MSc PROJECT MANAGEMENT
DISSERTATION CON523Z

The use of Dispute Boards as an Alternative Dispute Resolution Mechanism on Construction Projects in Southern Africa.

A RESEARCH PROJECT PREPARED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF SCIENCE IN PROJECT MANAGEMENT

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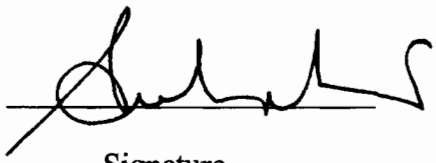

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ACKNOWLEDGEMENTS

I wish to express my sincere appreciation to those that have contributed to this dissertation by providing information, opinions and advice, responding to questionnaires and granting approval for the use of information.

Substantial reference was made to MacGregor (1994) in describing the following ADR processes:

- Court-annexed Arbitration
- Court-appointed referee/California 'rent-a-judge'
- Mini-trial
- Summary-jury trial
- Multi-door Court House
- Med-arb
- Expert Determination/Appraisal
- Concilio-arbitration
- Expedited Arbitration

I also wish to thank the University of Cape Town Architectural Library staff for their patient assistance, especially as I was remote from Cape Town during the development of the research and research report.

Many thanks to:

- My supervisor, Steve Donohoe for his guidance and comments during the research and development of the research report
- Professor RH Christie for reviewing and commenting on statements and references made in connection with the law
- Andy Griffiths for reviewing a section of the report
- My secretary Mamello Taleng who uncomplaining and diligently typed the bulk of the annexures and also sections of the main body of the report
- Deon Tredoux for transporting many books for me to and from Cape Town

Many thanks also to my parents for providing support for my endeavours and assistance with arranging, fetching and returning books from and to the libraries.

Lastly, thanks to my family, Sue, Karien and Jamie, for their unending patience and support for what seemed to be a never ending project.

Anton van Langelaar

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EXECUTIVE SUMMARY

1. INTRODUCTION

1.1 Rationale

The rationale for the dissertation is:

- *Inter alia*, substantial disputes in the past on large construction projects in Southern Africa has led to the use of DB on some recent large and smaller construction projects in the region. The success or failure of DB on the projects are not known.
- A knowledge base and experience in Southern Africa of DB started to develop during the early nineties, but the extent of this base is uncertain.
- Furthermore, where DB have been used substantial divergence between project participants as to the desirable role and authority of DB exists.

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1.2 Objectives

The objectives of this report are to:

- Summarise common ADR processes and consider the need for ADR processes on construction projects
- Compare the DB process with ADR processes
- Consider the development and characteristics of the DB process and why its use has increased
- For the projects under consideration
  - Describe the DB approaches used
  - Consider the differences in approach to DB between these projects
  - Assess the available DB decisions/recommendations on a qualitative and to a lesser extent on a quantitative basis
- Consider why the DB process is being chosen/not chosen
- Capture industry sentiment towards DB
- Identify the desirable characteristics for a successful DB approach
- Recommend the desirable role and authority of DB

2. INVESTIGATION METHODS

Four methods of investigation were followed. These were:

a) A comprehensive literature survey

b) The procurement, review and analysis of project data

c) Soliciting information and opinions by way of a questionnaire and analysis of the responses

d) Soliciting opinions by way of interviews and analysis thereof

References consulted for the literature survey included:

- Journals
- Books
- Reference works
- Personal communications from knowledgeable and experienced persons

In Section 6 dispute resolution research theory and the design of the research are described.

The following aspects of dispute resolution research theory are described:

- Research framework
- 'New Formalist' approach
- The elements of impact studies in relation to this research
- 'New Formalist' approach as applied in this research

Data and contracts information relating to DB on projects were gathered by visiting or contacting the project authorities for a number of engineering construction projects in Southern Africa. Eventually core data and information were obtained on some eight large projects and two smaller projects.

A questionnaire was used to establish:

- Industry exposure to DB
- History of DB in Southern Africa
- Reasons for using and for not using DB on projects in Southern Africa
- Sentiment towards DB
- Perceptions regarding DB

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Questionnaires were sent to 39 persons that were likely to have experience or knowledge of DB. Twenty-two responses were received from respondents chosen from legal consultants, engineering consultants, contractors, employers and DB members. Interviews were conducted with four persons to further explore opinions on key issues pertaining to DB.

3. FINDINGS OF THE INVESTIGATION

3.1 Disputes

For purposes of this work it was concluded that disputes in the construction industry are conflicts and consequently the words are used interchangeably in this report.

It was found that the majority view is that disputes in construction are inevitable and that conflict exists and would continue to do so.

3.2 Dispute Resolution

It was found that:

- The FIDIC standard form CoC approach to dispute resolution is mainly rights based. It has evolved with input from most project participants.
- Disputant acceptance of the dispute resolution system (*inter alia*, through involvement with the design) is necessary for the system to be successful.
- Disputant satisfaction in descending order is:
  - The procedure by which their dispute is resolved producing a fair and equitable settlement
  - The number or value of the assets which they end up winning.

3.3 Alternative Dispute Resolution (ADR)

- Some definitions for ADR are presented.
- It was concluded that for purposes of this report ADR processes are to be considered as alternatives to litigious processes, although not divorced from them.
- Characteristics of ADR are described in general and summarised. The following common characteristics of ADR were identified:
  - They exist somewhere between the polar alternatives of doing nothing or of escalating conflict

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- They are less formal and generally more private than litigation in open court
- They permit people with disputes to have more active participation and more control over the processes for solving their own problems than do traditional methods of dealing with conflict
- Almost all of the new methods have been developed in the private sector, although courts and administrative agencies have begun to borrow and adopt some of the more successful techniques.

