2 Robert M Matyas et al., *Construction Dispute Review Board Manual* (New York: McGraw-Hill, 1996) at 8; Cyril Chern, *Chern on Dispute Boards*, 3rd ed (Oxford: Wiley-Blackwell, 2015) at 11.

3 Matyas, *supra* note 2 at 10; Chern, *supra* note 2; American Society of Civil Engineers, *Avoiding and Resolving Disputes during Construction: Successful Practices and Guidelines* (New York: ASCE, 1991) at 34 [*Avoiding and Resolving Disputes*].

4 *Avoiding and Resolving Disputes*, *supra* note 3 at 35; Chern, *supra* note 2 at 9.

is sufficient (pursuant to the contractual specification) and whether, in the case of a time and/or cost overrun, the contractor is entitled to an extension and/or additional remuneration or compensation.⁵ The idea behind DRBs is to avoid expensive and time-consuming litigation or arbitration, the conclusion of which normally comes too late to be considered during project implementation.⁶ Expedient dispute resolution needs promote project implementation, which can be jeopardized by long-lasting disputes.

Although not a set of rules for DRB proceedings but rather a best practice guide, the usual characteristics of DRBs are captured well by the Dispute Resolution Board Foundation ('DRBF') *Practices and Procedures Manual*, as well as the American Arbitration Association ('AAA') DRB Rules, which as opposed to the former are a set of rules for DRB proceedings.⁷ While dispute settlement mechanisms are typically used only after the dispute has arisen, a DRB is set up at the beginning of the project and thus prior to any dispute.⁸ A DRB normally consists of three members, but some have only one.⁹ Requisite qualifications of DRB members are not mentioned in AAA DRB Rules. Usually, a DRB either consists entirely of non-lawyers (often engineers), or a lawyer as chairperson and two non-lawyers.¹⁰ The involvement of non-lawyers as neutrals in construction disputes can be very helpful since these often entail non-legal issues.

In the US, some DRB proponents are of the view that lawyers should not be involved in DRB proceedings or be DRB members altogether.¹¹ They argue that the involvement of lawyers in DRB proceedings makes these adversarial, that the focus turns to legal issues, and that

5 Jane Jenkins, *International Construction Arbitration Law*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2014) at 32 ff.

6 See Paul Hobeck, Volker Mahnken & Max Koebeke, "Time for Woolf Reforms in International Construction Arbitration" (2008) 11:2 Intl Arb L Rev at 84.

7 DRBF Manual, *supra* note 1; see also American Arbitration Association, "Dispute Resolution Board (DRB) Operating Procedures," available online at: <https://www.adr.org/sites/default/files/document_repository/Construction_DRB_Operating_Procedures.pdf> [AAA DRB OP]; American Arbitration Association, "DRB Hearing Rules and Procedures" [AAA DRB HRP], available online at: <https://www.adr.org/sites/default/files/document_repository/Construction_DRB_Hearing_Rules_Procedures.pdf>; American Arbitration Association, "Dispute Resolution Board Guide Specifications," available online at: <https://www.adr.org/sites/default/files/document_repository/AAA%20Dispute%20Resolution%20Board%20Guide%20SPECIFICATIONS.pdf> [AAA DRB GS]. All are in effect as of 1 December 2000.

8 DRBF Manual, *supra* note 1 at art 2.2.1.

9 AAA DRB GS, *supra* note 7 at arts 1.01(A)(5), 1.02(D); DRBF Manual, *supra* note 1 at art 2.11.3.7.

10 DRBF Manual, *supra* note 1 at art 2.2.3.

11 See Robert Smith, "Dispute Review Boards: Resolving Construction Disputes in Real

the use of common sense, which should be the basis of DB proceedings and DRB recommendations, but which lawyers are ostensibly not able to use, will be neglected.¹² While this scepticism may not be completely unjustified, it has nevertheless become quite common in recent years for the president of a DRB to be a lawyer.

It is also quite normal that all three DRB members—requisitely independent and impartial—are chosen unanimously, or at least with the consent of all parties.¹³ This contrasts with other dispute settlement mechanisms like arbitration, where each party normally selects one arbitrator and the chosen arbitrators select the presiding arbitrator. The DRB selection method works because it is much easier for the parties to agree on appropriate candidates prior to the existence of any dispute, where there is less distrust.

Time limits are imposed on various phases of the proceedings. These function to ensure that the dispute is limited to a few months—far shorter than construction litigation or arbitration proceedings, which often take years.¹⁴ Some alternative dispute resolution ('ADR') mechanisms only appoint a neutral third party after the dispute has arisen, and time is lost because the selection process is protracted and complicated by the fact that there is a conflict leading to distrust between parties. DRB members, on the other hand, are positioned to act quickly, like a fire brigade or a rapid deployment force, since they are appointed before a dispute arises. DRBs further expedite the dispute resolution process because its members familiarize themselves with the project prior to disputes, for example, by reviewing contracts and correspondence, and via occasional site visits.¹⁵ Getting up to speed is therefore unnecessary when a dispute arises.

Unlike US-style litigation, DRBs are largely in charge of case management and the conduct of the hearing, reducing the role of the parties and their counsel. There is no witness cross-examination, for example.¹⁶ DRB proceedings are also less formal than court or arbitration pro-

Time" in *American Arbitration Association Handbook on Construction Arbitration and ADR*, 2nd ed (Huntington, New York: JurisNet LLC, 2010) 459 at 463 [*AAA Handbook*]; Gwyn Owen and Brian Totterdill, *Dispute Boards: Procedures and Practice* (London: Thomas Telford Books, 2008) at 32; Matyas, *supra* note 2 at 47ff.

12 Chern, *supra* note 2 at 223.

13 DRBF Manual, *supra* note 1 at arts 1.6, 2.2.4; AAA DRB GS, *supra* note 7, art 1.02(B)(2)(a); AAA DRB GS, *supra* note 7 at art 1.02(A)(1).

14 See e.g. AAA DRB HRP, *supra* note 7 at arts 4.0, 17.0.

15 AAA DRB OP, *supra* note 7 at arts 4.0–7.0; AAA DRB GS, *supra* note 7 at arts 1.03 (B)-(C).

16 AAA DRB HRP, *supra* note 7 at arts 2.0, 3.0, 9.0, 10.0, 12.

ceedings, and there is no pre-trial discovery. DRBs issue non-binding recommendations that can become contractually binding if no party files a timely notice of dissatisfaction.¹⁷

An objective of DRBs is dispute prevention or avoidance. The DRB may act pre-emptively through informal means if there is a disagreement between the parties to avoid the escalation of a disagreement into a dispute.¹⁸

DRBs have no basis in statutory law. They are creatures of contract, and to be effective they thus often require thorough contractual provisions as well as the exhaustive procedural rules of dispute settlement institutions.

B. Statutory Construction Adjudication in the UK

The UK has faced similar problems as the US regarding construction disputes but has taken a different route to developing a solution.¹⁹ In 1996, it established a statutory scheme for construction adjudication via the *Housing Grants, Construction and Regeneration Act* ('HGCRA'), which became effective in 1998.²⁰ The HGCRA is supplemented by the *Scheme for Construction Contracts of 1998*²¹, which was amended in 2011.²² Prior to these enactments, construction adjudication provisions were provided for contractually via standard form construction contracts.²³

17 AAA DRB GS, *supra* note 7 at art 1.04(J)(1); DRBF Manual, *supra* note 1 at art 2.8.1.

18 AAA DRB GS, *supra* note 7 at art 1.03(C)(2); DRBF Manual, *supra* note 1 at arts 2.3.1(8), 2.3.6, 2.4.

19 UK, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry, *Constructing the Team* by Sir Michael Latham (London: Her Majesty's Stationary Office, 1994) at 87ff [*Constructing the Team*]. This report formed the basis for statutory adjudication under the *Housing Grants, Construction and Regeneration Act 1996* (UK).

20 *Housing Grants, Construction and Regeneration Act 1996* (UK), c 53, ss 104–08 [*Housing Grants Act*]. See also Jenkins, *supra* note 5 at 65 ff; Chern, *supra* note 2 at 44ff; Andrew Burr, "Introduction and the United Kingdom" in Andrew Burr, ed, *International Contractual and Statutory Adjudication* (New York: Informa Law from Routledge, 2017) 1 at 18.; Darryl Royce, *Adjudication in Construction Law* (New York, Informa Law from Routledge, 2016) at 2; Dominique Rawley et al., *Construction Adjudication and Payments Handbook* (Oxford: Oxford University Press, 2013) at 58-97.

21 *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 1998/649 [*Construction Contracts Regulations*].

22 *The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011*, SI 2011/2333.

23 See James P. Groton, Robert A. Rubin & Bettina Quintas, "Comparing Dispute Review

Strictly speaking, statutory construction adjudication is not mandatory, but it is only to a limited extent possible to opt out of or modify.²⁴ Section 108 HGCRA allows the parties to a construction contract to provide for adjudication, subject to certain conditions. If they do not, each party is entitled to use the adjudication proceeding provided for in the Scheme.²⁵ The time limit for dispute resolution is even narrower than in DRB proceedings, as adjudication proceedings may only take up to 28 days (but may be extended to 42 days with the consent of the referring party).²⁶ Usually, there is only one adjudicator instead of a three-person panel. The adjudicator can be a lawyer or non-lawyer (for example, an engineer or quantity surveyor). Unlike a DRB, he or she is usually appointed *ad hoc*, after the dispute has arisen, by an adjudicator nominating body instead of the parties. The adjudicator's decision is preliminarily binding on the parties²⁷ (rather than a mere recommendation) until a final determination by a court or arbitrator. This has been helpful for the adjudication concept since English courts accepted that adjudicator decisions could be enforced via summary judgment.²⁸

Published adjudication reports²⁹ suggest that annually there are between 1000 and 2000 adjudication proceedings in the UK.³⁰ Claims typically range between £10,000 and £500,000, and only a small number exceed £500,000.³¹ Normally, proceedings are initiated by the principle

Boards and Adjudication" in *AAA Handbook*, *supra* note 11 at 514. See also *Constructing the Team*, *supra* note 19.

24 Rawley, *supra* note 20 at 88.

25 See *Housing Grants Act*, *supra* note 20 at ss 104–05, 108(5).

26 *Ibid* at ss 108(2)(c)–(d). See also *Construction Contracts Regulations*, *supra* note 21 at s 19.

27 *Housing Grants Act*, *supra* note 20 at s 108(3); see also *Construction Contracts Regulations*, *supra* note 21 at s 23(2).

28 *Macob Civil Engineering Ltd v Morrison Construction Ltd*, [1999] EWHC 254 (TCC); see also Rawley, *supra* note 20 at 217, 224.

29 Since 2014, adjudication reports have been issued by CDR and the Adjudication Society covering the period between May 2010 and April 2015. J L Milligan and L H Cattanach, *Report No. 14*, on behalf of the Adjudication Society, (Glasgow: Construction Dispute Resolution, April 2016), available online at: <<https://www.adjudication.org/sites/default/files/Report%2014%20April%202016%202.pdf>>; J L Milligan and L H Cattanach, *Report No. 13*, (Glasgow: Construction Dispute Resolution, October 2014), available online at: <<https://www.adjudication.org/sites/default/files/FINAL%20REPORT%2013.pdf>>. Originally, the Glasgow Caledonian University issued adjudication reports (nos. 1 – 12) for the period from 1998 to April 2010; see Ian Trushell et al., *Research Analysis of the Progress of Adjudication Based on Returned Questionnaires from Adjudicator Nominating Bodies (ANBs) and from a Sample of Adjudicators* (Glasgow: Glasgow Caledonian University, 2012). For earlier reports, see The Adjudication Reporting Centre, *Adjudication Reports*, available online at: <www.gcu.ac.uk/ebe/businessservices/adjudicationreports/>.

30 Milligan & Cattanach, *Report No. 14*, *supra* note 29 at 4.

31 *Ibid* at 10.

contractor against the customer, or by a subcontractor against the main contractor.³² These have apparently had a chilling effect on the number of construction litigation and arbitration cases in England.

Other common law jurisdictions like Australia,³³ New Zealand,³⁴ Singapore,³⁵ Malaysia,³⁶ and Ireland³⁷ have introduced statutory construction adjudication³⁸ closely resembling the UK model. Ontario is the first Canadian province to initiate the process of introducing statutory construction adjudication (described briefly in V).

C. The DAB as a Merger of the DRB & Construction Adjudication Concepts

The Fédération Internationale des Ingénieurs-Conseils—the international association of consulting engineers based in Geneva—has combined the idea of DRBs and adjudication in its Conditions of Contract. In the FIDIC Orange Book of 1995,³⁹ a Dispute Adjudication Board

³² *Ibid* at 11.

³³ Royce, *supra* note 20 at 212; Samer Skaik, “Australia: the East Coast model with New South Wales as the principal legislation” in Burr, *supra* note 20 at 34–35.

³⁴ Royce, *supra* note 20 at 249; Rebecca Saunders, “New Zealand” in Burr, *supra* note 20 at 250.

³⁵ Royce, *supra* note 20 at 256; S. Magintharan, “Singapore” in Burr, *supra* note 20 at 280.

³⁶ Royce, *supra* note 20 at 262; S. Magintharan, “Malaysia” in Burr, *supra* note 20 at 219.

³⁷ John Lyden “Ireland” in Burr, *supra* note 20 at 207.

³⁸ For some of these jurisdictions, statistics are available online. See e.g. New South Wales Government, Finance & Services, *Building and Construction Industry Security of Payment Act 1999: Adjudication Activity in New South Wales*, Annual Report 2015/16, (2016), available online at: <http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/Tradespeople/Adjudication_annual_report_2015_2016.pdf>; Queensland, Queensland Building and Construction Commission, *Monthly Adjudication Statistics*, available online at: <www.qbcc.qld.gov.au/adjudication-monthly-statistical-reports>; South Australia, Small Business Commissioner, *Adjudication Results*, available online at: <https://www.sasbc.sa.gov.au/security_of_payment/adjudication-results>; Victorian Building Authority, *Annual Adjudication Activity Statistics Report*, available online at: <<http://www.vba.vic.gov.au/practitioners/security-of-payment/adjudication-activity-statistics>>; Western Australia, Department of Commerce, *Report of the Building Commissioner for the Financial Year 30 June 2015*, (2015), available online at: <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca_annual_report_2014-2015.pdf>; New Zealand, Building Disputes Tribunal, *Current Trends in Adjudication*, available online at: <www.buildingdisputestribunal.co.nz/site/buildingdisputes/files/BuildLaw/Issue%202/CURRENT%20TRENDS%20IN%20ADJUDICATION%20revised.pdf>.