- The need for and development of ADR are described. It was found that the need for ADR was born from the need for processes:
  - That are cost and time effective
  - That do not lead to disillusionment
  - That maintain clarity of issues
  - That do not result in damaged relationships and traumatic experiences
  - That allow control of the process
- ADR processes are considered both in South Africa and internationally and described in brief. Particular attention is paid to the concept of amiable composition as it was established that it is can contribute to the DRB concept.
- It was found that the use of ADR in construction was considered by some to be limited. Miles (1992:306) ascribes this to the general lack of awareness of what ADR is and what it seeks to achieve.
- It was found that the potential for ADR in construction is substantial (see also Section 11).
- The requirements for ADR success were identified as settlements with specific characteristics.
- The objectives of ADR were also identified and the characteristics of projects suitable for ADR.

3.4 Dispute Boards

The need for DB was identified as resulting from:

- The desire to avoid the costs and delays of lengthy arbitration and litigation.
- The role of the Engineer increasingly being questioned for many reasons.
- The Engineer's decision may be unacceptable to one or both parties.

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- The gap to be filled between ADR by means of mediation, mini-trial and the like and litigation and arbitration.
- Changes in the world wide construction arena resulting in the parties increasingly having to resort to arbitration, which due to high cost, lengthy periods and the often resulting poor relationships, ultimately causes the victory to be a Pyrrhic one.
- Increased incidence of joint ventures both in consulting and in contracting means that organisations involved in construction are less autonomous and are less able to negotiate settlements of their contractual disputes.
- Most ADR processes are not applicable to construction.

The earliest reported use of a DB was on Boundary Dam in Washington in the 1960's and the El Cajon project in Honduras constructed during the early eighties, is considered to be the first known application of a DRB on an international project.

In Southern Africa the earliest reported use of a DB was on the Delivery Tunnel North, forming part of Phase 1A of the LHWP.

The following aspects of a DRB are dealt with:

- Definition
- Composition
- DRB members
- Role/function
- Site visits and meetings
- Hearings and procedures
- Recommendations
- Duties of the chairman

It was found that there is great pressure to replace the 'independent Engineer' with a DB. The World Bank makes the use of a DRB mandatory (or DRE on smaller projects) and FIDIC allows for a DAB as the preferred approach.

On the face of it the advantages given for using DB seem to outweigh the disadvantages. It is reported in the literature that substantial successes have been achieved in the use of DB.

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From the literature survey it is concluded that the DRB concept is intended to be part of the amicable settlement process. The fact that certain DRB can make binding and certain non-binding 'recommendations' complicates the issue.

The type of DRB adopted must clearly depend on the nature of the project and the parties.

It is clear from its application by FIDIC and even its name, that the DAB is an adjudication process, resulting in a binding recommendation.

The DRB mechanism may well be the preferred system of dispute resolution as it provides:

- The opportunity to secure perceived objective and impartial experts
- Informality of procedure and reduction in cost and time of dispute resolution
- Credibility of the disputes resolution system among participants

3.5 DB in use on Various Projects in Southern Africa

In Section 7 the analysis of the following aspects of eight large projects are described:

- Project scope
- DB Contract Provisions (Dispute Resolution Agreement)
- DB Agreement and procedural aspects
- Dispute resolution event sequence

The essential differences (from a principle point of view) in the DB approaches used on the projects under consideration were identified. These are summarised in the table hereunder.

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Essential Differences in DB Approaches

	Process Type	Time of Appointment	Included in Tender Documents	Decision/ Recommendation
Project A	Consultative	Early	No	Non-binding
Projects B, C and D	Amicable settlement	Late	No	Non-binding
Projects E	Adjudication	Early to late	Yes	Non-binding
Project F	Adjudication	On commencement	Yes	Binding

The above is apparent from the CoC and the DB agreements. The process type is primarily apparent from the DB agreement but also from where it appears in the dispute resolution process (see event sequence timelines).

3.6 Assessment of DB Decisions/Recommendations

From the assessment the following was concluded:

- The recommendations generally relied heavily on reference to the statements of case and other documentation for detail. Consequently insufficient detail was presented in the recommendations to fully appreciate:
  - The contractual positions of the parties
  - The contentions of contract and law
  - The allegations of fact
  - The evidence presented
- The recommendations generally did not clearly state the contractual/legal basis for the recommendations. Also the allegations of fact and contentions of law by the parties were not always specifically dealt with. Consequently insufficient detail was presented in the recommendations to fully appreciate:
  - Which allegations of fact and contentions of contract and law were accepted and which were rejected.
  - The reasons for such acceptance and rejection.
- The lack of reference to contract law principles, precedence cases and reasoned recommendations based on the provisions of the contract, indicate that the DB tended to operate on a settlement rather than a rights (adjudicatory) basis.
- The DB generally considered itself as part of the amicable settlement process as:
  - Many references were found to equitable, reasonable and amicable settlement. An apparent distinction between adjudication and settlement was evident.
  - In one instance it is stated in the recommendation that it is a recommendation for the parties to amicably resolve their differences (thus indicating amicable settlement).
  - The DB stated its role as making a recommendation on the basis of engineering practice and contract management.
  - The DB stated that it applied its experience and judgement in order to reach equitable recommendations.
  - The DB stated that certain quantification analyses are considered reasonable.
  - The DB stated its responsibility to make an independent, impartial recommendation for the resolution of a dispute. It must rely, *inter alia*, upon its professional

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judgement as to what is reasonable and what will best serve the interest of the parties.