³⁹ Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for Design-Build and Turnkey* (Lausanne: FIDIC, 1995).

(‘DAB’) was included.⁴⁰ In 1996, it supplemented the then current edition of the Red Book with DAB provisions, which could be used by the parties on an opt-in basis. Earlier versions of the FIDIC Conditions of Contract provided that an engineer had to render decisions on a preliminary basis in disputes between the employer and the contractor. In theory, engineers were supposed to be neutral, but since they only had contracts with the employer many contractors regarded them as being biased. The FIDIC therefore established DABs in its 1999 Conditions of Contract⁴¹ as an ADR mechanism preceding the arbitration proceeding under the contract, which means that FIDIC uses escalation or multi-tier clauses in respect of dispute settlement.⁴²

Under the FIDIC Red Book⁴³, the DAB was permanent. The same applied to the DAB under the FIDIC Gold Book.⁴⁴ However, the DABs under the 1999 Yellow⁴⁵ and the Silver Book⁴⁶ were not permanent and were only set up *ad hoc* when a dispute arose.

The remainder of the DAB provisions in the various FIDIC Conditions of Contract largely resemble one another. The DAB normally consists of three members,⁴⁷ its decisions are preliminarily binding,⁴⁸ and these become finally binding if no timely notice of dissatisfaction is filed.⁴⁹ The time

40 *Ibid* at ss 20.3–20.4 GC. See also Owen & Totterdill, *supra* note 11 at 19.

41 See e.g. Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for Construction*, 1st ed (Geneva: FIDIC, 1999)[FIDIC Red Book 1999]; Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for Construction*, 2nd ed (Geneva: FIDIC, 2017) [FIDIC Red Book 2017]; Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for Plant and Design-Build*, 1st ed (Geneva: FIDIC, 1999)[FIDIC Yellow Book 1999]; Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for Plant and Design-Build*, 2nd ed (Geneva: FIDIC, 2017); Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for EPC/Turnkey Projects*, 1st ed (Geneva: FIDIC, 1999)[FIDIC Silver Book 1999]; Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for EPC/Turnkey Projects*, 2nd ed (Geneva: FIDIC, 2017); see also Murray Armes, “Fédération Internationale des Ingénieurs-Conseils (FIDIC) Dispute Board Rules” in Burr, *supra* note 20 at 160.

42 See generally Jan-Michael Ahrens, “Escalation Clauses—Stairway to Heaven or Highway to Hell?” in Christoph Müller & Antonio Rigozzi, eds, *New Developments in International Commercial Arbitration* (Zurich: Schulthess Juristische Medien AG, 2010) 173.

43 FIDIC Red Book 1999, *supra* note 41 at s 20.2 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.1.

44 Fédération Internationale des Ingénieurs-Conseils, *Conditions of Contract for Design, Build and Operate Projects* (Geneva: FIDIC, 2008) at ss 20.3, 20.10 GC [FIDIC Gold Book].

45 FIDIC Yellow Book 1999, *supra* note 41 at s 20.2 GC.

46 FIDIC Silver Book 1999, *supra* note 41 at ss 20.2–20.4 GC.

47 FIDIC Red Book 1999, *supra* note 41 at s 20.2 GC. But see FIDIC Gold Book, *supra* note 44 at s 20.10 GC; the FIDIC Green Book provides for a single adjudicator who is appointed on an *ad hoc* basis: Fédération Internationale des Ingénieurs-Conseils, *Short Form of Contract* (Geneva: FIDIC, 1999) at s 15.1 [FIDIC Green Book].

48 FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC.

49 *Ibid*. See also ICC Case no 18320/2013 (Final Award), (2015) 1 ICC Bull at 132 (International

limit for proceedings is 84 days,⁵⁰ and these are not administered by FIDIC, which only provides very limited administrative support where the parties are not able to nominate DAB members.⁵¹

The FIDIC DAB provisions have gained increased importance since the World Bank based the General Conditions of its *Standard Bidding Documents Procurement of Works*⁵² on the FIDIC Red Book. The General Conditions in its *Standard Bidding Documents for the Procurement of Plant Design, Supply and Installation*⁵³ also contain a DAB provision. Other multilateral development banks ('MDBs') and international financial institutions ('IFIs') have copied this approach.⁵⁴ Other institutions offering DAB rules include the Institution of Civil Engineers ('ICE') of the UK,⁵⁵ the Chartered Institute of Arbitrators,⁵⁶ and the Dispute Board Federation ('DBF').⁵⁷

In 2017, the FIDIC published the 2nd edition of its Red, Yellow, and Silver Books with significantly amended dispute settlement provisions.

D. Court and Arbitration Decisions Regarding DB Provisions & DB Determinations

The last several years have seen courts and arbitral tribunals render decisions regarding DB clauses and DB determinations that dealt primarily with FIDIC contracts.⁵⁸

For instance, the Swiss Supreme Federal Court and an arbitral tri-

Chamber of Commerce) [*ICC Case 18320*] and ICC Case 19346/2014 (Final Award), (2015) 1 ICC Bull at 142 (International Chamber of Commerce).

50 FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC.

51 *Ibid* at s 20.3 GC 1999 and Appendix to Tender; FIDIC Red Book 2017, *supra* note 41, sc 21.2 GC and Contract Data.

52 International Bank for Reconstruction and Development & International Development Association, *Standard Bidding Document for Procurement of Plant Design, Supply, and Installation & User's Guide* (Washington, DC: The World Bank, 2015) at s VII: 3-5 to 3-92, sc 46.1 - 3 GC, available online at: <<http://pubdocs.worldbank.org/en/952741475182519904/Procurement-of-Plant-Design-Supply-and-Installation-and-User-Guide-April-2015.pdf>>. This is often called the FIDIC Pink Book.

53 *Ibid* at s VII: 3-93 to 3-97.

54 See also DRBF Manual, *supra* note 1 at art 4.2.1.

55 Institute of Civil Engineers, *ICE Dispute Board Procedure* (London: ICE Publishing, 2012)[*ICE DB Procedure*]. In the following, the Procedural Rules of the ICE not being subject to *Housing Grants Act 1996*, *supra* note 20 will be considered.

56 Chartered Institute of Arbitrators Practice and Standards Committee, *Dispute Board Rules* (London, UK: CI Arb, 2014)[CI Arb]. See also Michael Cover, "Chartered Institute of Arbitrators' Dispute Board Rules" in Burr, *supra* note 20 at 136-137.

57 Dispute Board Federation, *Ad Hoc Dispute Adjudication Board Rules* (Geneva: Dispute Board Federation, 2011) [DBF Rules].