- Some recommendations appeared to be outside the authority of the relevant DB. The DB considered positions other than the contentions made by the parties and made recommendations which were not based on the provisions of the contract. However, this may be a question of interpretation of the brief of the DB. In the preamble to a DB agreement reviewed it is stated that the parties are obliged to settle disputes amicably and that they wish to minimise time, effort and cost necessary to resolve disputes and that the DB is a means of achieving such objective. It is not clearly stated whether the DRB has an adjudication or settlement (or a combined) role to play.

From a quantitative analysis of disputes referred to the DB and the outcomes of the process, it was established that:

- The Contractors initiated the reference to the DB in each case.
- The DB decisions were generally in the favour of the Contractors.
- The majority of recommendations were either accepted or the dispute was settled after the recommendation was made.
- Contractors rejected more recommendations than the Employers.
- Definitely 21% of disputes could not be resolved by involving a DB.

It was established in connection with the purpose of DB decisions/recommendations stated in Section 8.1:

a) To provide the reasoning for the DB's decision/recommendation - This purpose was not entirely achieved.

b) To provide a 'tool' for settlement negotiations - This purpose was generally achieved.

c) Acceptance by the parties - This purpose was not entirely achieved.

3.7 Analysis of Questionnaire Responses

The response ratio for the questionnaire was 56% with the DB members being the most responsive.

From the responses the following was concluded:

- The respondents have experience of a number of large projects.

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- The majority of respondents were of the opinion that the DAB is the closest to an adjudicatory process (arbitration/adjudication – 70%). Those in the industry with knowledge of DB are clear on where the DAB fits as an ADR process.
- Those in the industry with knowledge of DB have divergent opinions as to where the DRB fits as an ADR process. This was prevalent even among experienced DRB members.
- The most prominent reasons for using a DB are dissatisfaction with the existing (at the time) standard form contract dispute resolution mechanisms and funding agent requirements.
- The major reason put forward for not using a DB is that the standard form of contract which do not have a DB provision is simply followed.
- All groups generally considered DB to be impartial except the employer group which considered the DB not to be impartial.
- The general opinion was that DB are value for money. The employer and engineering consultants groups were split on this issue with 50% saying they are and 50% saying they are not.
- Respondents were of the opinion that DB are not an essential part of the dispute resolution process.

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3.8 Analysis of Interview Results

The following pertinent conclusions were drawn from the interviews conducted:

- There is general consensus that the DRB, although adjudicating in the first instance, has more discretion in recommending solutions as the recommendation is non-binding and may set the stage for a settlement. A DAB is bound to the letter of the contract and law as their decision is immediately binding and enforceable. The DRB is a 'softer' approach whereas the DAB is a 'harder' approach.
- The DAB approach is in danger of becoming legalistic due to the immediately binding decision. The objectives of flexibility, reduced cost and time and a resolution by engineers would then not be met.
- Clear terms of reference for the DB and early involvement are important.
- In Southern Africa the DB process is not well known and project participants do not budget and consider the probability of disputes in advance.

- There is some disillusionment with the concept given the sensitivity of its success to member choice and the high proportion of recommendations in the favour of the Contractor.

3.9 Future of DB in Southern Africa

In Section 11 increased use and requirement for DB world wide and in Southern Africa are identified.

The principle advantages of DB are identified as:

- Reduction in disputes
- Reduction in cost
- Reduction in time for dispute resolution
- Improved dispute resolution process
- Improved relationships
- Improved chance for acceptance and settlement
- Wide application

There is evidence and general acceptance that DB are successful in resolution/settlement of disputes.

It is concluded that the DB mechanism may well be the preferred system of dispute resolution as it provides:

- The opportunity to secure perceived objective and impartial experts
- Informality of procedure and reduction in cost and time of dispute resolution
- Credibility of the disputes resolution system among participants

The DB mechanism may meet the need in the construction industry for prompt, informal, cost-effective, consistent and impartial dispute resolution.

It is anticipated that the use of DB in Southern Africa would increase.

3.10 DB Role and Appropriate Characteristics

In this section two important aspects are considered, *viz*:

- The role of the DB and where it fits in the dispute resolution process
- Appropriate procedures and characteristics of a DB

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Also, the principles of adjudication are presented as it forms part of both the DRB and DB process.

It was concluded that:

- DB are part of the ADR process.
- The general way in which DB are appointed (formal involvement only when dispute arises) results in them not actively preventing disputes. However, their existence and the message their inclusion conveys, may contribute to dispute prevention. Although this role of a DB is postulated in the literature and was mooted in the interviews, no evidence supporting this view was found.
- A DRB is part of the amicable settlement process.
- The DAB has a fully adjudicatory role.

It was further concluded that a DRB can operate in three ways, *viz*:

- Adjudication solely in accordance with the contract and substantive rules of law
- In the sense of a amiable compositeur
- A combination of the above

Further the characteristics of a DB to satisfy certain needs for a dispute resolution system to be successful are considered under the aspects of:

- Cost
- Speed
- Accuracy
- Credibility
- Workability
- In some cases predictability
- Disputant acceptance of the dispute resolution system.
- DB recommendations
- Role of the Engineer

4. CONCLUSIONS

Many apparent flaws and unanswered questions exist. However, many influential institutions (World Bank, FIDIC) have fully embraced the DB concept, ensuring that it is here to stay (for the foreseeable future at least) warts and all. Also perceptions are very

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strong that the traditional Engineer is not impartial, due to *inter alia*, a higher level of Employer involvement and pressure, economic realities for repeat work, loss of professionalism, etc.

The author is of the opinion that the replacement of the Engineer adjudicating on disputes by a DRB giving a non-binding recommendation, is the correct approach for the following reasons:

- It is an accepted principle in adjudication that one cannot be a judge in one's own case (contrary to the rules of natural justice).
- With the increased competition for appointments, the impartiality of the Engineer rightfully becomes questionable, especially in certain cultures and environments where little attention is paid to ethics.
- Contractors generally do not believe that the Engineer is, and can be, impartial. This does not add value to the dispute resolution process and the Engineer's decision is viewed as a mere time consuming formality in the process.
- The removal of the adjudicatory role from the Engineer does not undermine the authority of the Engineer.
- There is evidence that DRB have been very successful with resolution of disputes.
- It is an opportunity to secure perceived objective and impartial experts.
- It brings informality of procedure and reduction in cost and time of dispute resolution.
- It brings early finality to the dispute resolution process as:
  - The DRB is perceived to be impartial and its decision would carry more weight than the Engineer
  - Elimination of the Engineer's decision from the process reduces the time period

Further conclusions are:

a) The DRB concept is intended to be part of the amicable settlement process. Those in the industry with knowledge of DB have divergent opinions as to where the DRB fits as an ADR process.

b) The DAB is an adjudication process, resulting in a binding decision. Those in the industry with knowledge of DB are clear on where the DAB fits as an ADR process.

c) Generally DB agreements are not clear on the authority of the DB as to whether recommendations must conform to the provisions of the contract and be decided in

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accordance with the substantive rules of law or whether some leeway exists and if so, how much.

d) Where a DRB is to provide a recommendation on the basis of equity the manner in which an equitable solution is sought, is not immediately clear.

e) The standard of DRB recommendations in Southern Africa could be improved.

f) The proximity of the amounts decided/recommended by DB in Southern Africa and a 50/50 compromise position could be pure coincidence or it could be proof of a propensity for a DB to 'split the difference'.

g) In Southern Africa the DB process is not well known and project participants do not budget and consider the probability of disputes in advance. DB are only in use on civil engineering construction projects and then also mainly on large projects.

h) There is some disillusionment with the concept.

i) The most prominent reasons for using a DB are dissatisfaction with the existing (at the time) standard form contract dispute resolution mechanisms and funding agent requirements. The major reason put forward for not using a DB is that the standard form of contract which do not have a DB provision is simply followed.

j) Generally DB are considered to be impartial, however some doubt exists in this regard from the side of employers and engineering consultants. Also the general opinion is that DB provide value for money but that DB are not an essential part of the dispute resolution process.

k) DRB and DAB are alternative dispute resolution processes.

l) DB do not actively prevent disputes. However, their existence and the message their inclusion conveys, may contribute to dispute prevention. DB are generally used as dispute resolution processes.

m) A DRB can operate in three ways, *viz*:

- Adjudication solely in accordance with the contract and substantive rules of law
- In the sense of an amiable compositeur
- A combination of the above two

n) A dispute resolution process must satisfy certain needs for it to be accepted by the parties.

o) The timeframe allowed for the research project places limits on the scope. In this particular instance it was not possible to identify and contact all users of DB in Southern Africa and solicit information and opinions from them.

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p) The DB mechanism can meet the need in the construction industry for prompt, informal, cost-effective, consistent and impartial dispute resolution. It is anticipated that the use of DB in Southern Africa would increase.

q) In connection with DB recommendations/decisions it is concluded that in Southern Africa:

- The Contractors initiate the references to the DB.
- The DB decisions are generally in the favour of the Contractors.
- The majority of recommendations are either accepted or the dispute is settled after the recommendation is made.
- Contractors reject more recommendations than Employers.
- The 79% success rate of DB is lower than expected from the literature survey.

5. RECOMMENDATIONS

The following recommendations are made:

a) DRB recommendations should be non-binding, leaving the binding decisions to a DAB operating in a purely adjudicatory role.

b) The use of a DAB with a binding decision is not recommended.

c) It must be clearly stated whether the DB authority in connection with recommendations must conform to the provisions of the contract and be decided in accordance with the substantive rules of law or whether it has some leeway.

d) Guidance on the manner in which an equitable solution, which may not coincide with the strictly legal principle is arrived at, can be sought from the French system of *amiable composition.*

e) Requirements (format and content) for DB recommendations should be detailed and clearly set out in the DB agreement.

f) A larger database must be used to assess whether there is a propensity for DB to 'split the difference'.

g) It would be prudent to conduct DB workshops for employers, contractors and engineers who are involved with large projects and operate internationally.

h) DB recommendations must clearly set out the reasons for the recommendations and show that the recommendations are in keeping with the DB authority and terms of reference.

i) The building industry should also be specifically involved in DB workshops.

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j) Criteria for membership must be exacting and the choice of correct DB members must be a high priority with the parties.

k) The alternative dispute resolution process status of DRB and DAB must be maintained.

l) DB agreements must make it clear whether the DB would be acting in a preventative or resolutive role, or both.

m) A DRB should operate as a combination of:
   - In the first instance adjudication solely in accordance with the contract and substantive rules of law and
   - Secondary as amiable compositeur

n) In designing the DB agreement cognisance must be taken of the needs of the industry from a dispute resolution process.

o) The author considers it of importance to the base of knowledge regarding DB in Southern Africa to obtain and analyse information also from all other projects employing DB in Southern Africa.

Although the characteristics and recommendations for DB contained in this report have been put forward from a particular point of view, the author recognises that the DB details are also flexible to be adjusted to suit the needs of the project and the project participants.