58 See generally "ICC Arbitral Awards and Procedural Orders on Issues Concerning Dispute Adjudication Boards under FIDIC Contracts" (2015) 1 ICC Bull 35. See also Christopher R. Seppälä, "Commentary on Recent ICC Arbitral Awards dealing with Dispute Adjudication Boards under FIDIC Contracts" (2015) 1 ICC Bull 21.

bunal having its seat in Switzerland recently ruled that the law governing the arbitration agreement also governs the DB provision if there is no explicit choice of law in respect of the DB proceeding.⁵⁹ Elsewhere, a predominant question has been whether and in what circumstances the DB stage could be bypassed. Courts and arbitral tribunals have decided that in contracts with a DB provision this stage is normally mandatory but, under certain conditions, a referral directly to arbitration is possible.⁶⁰ Another issue has been whether and how it is possible to use arbitration to enforce preliminarily binding DAB decisions.⁶¹

*E. Characteristics of the ICC DB Rules 2004 & a Comparison with the FIDIC DB Provisions and Provisions of the Various DB Rules Sets*⁶²

The ICC is best known for its arbitration rules, but since the 1970s it has also been issuing other sets of ADR rules. At present, it offers the ICC Mediation Rules,⁶³ and the ICC Rules for the Administration

59 See Swiss Federal Supreme Court, 7 July 2014, *A. SA v. B. SA*, 4A_124/2014, (2014), Swiss Arbitration Association 826 (Switzerland) [A.SA v. B.SA]; ICC Case no 16083/2010 (Interim Award), 2015 1 ICC Bull at para 112 (International Chamber of Commerce) [ICC Case 16083].

60 See *Peterborough City Council v Enterprise Managed Services Ltd*, [2014] EWHC 3193 (TCC) (UK); *A.SA v. B.SA*, *supra* note 59; ICC Case no 14431/2008 (Interim Award), (2015) 1 ICC Bull at 35 (International Chamber of Commerce); ICC Case no 15956/2010 (Partial Award), (2015) 1 ICC Bull at 44 (International Chamber of Commerce) [ICC Case 15956]; ICC Case no 16155/2010 (Interim Award), (2015) 1 ICC Bull at 71 (International Chamber of Commerce); ICC Case no 16262/2010 (Partial Award), (2015) 1 ICC Bull at 75 (International Chamber of Commerce); ICC Case no 16570/2012 (Partial Award), (2015) 1 ICC Bull at 92 (International Chamber of Commerce) [ICC Case 16570]; ICC Case no 16765/2013 (Final Award), (2015) 1 ICC Bull at 101 (International Chamber of Commerce); ICC Case 18505/2012 (Final Award), (2015) 1 ICC Bull at 137 (International Chamber of Commerce); ICC Case no 19581/2014 (Final Award), (2015) 1 ICC Bull at 147 (International Chamber of Commerce) [ICC Case 19581]; see also *ICC Case 16083*, *supra* note 59; see also Andrew Burr, "Failure properly to constitute a DAB under the FIDIC terms and conditions of contract" (2016) 11:1 *Construction L Intl* 19 at 20; José Ricardo Feris and Živa Filipič, "Jurisdictional Issues in Construction Arbitration", [2017] *ICC Dispute Resolution Bulletin*, Issue 4, 44 at 54-56.

61 See *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 SLR 364 at 46ff [Perusahaan Gas Negara v CRW]; see also Frédéric Gillion, "The Court of Appeal Decision in *Persero II*: Are We Now Clear About the Steps to Enforce a Non-final DAB Decision under FIDIC?" (2016) *Intl Construction L Rev* 4; Feris & Filipič, *supra* note 60 at 58; see also ICC Case no 16119/2010 (Partial Award), (2015) 1 ICC Bull at 67 (International Chamber of Commerce); ICC Case no 16948/2011 (Final Award), (2015) 1 ICC Bull at 107 (International Chamber of Commerce); *ICC Case 18320*, *supra* note 49.

62 See Jenkins, *supra* note 5 at 107 ff on the comparison of various DB sets of rules.

63 ICC, *Rules of Mediation*, 2014 and ICC, *Mediation Guidance Notes* online: <www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes/#Top> (the *Mediations Guidance Notes* are recommendations referring to

of Expert Proceedings,⁶⁴ and the Documentary Instruments Dispute Resolution Expertise (“DOCDEX”) Rules.⁶⁵ In 2004, the ICC also published Dispute Board Rules,⁶⁶ which were revised in 2015.⁶⁷ The ICC offers a DRB which issues recommendations that become finally binding if there is no timely notice of dissatisfaction; a DAB whose decisions are preliminarily binding and will become finally binding if there is not a timely notice of dissatisfaction; and a Combined Dispute Board (“CDB”)—a hybrid invented by the ICC. The latter normally issues recommendations, but can render provisionally binding decisions under certain circumstances.⁶⁸ The general designation covering all three types is the Dispute Board.⁶⁹

The DB normally consists of three members, but can also have only one member if the parties so choose.⁷⁰ The parties are supposed to appoint the first two members jointly,⁷¹ with the third DB member, who becomes the chairperson, being proposed to the parties for their approval by the first two DB members.⁷² The ICC only nominates DB members in cases of default.⁷³ All DB members are supposed to be neutral and independent,⁷⁴ and are treated equally in respect of remuneration,⁷⁵ which is not a matter of course since the hourly rates of lawyers and non-lawyers can differ considerably.

The 2004 ICC DB Rules provide a two-stage approach in relation to disagreements and disputes (after an initial preparatory and familiarization

mediation in general).

64 ICC, *Rules for the Administration of Expert Proceedings*, 2015.

65 ICC, *DOCDEX Rules*, 2015 (expert proceedings in respect of certain financial documents).

66 ICC, Dispute Board Rules, 2004 [ICC DB Rules 2004]. The 2004 version of the ICC DB Rules can be found in Chern, *supra* note 2, Appendix 5 at 685 ff. See also Christopher Koch, “The New Dispute Board Rules of the ICC” (2005) 23:1 ASA Bull at 53; Ragnar Harbst & Volker Mahnken, “ICC Dispute Board Rules: the Civil Law Perspective” (2006) 72:4 J Chart Inst of Arbit 310.

67 ICC, Dispute Board Rules, 2015, online: <<https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/>> [ICC DB Rules 2015]; see also Ruta Kersyte and Andrew Burr, “International Chamber of Commerce Dispute Board Rules,” in Burr, *supra* note 20 at 198.

68 ICC DB Rules 2015, *supra* note 67 at arts 4–6; cf CIARB, *supra* note 56 at arts 3–4. But see DBF Rules, *supra* note 57, which do not mention whether the DAB decision is (provisionally) binding or not. This seems to be a serious flaw because uncertainty on this issue needs to be avoided.

69 ICC DB Rules 2015, *supra* note 67 at art 2(iv).

70 *Ibid* at art 7(3). See also ICE DB Procedure, *supra* note 55 at 3 r 2.2.

71 ICC DB Rules 2015, *supra* note 67, art 7(4). See also FIDIC Red Book 1999, *supra* note 41 at s 20.2 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.1; ICE DB Procedure, *supra* note 55 at 3 r 2.4; CIARB, *supra* note 56 at art 6.3; cf DBF Rules, *supra* note 57 at r 3.1 (DBF appoints all three members, which is not so desirable since party autonomy should be the principle).