University of Cape Town

The use of Dispute Boards as an Alternative Dispute Resolution Mechanism on Construction Projects in Southern Africa

TABLE OF CONTENTS

Page

DECLARATION ..... **ii**
ACKNOWLEDGEMENTS ..... **iii**
EXECUTIVE SUMMARY ..... **iv**
TABLE OF CONTENTS ..... **xix**
GLOSSARY AND ABBREVIATIONS ..... **xxiv**
LIST OF ILLUSTRATIONS ..... **xxv**
1. INTRODUCTION **1**
1.1 Rationale 1
1.2 Aim 2
1.3 Objectives 2
1.4 Key Questions 3
1.5 Methodology 3
1.5.1 Stage 1 : Dissertation Planning 3
1.5.2 Stage 2 : Literature Survey 4
1.5.3 Stage 3 : Exploratory Telephonic Interviews and Data Gathering 4
1.5.4 Stage 4 : Review and Analysis of Contract Documentation and Data 4
1.5.5 Stage 5 : Questionnaire 5
1.5.6 Stage 6 : Structured Interviews 5
1.5.7 Stage 7 : Analysis of Questionnaire Responses and Interview Results 6
1.5.8 Stage 8 : Writing the Research Report 6
1.6 Structure of Report 6
1.7 Definition of Terms 9
2. DISPUTE **10**
2.1 Section Introduction 10
2.2 Conflict and Dispute 10
2.3 Sources of Dispute 12
2.4 Sources of Dispute in Construction 13
2.5 Inevitability of Disputes in Construction 16
2.6 Section Summary and Conclusion 17
3. DISPUTE RESOLUTION **18**
3.1 Section Introduction 18
3.2 Approaches to Dispute Resolution 18
3.3 Construction Contract Provisions for Dispute Resolution 20
3.3.1 FIDIC Conditions of Contract 20
3.3.2 Provisions 21
3.3.3 The Role of the Engineer 23
3.3.4 Criticism 24
3.4 New (1999) FIDIC CoC Provisions for Dispute Resolution 25
3.5 Dispute Resolution System Design 27

University of Cape Town

3.5.1 Diagnosis 27
3.5.2 Design 30
3.6 Section Summary and Conclusion 32
4. ALTERNATIVE DISPUTE RESOLUTION (ADR) 33
4.1 Section Introduction 33
4.2 Definition of ADR 33
4.3 Development and Characteristics of Alternative Dispute Resolution 35
4.3.1 Need for ADR 35
4.3.2 Development of ADR 39
4.3.3 Characteristics of ADR 40
4.3.4 Advantages/Benefits of ADR 44
4.3.5 ADR Disadvantages and Reservations 45
4.4 ADR Methods in South Africa 47
4.4.1 Small Claims Court 48
4.4.2 Short Process Courts and Mediation in Certain Civil Cases 48
4.4.3 Other ADR Methods in South Africa 49
4.5 ADR Methods Internationally 49
4.6 Summary of ADR Procedures 49
4.7 ADR Processes – Binding Elements 50
4.7.1 ADR Adjudication (not litigation) 50
4.7.2 Med-Arb and Arb-Med 51
4.7.3 Arb-Med 53
4.7.4 Expert Determination / Appraisal 54
4.7.5 Court-appointed Referee /Rent-a-Judge/Private Judging 56
4.7.6 Concilio-Arbitration 57
4.7.7 Expedited Arbitration 58
4.7.8 Short-form Arbitration 59
4.7.9 Amiable Composition 59
4.8 ADR Processes – Non-binding 62
4.8.1 Mediation 62
4.8.2 Conciliation 63
4.8.3 Court-annexed Arbitration 64
4.8.4 The Mini-Trial 65
4.8.5 Summary-Jury trial 66
4.8.6 Multi-door Courthouse 67
4.8.7 Ombudsman 68
4.8.8 Neutral Expert Fact Finding 68
4.8.9 Dispute Resolution Advisor (DRA) 69
4.9 Other Dispute Resolution Processes 70
4.9.1 Negotiation 70
4.9.2 Adjudication 72
4.9.3 Arbitration 73
4.10 Applicability of ADR in Construction 74
4.11 ADR Success and Future Prospects in Construction 75
4.12 ADR Suitability and Measure of Success 77
4.13 Section Summary and Conclusion 79
5. DISPUTE BOARDS 80
5.1 Section Introduction 80
5.2 Need for DB 80
5.3 History of Dispute Boards 82

University of Cape Town

5.3.1 In the World 82
5.3.2 In Southern Africa 86
5.4 Definition and Description 88
5.4.1 Dispute Review Board 88
5.4.2 Dispute Adjudication Board 104
5.5 Dispute Boards and FIDIC 104
5.5.1 Dispute Review Board 105
5.5.2 Dispute Adjudication Board 108
5.6 Advantages of DB 111
5.7 Disadvantages of DB 114
5.8 Success of DB 115
5.9 Application 116
5.10 Section Summary and Conclusion 117
6. RESEARCH DESIGN AND PROCESS 120
6.1 Section Introduction 120
6.2 Dispute Resolution Research Theory 120
6.2.1 Research Framework 120
6.2.2 'New Formalism' Approach 121
6.2.3 Application of Theory 122
6.3 Data, Information and Opinion Gathering 124
6.4 Questionnaire 124
6.5 Interviews 125
6.6 Section Summary and Conclusion 126
7. DB SPECIFICATIONS AND AGREEMENTS IN USE ON CONSTRUCTION PROJECTS IN SOUTHERN AFRICA 127
7.1 Section Introduction 127
7.2 DB Specification and Agreement 127
7.3 Project A 127
7.3.1 Project Description 127
7.3.2 DB Contract Provisions (Dispute Resolution Agreement) 128
7.3.3 DB Agreement 128
7.3.4 Event Sequence 131
7.4 Project B 132
7.4.1 Project Description 132
7.4.2 DRB Provisions in the Contract 132
7.4.3 DRB Agreement 135
7.4.4 Event Sequence 139
7.5 Project C 139
7.5.1 Project Description 139
7.5.2 DRB Provisions in the Contract 140
7.5.3 DB Agreement 140
7.6 Project D 140
7.6.1 Project Description 140
7.6.2 DRB Provisions in the Contract 141
7.6.3 DB Agreement 141
7.7 Projects E 141
7.7.1 Project Description 141
7.7.2 DRB Provisions in the Contract 143
7.7.3 DRB Tri-Partite Agreement 145
7.7.4 Event Sequence 156

University of Cape Town

7.8 Project F 156
7.8.1 Project Description 156
7.8.2 DAB Provisions in the Contract 157
7.8.3 DAB Terms of Appointment 159
7.8.4 Event Sequence 160
7.9 Smaller Projects 160
7.9.1 Project G 161
7.9.2 Project H 161
7.10 Comparative Summary of DB Provisions 161
7.11 Essential Differences in DB Approaches 162
7.12 Section Summary and Conclusion 162
8. ASSESSMENT OF DB DECISIONS / RECOMMENDATIONS 163
8.1 Section Introduction 163
8.2 Assessment Criteria 163
8.3 Qualitative Assessment 164
8.3.1 Contract References 165
8.3.2 Description of Relevant Contract Background 165
8.3.3 Description of Dispute 165
8.3.4 Statement(s) of Dispute 165
8.3.5 Recommendations 166
8.3.6 Analysis and Findings 166
8.4 Quantitative Analysis 167
8.5 Achievement of Recommendation Objectives 168
8.5.1 Observations 169
8.6 Section Summary and Conclusion 169
9. ANALYSIS OF QUESTIONNAIRE RESPONSE RESULTS 172
9.1 Section Introduction 172
9.2 Response Ratio 172
9.3 Personal Experience with DB 173
9.4 Where Does DB Fit? 174
9.5 Reasons for Using/Not Using DB 175
9.5.1 Reasons for Using DB 175
9.5.2 Reasons for Not Using DB 176
9.6 Perceptions of DB 177
9.6.1 Principle of Dispute Adjudication Board 177
9.6.2 Principle of Dispute Review Board 179
9.6.3 Impartiality of DB 180
9.6.4 Value for Money 181
9.6.5 Essential Part of Amicable Settlement/Adjudication Process 183
9.7 Section Summary and Conclusion 184
10. RESULTS OF INTERVIEWS 186
10.1 Section Introduction 186
10.2 Summary of Opinions 186
10.2.1 Role and Authority of the DB 186
10.2.2 Industry Sentiment 187
10.2.3 General Observations 188
10.2.4 Recommendations 189
10.3 Section Summary and Conclusion 190
11. DISPUTE BOARD FUTURE 191
11.1 Section Introduction 191

University of Cape Town

11.2 Developments 191
11.3 Advantages 192
11.4 Disadvantages of DB 192
11.5 Success of DB 194
11.6 Section Summary and Conclusion 194
12. DB ROLE AND APPROPRIATE PROCEDURE AND CHARACTERISTICS 196
12.1 Section Introduction 196
12.2 Where Does the Dispute Board Fit? 196
12.2.1 DB and ADR 196
12.2.2 Adjudication 197
12.2.3 Dispute Review Board 199
12.2.4 Dispute Adjudication Board 206
12.3 Characteristics of a Successful DB 207
12.3.1 Cost 207
12.3.2 Speed 208
12.3.3 Accuracy 208
12.3.4 Credibility 208
12.3.5 Workability 210
12.3.6 Predictability 210
12.3.7 Disputant Acceptance of the Dispute Resolution System 210
12.3.8 DB Recommendations 211
12.3.9 Role of the Engineer 212
12.4 DB Selection 213
12.5 Section Summary and Conclusion 213
13. CONCLUSIONS 215
14. RECOMMENDATIONS 219
15. REFERENCES 221
16. ANNEXURES 226

University of Cape Town

GLOSSARY AND ABBREVIATIONS

c	clause
CEDR	Centre for Dispute Resolution
Contractor	the contractor who is responsible for the actual execution of the works under the supervision of the Engineer
COPA	Conditions of Particular Application
DAB	Dispute Adjudication Board(s)
DB	Dispute Board(s)
DRB	Dispute Review Board(s)
Employer	project owner
Engineer	consultant appointed by the Employer to assist him and to act on its behalf in connection with the works to be constructed
ex aequo et bono	in fairness and justice; according to what is just and good
ex post facto	acting (judging) retrospectively
FIDIC	Fédération Internationale des Ingénieurs-Conseils
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICOLD	International Committee on Large Dams
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
NEC	New Engineering Contract
OED	Oxford English Dictionary
res judicata	a matter adjudged
SBDW	Sample Bidding Documents Procurement of Works
sc	Sub-Clause
TCCP of UTRC	The Technical Committee on Contracting Practices of the Underground Technology Research Council
ultra vires	beyond the scope of its powers

University of Cape Town

LIST OF ILLUSTRATIONS

Tables

Table 1 : Summary of Major Approaches to Dispute Resolution 19
Table 2 : Dispute Resolution Methods 19
Table 3 : Diagnosis of FIDIC Dispute Resolution Procedures, with (DRB) and (DAB) 27
Table 4 : Comparison of FIDIC Procedures with Design Principles 31
Table 5 : Characteristics of ADR (Source : MacGregor quoting Kwayke, 1994) 41
Table 6 : Primary Dispute Resolution Processes 42
Table 7 : 'Hybrid' Dispute Resolution Processes 43
Table 8 : Summary Analysis of ABA Survey Results 75
Table 9 : Outline for a General Theory of Dispute Processing ('New Formalist') 122
Table 10 : Essential Differences in DB Approaches 162
Table 11 : Summary of Assessment Criteria 164
Table 12 : Summary of Quantitative Analysis of Decisions/Recommendations 167
Table 13 : Summary of Quantitative Analysis of Decisions/Recommendations; Total Amounts 167
Table 14 : Distribution of Target Group and Questionnaire Responses 172
Table 15 : Respondents' Experience with DB 173
Table 16 : Summary of Reponses Regarding DAB and ADR 174
Table 17 : Summary of Reponses Regarding DRB and ADR 175
Table 18 : Reasons for Using DB on Projects 175
Table 19 : Reasons for Not Using DB on Projects 177
Table 20 : Summary of Responses Regarding DB Impartiality 180
Table 21 : Summary of Responses Regarding DB Value for Money 181
Table 22 : Summary of Responses on Essentiality of DB 183
Table 23 : Arguments Against DB and Counter Arguments 192
Table 24 : Comparison of DB Processes with ADR Definitions 196