72 ICC DB Rules 2015, *supra* note 67 at art 7(5); cf CIARB, *supra* note 56 at art 6.3.

73 ICC DB Rules 2015, *supra* note 67 at art 7(3)-7(5); cf CIARB, *supra* note 56 at art 6.6; cf DBF Rules, *supra* note 57 at r 3.1 (appointment by DBF, not by parties).

74 ICC DB Rules 2015, *supra* note 67 at art 8; FIDIC Red Book 1999, *supra* note 41 at 63–64 No 3–4; FIDIC Red Book 2017, *supra* 41 at No. 3 and 4 GC DAA Agreement; DBF Rules, *supra* note 57 at r 12.6.6; ICE DB Procedure, *supra* note 55 at 5 r 7.3(a), 12 r 12 Dispute Board Agreement Tripartite Agreement; CIARB, *supra* note 56 at art 8.

75 ICC DB Rules 2015, *supra* note 67 at art 28(2); cf CIARB, *supra* note 56 at art 9.1.

phase⁷⁶) which is common to other sets of DB rules. At the dispute prevention stage, the DB is entitled to deal with disagreements of the parties.⁷⁷ The DB does not have to wait for a party request, as is entitled to act on its own motion.⁷⁸ How it can deal with disagreements is not mentioned, so it has significant discretion and can employ a wide range of informal measures. The DB can act quickly because it knows the project, having had to familiarize itself with it immediately after being constituted (e.g. through project documentation review⁷⁹ and site visits).

The second stage is a formal dispute settlement proceeding, which may not take longer than three months.⁸⁰ The limited duration means that there can only be one round of submissions.⁸¹ As is typical in DB proceedings, the DB has many powers with respect to case management, control of the hearings, and fact ascertainment.⁸² Normally, a hearing is held.⁸³ To arrive at a determination, a majority vote is sufficient, although unanimity is preferred.⁸⁴ The determination has to be in writing

76 ICC DB Rules 2015, *supra* note 67 at arts 11-12. See also FIDIC Red Book 1999, *supra* note 41 at 67; FIDIC Red Book 2017, *supra* note 42 at r 3.2 and 4.3 DAAB Procedural Rules; CI Arb, *supra* note 56 at arts 10-11; DBF Rules, *supra* note 57 at r 6.1, 7.2; *ICE DB Procedure*, *supra* note 55 at 4 r 5.1, 5 r 6.1.

77 ICC, *Dispute Board Rules* 2004, *supra* note 66 at art 16; ICC DB Rules 2015, *supra* note 67 at art 17. See also DBF Rules, *supra* note 57 at r 12.1; CI Arb, *supra* note 56 at art 12.

78 See ICC DB Rules 2004, *supra* note 66, art 16 (which has become ICC DB Rules 2015, *supra* note 67, art 17). See also DBF Rules, *supra* note 57 at r 12.1 Rules; CI Arb, *supra* note 56 at 12.2.

79 ICC DB Rules 2015, *supra* note 67 at arts 11-12; see also FIDIC Red Book 1999, *supra* note 41 at 67 nn 1-4; FIDIC Red Book 2017, *supra* note 41 at r 4.3; 4.0 AAA DRB OP, *supra* note 7, art 4.0-7.0; *ICE DB Procedure*, *supra* note 55 at 4 r 5, 5 r 6; DBF Rules, *supra* note 57 at r 6.1, 7.0.

80 ICC DB Rules 2004, *supra* note 66 at art 20(1); ICC DB Rules 2015, *supra* note 67 at art 22(1). See also FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.4.3; *ICE DB Procedure*, *supra* note 55 at 4 r 4.5; DBF Rules, *supra* note 57 at r 13.1.1; CI Arb, *supra* note 56 at art 15.2.

81 ICC DB Rules 2015, *supra* note 67 at art 19, 20; DBF Rules, *supra* note 57 at r 14.4, 12.5.

82 ICC DB Rules 2015, *supra* note 67 at art 15, 21(5). Cf. FIDIC Red Book 1999, *supra* note 41 at p 67-68 No 7-8; FIDIC Red Book 2017, *supra* note 41 at r 5 DAAB Procedural Rules; see also *ICE DB Procedure*, *supra* note 55 at 5 (mentioning an "inquisitorial procedure" at r 7.2, and specifying that the adjudicators shall "take the initiative in ascertaining the facts and the law" at 7.4(d)). AAA DRB HRP, *supra* note 7, art 10.0; and DBF Rules, *supra* note 57 at r 10.1, 12.6.5; CI Arb, *supra* note 56 at art 16.1(d).

83 ICC DB Rules 2015, *supra* note 67 at art 21; FIDIC Red Book 1999, *supra* note 41 at 67 No 6 ("may"); FIDIC Red Book 2017, *supra* note 41 at r 7 DAAB Procedural Rules; CI Arb, *supra* note 56 at art 14; DBF Rules, *supra* note 57 at r 12.6.1;.

84 ICC DB Rules 2015, *supra* note 67 at art 25. See also FIDIC Red Book 1999, *supra* note 41

and contain reasons.⁸⁵

If a party is not satisfied with the recommendation or decision, it must give a notice of dissatisfaction within 30 days.⁸⁶ Arbitration or litigation proceedings can then handle the case *de novo*.⁸⁷ Decisions by a DAB or CDB are preliminarily binding.⁸⁸ Recommendations by a DRB or CDB and decisions by a DAB or CDB become finally binding if there is no timely notice of dissatisfaction.⁸⁹

The ICC DB Rules diverge from other ICC dispute settlement mechanisms in several ways. Firstly, while other ICC dispute mechanisms are *ad hoc* in the sense that the dispute settlement proceeding only commences after a dispute has arisen, the DB is a standing committee.⁹⁰ Secondly, the ICC only provides administrative support for DB proceedings, while the other dispute settlement proceedings are normally fully administered by the ICC.⁹¹ Since there is no full administration by the ICC, a tripartite DB member agreement has to be entered into by the DB members and the parties.⁹² A review of DB draft decisions (but not recommen-

at 68 No 9(b); FIDIC Red Book 2017, *supra* note 41 at r 8.2 (b) DAAB Procedural Rules; *ICE DB Procedure*, *supra* note 55 at 6 r 8.2(b); DBF Rules, *supra* note 57 at r 10.2 and 13.1.1; CIArb, *supra* note 56 at art 15.4.

85 See FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.4.3 GC; *ICE DB Procedure*, *supra* note 55 at 4 r 4.5.

86 ICC DB Rules 2015, *supra* note 67 at art 4(3), 5(3). Within 28 days, pursuant to FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC and FIDIC Red Book 2017, *supra* note 41 at s 21.4.4; see also *ICE DB Procedure*, *supra* note 55 at 4 r 4.7; but see CIArb, *supra* note 56 at arts 3.4, 4.4.

87 ICC DB Rules 2015, *supra* note 67 at art 14(4). See the explicit language in that respect in FIDIC Red Book 1999, *supra* note 41 at s 20.6 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.6 GC.

88 ICC DB Rules 2015, *supra* note 67 at art 5(2). See also FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.4.3 GC; *ICE DB Procedure*, *supra* note 55 at 4 r 4.6; CIArb, *supra* note 56 at 4.1.