Figures

Figure 1 : Conflict Model by Dressler 11
Figure 2 : FIDIC CoC 4th Edition Dispute Resolution Event Sequence 23
Figure 3 : FIDIC CoC 1999 Edition Dispute Resolution Event Sequence 26
Figure 4 : Project A Dispute Resolution Event Sequence 131
Figure 5 : Projects B-D Dispute Resolution Event Sequence 139
Figure 6 : Projects E Dispute Resolution Event Sequence 156
Figure 7 : Project F Dispute Resolution Event Sequence 160

University of Cape Town

1. INTRODUCTION

This dissertation has been developed along the lines as proposed by Naoum (1998), taking due cognisance of the "Dissertation Memorandum" of the Department of Construction Economics and Management of University of Cape Town.

1.1 Rationale

Large (in excess of R 350 million in 2000 value) construction projects in Southern Africa have shown a propensity for complex contractual disputes not easily resolved in conventional processes of arbitration and litigation. Among these are the Drakenberg Pumped Storage Scheme, the Richards Bay Line, the Sishen Saldanha Railway Line, the Koeberg Nuclear Power Station and the Hex River Tunnel. Loots & Fraser (1999) say that in some cases the disputes became extremely acrimonious, were drawn out over a number of years and were eventually settled out of court to neither party's satisfaction.

Pike (cited by Jaynes, 1993) says that Dispute Review Boards are needed '*for a dispute resolution regime which is impartial, comprehensive, swift and binding and which offers the parties a fair opportunity at being heard*'. Alternative disputes resolution techniques in the form of Dispute Boards have been developed over the past 20 years (first known use on an international project was in 1980 – El Cajon in Honduras) and needs serious consideration by owners of large construction projects in Southern Africa. Already the World Bank has adopted a policy requiring the appointment of Dispute Review Boards (or a Dispute Review Expert on projects of value less than US$ 50 million) on its projects and FIDIC has adopted Dispute Adjudication Boards for its standard form contracts.

Dispute Board approaches have been instituted on large construction projects in Southern Africa in the past ten years. On the Lesotho Highlands Water Project (which includes, *inter alia* Delivery Tunnels South and North, Katse Dam, the Transfer Tunnel, Mohale Tunnel, Mohale Dam and Matsoku Diversion Weir and Tunnel) a Dispute Review Board approach was and is being followed. On Maguga Dam a Disputes Adjudication Board approach is being followed. The approaches vary from that of non-binding recommendations to adjudication and from maintaining the role of the impartial engineer to that of diluting the engineer's role. Loots & Fraser (1999) considers the various DB approaches being

University of Cape Town

followed in Southern Africa to still be part of an evolutionary process, which has not yet reached maturity.

A knowledge base and experience in Southern Africa of DB started to develop during the early nineties. Through personal interaction the author became aware that there was substantial divergence between project participants as to the desirable role and authority of DB.

The research considered available ADR processes and the position of DB. It also assessed industry sentiment towards the various DB approaches and DB application on construction projects in Southern Africa. Eight large prominent projects and two smaller projects were considered. The research was conducted on a qualitative rather than a quantitative basis. The preferred role and authority of the DB was identified.

It is hoped that the research would assist in the development of understanding in Southern Africa of DB approaches, contribute to the knowledge base in the region and be viewed as a reference work by the industry.

University of Cape Town

1.2 Aim

To consider available ADR systems in construction and in particular the DB procedures used on construction projects in Southern Africa and in so doing, identify the characteristics of DB procedures that contribute to the successful resolution of disputes.

1.3 Objectives

The objectives are to:

- Summarise common ADR processes and consider the need for ADR processes on construction projects
- Compare the DB process with other ADR processes
- Consider the development and characteristics of the DB process and why its use has increased
- For the projects under consideration
  - Describe the DB approaches used
  - Consider the differences in approach to DB between these projects

- Assess the DRB decisions / recommendations on a qualitative and to a lesser extent on a quantitative basis
- Consider why the DB process are being chosen / not chosen
- Capture industry sentiment towards DB
- Identify the characteristics of a successful DB approach
- Recommend the desirable role and authority of DB

1.4 Key Questions

- What are the characteristics of DB procedures used on construction projects in Southern Africa?
- What evidence is available to indicate the success of a particular DB approach (that ensures the successful resolution of disputes)?
- What are the industry sentiments with regard to DB in Southern Africa?
- What are the characteristics of DB procedures that ensure the successful resolution of disputes?
- What are the desirable role and authority of DB?

1.5 Methodology

The research was undertaken in the following stages. The stages are not discrete and sequential, but rather they overlap and interact with each other. The questions are not answered in single sections alone but emanate from considerations contained in many of the sections.