89 ICC DB Rules 2015, *supra* note 67 at art 4(3), 5(3). See also FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.4.4 GC; *ICE DB Procedure*, *supra* note 55 at 4 r 4.9. DBF Rules, *supra* note 57 do not mention notice of dissatisfaction.

90 ICC DB Rules 2015, *supra* note 67 at art 3(1). See also *ICE DB Procedure*, *supra* note 55 at 3 r 2.1; DBF Rules, *supra* note 57 at r 2.0, 3.1.

91 ICC DB Rules 2004, *supra* note 66 at art 1; ICC DB Rules 2015, *supra* note 67 at art 1(2).

92 ICC DB Rules 2015, *supra* note 67 at art 10; ICC, “Model Dispute Board Member Agreement” in *Dispute Board Rules (ICC Publication 873)* (2015) 45. See also FIDIC Red Book 2017, *supra* note 41 at s 21.1, 21.2 GC, and Form Dispute Avoidance/Adjudication Agreement (abbreviated “DAA Agreement”); AAA DRB GS, *supra* note 7 at art 1.01(E); DRBF Manual, *supra* note 1, art 2.11.2; DBF Rules, *supra* note 57 at r 5.1; *ICE DB Procedure*, *supra* note 55 at 6 r 9, 11–15; Chern, *supra* note 2 at 131ff (sample agreements); Owen & Totterdill, *supra* note 11 at 37ff. In respect of FIDIC DABs, there are two arbitral awards stating that it is sufficient that only one party signs the DAA if the other party refuses to cooperate. See *ICC Case 15956*, *supra* note 60, art 4.2.7 and *ICC Case 16570*, *supra* note 60 at paras 217, 222.

dations) is possible for remuneration, in respect of formalities, or for extending the duration of the DB proceeding,⁹³ but is not mandatory.⁹⁴

Costs are usually shared equally between the parties irrespective of the outcome of proceedings, which is another fact distinguishing them from arbitration.⁹⁵ The remuneration of the DB members normally consists of a retainer fee and a daily fee. DB members are also entitled to reimbursement for reasonable expenses.⁹⁶

DBs should not be equated to arbitral tribunals.⁹⁷ Unlike an arbitral award, a binding DB conclusion is not *res judicata* and is not easily recognizable and enforceable.⁹⁸ The idea is that, because the DB members have been jointly nominated by the parties, a considerable number of DB conclusions will simply be accepted by the parties, with notices of dissatisfaction filed in only a limited number of cases. Recognition and enforcement provisions are therefore unnecessary. However, if a provisionally or finally binding DAB conclusion is not complied with, and the parties' contract has an arbitration clause, it may be possible for the successful party to commence an arbitration proceeding and request that an arbitral award be issued in respect of the DAB decision.⁹⁹

Since the ICC does not fully administer DB proceedings, there are no statistics outlining the exact number of DBs established pursuant to the ICC DB Rules. ICC statistics do however show that the ICC must occasionally appoint DB members and decide on challenges of DB members.¹⁰⁰ From this, it can be concluded that ICC DB Rules are

See also *Peterborough City Council v Enterprise Managed Services Ltd*, [2014] EWHC 3193 (TCC) (UK); *A.SA v. B.SA*, *supra* note 59.

93 ICC DB Rules 2015, *supra* note 67 at art 22(2).

94 *Ibid* at art 23.

95 ICC DB Rules 2015, *supra* note 67 at art 28(1); FIDIC Red Book 1999, *supra* note 41 at s 20.2 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.1 GC; AAA DRB GS, *supra* note 7 at art 1.06(A); DBF Rules, *supra* note 57 at r 11.7; *ICE DB Procedure*, *supra* note 55 at s 16; CI Arb, *supra* note 56 at 17.1.

96 ICC DB Rules 2015, *supra* note 67 at art 31; FIDIC Red Book 1999, *supra* note 41 at 65–66 No 6; FIDIC Red Book 2017, *supra* note 41 at s 9.1(c) GC DAA Agreement; DBF Rules, *supra* note 57 at r 11.0; *ICE DB Procedure*, *supra* note 55 at 11 ss 5(b)–(c), 5(e); cf CI Arb, *supra* note 56 at art 17.3.

97 ICC DB Rules 2015, *supra* note 67 at art 1. See also FIDIC Red Book 1999, *supra* note 41 at s 20.4 GC; FIDIC Red Book 2017, *supra* note 41 at s 21.4.3 GC.

98 Term introduced by ICC DB Rules 2015, *supra* note 67 at art 2(ii) to cover DB recommendations as well as DB decisions. ICC DB Rules 2004, *supra* note 66 used the term “determination”.

99 See *Perusahaan Gas Negara v CRW*, *supra* note 61.

100 See e.g. “2010 Statistical Report” (2011) 22:1 ICC Bull 5 at 17 (one request for appointment of a DAB member in 2010); “2013 Statistical Report” (2014) 25:1 ICC Bull 5 at 17 (five requests for appointment of DB members in 2013); “2014 ICC Dispute Resolution

agreed upon in a certain number of cases.

III. The 2015 Revision of the ICC DB Rules

A. Major Amendments

The last few years have seen the ICC revise all of its procedural rules. The ICC DB Rules were the last to be tackled, with the revised rules entering into force on October 1, 2015. Their revision entailed expert consultations and drafting by a working group of the ICC Commission on Arbitration and ADR.

The major novelty of the ICC DB Rules 2015 is that the DB may pre-emptively act to avoid disagreements.¹⁰¹ This means that after the initial preparatory and familiarization phase, the DB process may now consist of three stages: avoidance of disagreements, avoidance of disputes, and a formal dispute settlement proceeding.¹⁰² A party request is not required for the DB to take disagreement avoidance measures, and can rather be taken by the DB on its own initiative. This extension of its powers is a unique feature of the ICC DB Rules which does not yet have an equivalent in other DB rules. However, it should be handled with care by DBs so as not to give the parties and their project management the impression that it is actually the DB which runs the project. The principle of party autonomy applies to the DB rules, and the parties have an option to curtail the competence of the DB by providing that it may only act to avoid disagreements on the request by a party.

Article 18 of the ICC DB Rules 2015¹⁰³ now prohibits *ex parte* communication of a DB member with a party in respect of a specific dispute.¹⁰⁴ An explicit prohibition is useful because DBs will only be regarded as neutral and impartial if certain ethical standards are observed by DB members.¹⁰⁵

The ICC DB Rules leave open to the parties the fee and the fee rate upon which the remuneration of the DB members is based. In view

Statistics" (2015) 26:1 ICC Bull 7 at 13 (three requests for appointment of DB members and one challenge of a DB member in 2014).

101 ICC DB Rules 2015, *supra* note 67 at arts 1(1), 12(3), 16.

102 *Ibid*, art 1.

103 See ICC DB Rules 2015, *supra* note 67 at arts 16, 18.

104 ICC DB Rules 2015, *supra* note 67 at art 18. See also AAA DRB OP, *supra* note 7 at art 2.0 (final paragraph).

105 For ethical standards in general, see DRBF Manual, *supra* note 1 at arts 1.6, 2.10 and Dispute Board Federation, *DBF Code Of Professional Conduct For Dispute Board Members* (Geneva: DBF, 2011).

of the worldwide application of the ICC DB Rules and the fact that lawyers and non-lawyers can be DB members, it indeed seems difficult to determine an acceptable uniform fee or fee rate. The ICC now also has the power to fix costs where there is no agreement between the parties and the DB members.¹⁰⁶

New rules also limit the defences available in subsequent court or arbitration proceedings to a party that does not comply with a decision or a recommendation that has become binding.¹⁰⁷ This clarification is useful because a practical route to enforcing DB determinations without cumbersome complications is essential.¹⁰⁸

The DB now also has the explicit power to provide preliminary relief.¹⁰⁹ This is a useful innovation because there are sometimes issues requiring immediate resolution for which even the usual term of a DB proceeding is inadequate. However, it is not clear to what extent the preliminary relief is binding. Indeed, one would assume that a DRB cannot grant preliminary relief that is *preliminarily* binding. Moreover, does a party that is not satisfied with the preliminarily relief have to give a timely notice of dissatisfaction? Some explicit language dealing with these issues would be helpful.

Further, administrative expenses of the ICC have been raised moderately.¹¹⁰ On behalf of the ICC, the ADR Centre is now in charge of all ICC ADR proceedings and thus also charged with providing administrative support for ICC DB proceedings.¹¹¹

Finally, some editorial changes have been made. The superordinate term for a DAB or CDB decision and a DRB or CDB recommendation is no longer a ‘determination’ but rather a ‘conclusion’. The monthly retainer fee has now become the monthly ‘management fee’.¹¹²

B. Assessment

Positive changes in the 2015 revisions of the ICC DB Rules include the new power given to the Centre to fix the fees of the DB members if these cannot be agreed upon, and the explicit prohibition of *ex parte* communication. However, it is still uncertain whether the introduction of

¹⁰⁶ ICC DB Rules 2015, *supra* note 67 at art 28(4).

¹⁰⁷ See last sentences of ICC DB Rules 2015, *supra* note 67 at arts 4(4), 5(4).

¹⁰⁸ *Perusahaan Gas Negara v CRW*, *supra* note 61, para 60ff, 83, 88. See generally Frédéric Gillion, “The Court of Appeal decision in Persero II: Are we now clear about the steps to enforce a non-final DAB Decision under FIDIC?” (2016) Intl Construction L Rev 4.

¹⁰⁹ ICC DB Rules 2015, *supra* note 67 at art 15(1).

¹¹⁰ *Ibid* at Appendix Schedule of Costs.

¹¹¹ *Ibid* at art 1(2).

¹¹² *Ibid* at arts 18, 29.

disagreement avoidance provisions as a new stage will truly be helpful. From the perspective of the drafters of the ICC DB Rules, it is logical that the DB can take the initiative to avoid disputes by providing informal assistance.¹¹³ However, this power is arguably too paternalistic and interventionist, and should only be possible when requested by a party.

It is also regrettable that there are several issues which were not tackled despite being worth reconsideration. As mentioned previously, pursuant to the ICC DB Rules, three types of DBs can be established that have different powers in respect of the conclusion. However, there is no default provision that applies if the agreement of the parties is unclear in respect of which they have chosen (e.g. if they only mention a “DB” in their agreement).¹¹⁴ In such a case, a sensible approach seems to be that a DRB is established, since its powers are more restricted than those of the other two available options. An explicit clarification would have nevertheless been helpful.

Moreover, if the dispute avoidance is unsuccessful and there is a formal proceeding afterwards, it can be problematic when, during the dispute avoidance phase, the DB is permitted to have *ex parte* communication pursuant to Art. 17 sub-art. 2 ICC DB Rules. In such a situation, the DB should not be permitted to use information obtained through *ex parte* communication.

As described in the ICC DB Rules, it should be assumed that there will only be one round of submissions in a formal proceeding. The question remains as to whether this is sufficient, or whether two rounds of briefs are necessary. This would mean that the usual 90-day duration of DB proceedings would have to be extended.

Another question is whether it is desirable that DABs (which issue provisionally binding decisions) and DRBs (which issue only recommendations) are treated the same under the ICC DB Rules. For instance, it is not explicitly mentioned whether the DAB can order the successful party to provide security. If the DB decision is reversed in a subsequent arbitration or court proceeding, the party that had to comply with the DB decision should not bear the insolvency risk of the other party.¹¹⁵

The monthly management fee of the DB members is also relatively high, with three daily rates per month.¹¹⁶ This means 36 daily rates per year per DB member, which results in 108 daily rates per year for a three-member DB. If the daily rate is US\$2,500, which is not unreal-

113 *Ibid* at art 17.

114 Similar shortcomings exist in CIArb, *supra* note 56.

115 See e.g. FIDIC Gold Book, *supra* note 44, § 20.6 GC.

116 ICC DB Rules 2015, *supra* note 67 at art 29(2).

istic,¹¹⁷ the result is US\$270,000 in total fees per year, or US\$135,000 annually per party (costs for site visits and formal proceedings are not included, which would increase this figure).¹¹⁸

Fortunately, parties have the option to modify provisions that do not suit their needs.

IV. DAAB Provisions in the 2017 FIDIC Conditions of Contract

In 2017, the FIDIC published a second edition of its main forms of contract, and the provisions regarding dispute settlement have been amended significantly. Firstly, dispute resolution is now dealt with in a new clause 21 and is therefore separated from the issue of claims, which continues to be dealt with in clause 20. This separation makes sense because a claim by a party does not always result in a dispute. Secondly, the Appendix “General Conditions of Dispute Avoidance/Adjudication Agreement” and the Annex “DAAB Procedural Rules” have added more breadth. What was once called a Dispute Adjudication Board in the 1999 edition is now a Dispute Avoidance/Adjudication Board (“DAAB”). Through this designation and the new sub-clause 21.3 of the GC¹¹⁹, the FIDIC is seeking to emphasize that the objective of DBs is not only dispute settlement, but also dispute prevention through informal means. This was neglected in the 1999 edition.

In the 1999 FIDIC Yellow and Silver Books, the DAB was only appointed when the dispute had arisen, and only the DAB in the 1999 FIDIC Red Book was permanent. The DAAB in the 2017 FIDIC Yellow and Silver Books is now permanent as well.¹²⁰

A useful innovation is that the DAAB can now order the winning party to a dispute to provide security.¹²¹ Through the amendment of sub-clause 21.7 GC, it is also now clear that a provisionally binding DAAB decision can be enforced by an arbitral award or order, hopefully neutralizing the problems encountered in *Perusahaan Gas Negara v CRW*.¹²² The 2017 FIDIC Conditions of Contract also rightfully tack-

117 Cf. Owen & Totterdill, *supra* note 11 at 13.

118 *Ibid* at 13.

119 See also the new Rule 2 DAAB Procedural Rules of the FIDIC Red Book 2017, *supra* note 41.

120 See FIDIC Red Book 2017 *supra* note 41 at s 21.1 GC.

121 FIDIC Red Book 2017 *supra* note 41 at s 21.4.3(ii) GC (not dealt with in the ICC DB Rules).

122 See discussion, *supra* note 61.

les the issues created by challenges to DB members,¹²³ which were not dealt with in the 1999 edition. Further, the 2017 version offers a remedy for situations where a DAAB member and the parties are not able to agree on remuneration.¹²⁴ This was not dealt with in the 1999 version, and resulted in procedural complications when a party refused to sign the agreement with the DAB member. Increased administrative support should therefore be welcomed.

V. Introduction of Statutory Construction Adjudication in Ontario

In Canada, Ontario was the first province to introduce statutory construction adjudication legislation, which was passed in December 2017.¹²⁵ The statute is based on a report prepared by Bruce Reynolds and Sharon Vogel in which existing adjudication statutes in common law jurisdictions were compared, and the introduction of a statutory adjudication regime resembling the models of other common law jurisdictions was recommended.¹²⁶

The section on adjudication in the *Construction Act* is not yet operative, but will come into force after a preparation and transition period on a day determined by proclamation of the Lieutenant Governor in Council.¹²⁷

123 FIDIC Red Book 2017, *supra* note 41 at Rules 10 and 11 DAAB Procedural Rules, Sub-clause 11 GC DAAB Agreement.

124 FIDIC Red Book 2017, *supra* note 41 at sub-clause 9.3 DAAB Agreement. The parties should clarify with the envisaged appointing authority whether it is prepared to decide on fee issues before they agree on this since presumably not every appointing authority is ready to do so. See also ICC DB Rules 2015, *supra* note 67 at art 28.4.

125 *Construction Lien Amendment Act, 2017*, SO 2017, c C 24, amending RSO 1990, c C 30, available online at: <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4957> [*Construction Lien Amendment Act*]. As part of the amendments, the former *Construction Lien Act* became the *Construction Act*.

126 Bruce Reynolds and Sharon Vogel, *Striking the Balance: Expert Review of Ontario's Construction Lien Act*, Report prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, (April 30, 2016), available online at: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/>.

127 *Construction Lien Amendment Act*, *supra* note 125, s 86(2).

VI. Assessment of DBs Generally

Despite recent, positive developments, it should not be ignored that there are still disadvantages to DBs. Monthly management or retainer fees mean they are relatively expensive compared to other ADR mechanisms. Further, it is not easy to select DB members with the appropriate expertise at the beginning of a project, particularly in plant construction. At the commencement of the project, the parties are normally unaware of the issues that will give rise to future conflicts. This makes it difficult to know whether they should pick specialists in civil, process, mechanical, electrical, or cost engineering, or a time-scheduling expert. In some of these disciplines, it is difficult to find appropriate candidates, particularly in process, mechanical, and electrical engineering, since very few engineers in these fields have experience with dispute settlement.

Further, and as with other ADR mechanisms and arbitration proceedings, DBs are designed for two-party disputes, and it is cumbersome to adjust them to multi-party settings. They also lack a robust body of case law because determinations are not published.

That DBs are still a relatively young phenomenon not backed by statutory law is also disadvantageous. Purely contractual provisions and sets of procedural rules offered by institutions must therefore be relied upon. Inevitably, there are thus open questions without governing rules which can be exploited by parties trying to obstruct proceedings.

Ethical standards for DB members have also yet to be developed.¹²⁸ These are especially relevant to conflicts of interest questions and challenges to DB members.¹²⁹ The principles applying to arbitrators in this respect should also apply to DB members.

For certain projects, however, permanent DBs are nevertheless useful. If it is likely that there will be disputes during project implementation which require a speedy resolution, they are likely to be helpful. This also true for large complex projects of long duration and significant uncertainty, particularly regarding cost and/or time

¹²⁸ DRBF Manual, *supra* note 1 at art 2.10; Dispute Board Federation, *DBF Code of Professional Conduct for Dispute Board Members*, *supra* note 109.

¹²⁹ See ICC DB Rules 2015, *supra* note 67 at art 8; AAA DRB GS, *supra* note 7 at art 1.02(E)-(F); DBF Rules, *supra* note 57 at r 4.1. The issue of challenge is not adequately dealt with in the ICE DB Rules. A practical example of a DB member having a conflict of interest can be found in *ICC Case 19581*, *supra* note 60.

(arising, for example, due to subsoil risk and/or the risk of regulatory interference). It is therefore of no surprise that they continue to be used, especially on large civil infrastructure projects like the extension of the Panama Canal.¹³⁰

Since DBs are purely contractual, procedural rules by dispute settlement institutions are also helpful. These reduce the risk of drafting errors and make contract negotiations simpler. Administrative support by an institution is also expedient in certain cases, such as where a DB member's nomination is challenged.¹³¹ Therefore, the World Bank would be well advised to either take care of this issue themselves in their conditions of contract (as FIDIC did in its 2017 edition of its Red, Yellow, and Silver Books) or to use the procedural rules of a recognized dispute settlement institutions like the ICC.

Ultimately, DBs are no panacea for construction disputes. Other ADR mechanisms like *ad hoc* adjudication¹³² and mediation remain useful as supplements. This is true for civil and plant construction projects. For consortium agreements and sub-contracts, a permanent DB seems to be overkill and *ad hoc* adjudication appears to be sufficient.¹³³

Another interesting aspect of this discussion is that, in various DB rules, there is no explicit limitation dictating that DBs can only be set up in respect of engineering and construction contracts. It remains to be seen whether they can also be used in other contexts.

VII. Conclusion

DBs and *ad hoc* adjudication are useful innovations, particularly for infrastructure and plant construction projects. Neutral decisions can be obtained so quickly that they can be implemented during the term of the project. Disruption via disputes is therefore

¹³⁰ See DRBF, "Introduction to the DRB database", available online at: <www.drb.org/database_intro.htm>. See also Chern, *supra* note 2 at 100 ff.

¹³¹ Chern, *supra* note 2 at 351 ff.; Owen & Totterdill, *supra* note 11 at 31–32 (on the independence and impartiality of DB members).

¹³² Volker Mahnken, "Why International Dispute Settlement Institutions Should Offer Ad Hoc Dispute Board Rules" (2006) 23 Intl Construction L Rev 433.

¹³³ FIDIC Green Book, *supra* note 47 at s 15.1; ICC Model Subcontract to ICC Model Turnkey Contract for Major Projects (2011) at art 66.3.1.

avoided or at least mitigated, which should be in of interest to all parties.

If no statutory regime exists, institutional rules in respect of DBs and *ad hoc* construction adjudication are helpful. The ICC DB Rules, for instance, provide a useful and well-drafted framework. However, institutions like the ICC should offer rules for standing DBs *and* for *ad hoc* adjudication, since there is a demand for the latter.

The DAAB provisions of the 2017 FIDIC Conditions of Contract contain some improvements compared with the 1999 versions. Lingering scepticism is nevertheless justified in respect of the fact that, as a standard, the DAABs of the FIDIC Yellow and Silver Book 2017 are permanent.

Ultimately, DBs and *ad hoc* construction adjudication can only be successful if there is a large pool of qualified DB members and adjudicators. While finding qualified construction lawyers is generally feasible, it remains difficult to find qualified non-lawyers, especially process, mechanical, and electrical engineers for disputes in plant construction projects.