1.5.1 Stage 1 : Dissertation Planning

Once the topic was identified the following planning was undertaken:

- Study dissertation development guidelines
- Develop proposal, including time schedule
- Identify potential projects in Southern Africa for study
- Identify contact persons and details
- List project documentation required
- List potential literature sources
- Set up management sheets and progress reporting

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1.5.2 Stage 2 : Literature Survey

During this stage relevant literature was obtained and studied.

A comprehensive review of the relevant literature was undertaken in order to:

- Identify available research
- Develop an understanding of disputes and in particular of disputes in construction
- Develop an understanding of the commonly used ADR systems
- Appreciated the development of DB over time
- Develop an understanding of the various DB approaches and characteristics
- Assist with structuring the telephonic interviews and questionnaires

1.5.3 Stage 3 : Exploratory Telephonic Interviews and Data Gathering

- Exploratory telephonic interviews were undertaken with key people (those with insight into the dispute resolution processes followed on the project), who were employed on the relevant projects. The objectives were to assess whether the project was worthy of further study and what the practical constraints were (no documentation, key persons not available, etc).
- The interviews also contributed to the development of the questionnaire and face to face structured interview questions.
- Project owner approval was obtained and project data gathered once the project was identified as worthy of further consideration.

1.5.4 Stage 4 : Review and Analysis of Contract Documentation and Data

Contract documentation and data relevant to the projects were reviewed and analysed to:

- Identify the scope of the construction work
- Identify the characteristics of the DB approach used (provisions of Contract and DB Agreement)
- Identify the relevant DB role and authority
- Assess the DB decisions/recommendations
- Consider the results of the DB process
- Identify the criteria to measure DB success
- Determine the level of success achieved by the various DB approaches in resolving disputes by:
  - Measuring it against success criteria

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- Considering the number and size of disputes referred to the DB
- Considering how many and which disputes were settled
- Establishing whether the DB recommendations were in terms of the contract and the DB agreement
- Establish how many recommendations and of what value were in the employer's and how many and of what value in the contractor's favour. Also how many were settled with no clear recommendation in either's favour.

1.5.5 Stage 5 : Questionnaire

A questionnaire was developed with due consideration of the objectives of the dissertation, the exploratory telephonic interviews and the literature survey.

The objectives of the questionnaire were to gather information and opinions to assist with the establishment of:

- DB experience available in Southern Africa
- History of DB in Southern Africa
- Why the DB approach was/was not followed on projects
- Industry perception of the role of DB
- Industry sentiment towards DB

Questionnaires were sent to 39 persons that were likely to have experience or knowledge of DB. The persons were chosen from legal consultants, engineering consultants, contractors, employers and DB members.

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1.5.6 Stage 6 : Structured Interviews

Structured interviews were conducted with persons having experience with DB.

The objectives were to gather information and opinions to assist with:

- Understanding of the DB approach followed (where it was project linked)
- Soliciting the personal views of those interviewed regarding the DB process
- Determining
- Identifying lessons learned
- Elaboration on, and to supplement some aspects of the questionnaire

1.5.7 Stage 7 : Analysis of Questionnaire Responses and Interview Results

The questionnaire responses and results of the interviews were analysed to:

- Identify DB experience available in Southern Africa
- Develop the history of DB in Southern Africa
- Identify lessons learnt and suggestions for improvements, which were evaluated in the process of proposing the characteristics of an appropriate DB approach in resolving disputes
- Establish whether a common thread exists in industry sentiment regarding the process of dispute resolution by DB and perception regarding the role of DB
- Assist in establishing whether the DB approach is successful in resolving disputes
- Establish why the DB approach was/was not followed on projects

1.5.8 Stage 8 : Writing the Research Report

This stage involved writing the dissertation and covers the sections in the table of contents and elaborated on in the following section.

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1.6 Structure of Report

Although the research included evaluation of the DB method of dispute resolution this is not only an evaluation report of a particular method of dispute resolution. It also includes a broader perspective of disputes, dispute resolution, its application to the construction industry, in particular in Southern Africa. Never the less, in planning, conducting and reporting the evaluation, the author has been mindful of the framework through which processes of dispute resolution is understood. The research design is dealt with in more detail in Section 6.

The logic development of the dissertation is as follows:

- Disputes
  - Disputes are a reality of life
  - Disputes are part and parcel of the construction process
- Dispute Resolution
  - Dispute resolution exists and follows a certain pattern
  - The construction industry allows for certain traditional procedures of dispute resolution

- > There is criticism of some of these procedures
- ➢ Alternative Dispute Resolution (ADR)
  - > There is a need for a move away from traditional systems
  - > What is ADR
  - > Development of ADR
  - > Summary of ADR methods and characteristics
  - > Application of ADR in construction
- ➢ DB has developed as a ADR process in construction
- ➢ Description and definition of DB
- ➢ DB application in Southern Africa
  - > History
  - > Different approaches used
  - > Industry sentiment
  - > Role and authority of DB
  - > DB decisions/recommendations
  - > DB future
  - > Appropriate DB characteristics

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The report is structured as follows:

Section 1: Introduction – The rationale, aim, objectives, key questions, stages of the research, dissertation structure and definition of certain terms are elaborated.

Section 2 : Dispute – The terms 'dispute' and 'conflict' are considered, the sources of dispute and in particular in construction are identified and the inevitability of disputes in construction are considered.

Section 3 : Dispute Resolution – Approaches to dispute resolution, traditional and new construction contract provisions for dispute resolution and dispute system design are considered.

Section 4 : Alternative Dispute Resolution – The development and characteristics of ADR are described, the ADR methods in use in Southern Africa and the world are considered, ADR processes are described in summary, key ADR characteristics are

identified and the applicability, success and future prospects of ADR in construction is considered.

Section 5 : Dispute Boards - The need for DB is considered, the histories of DB in the world and in Southern Africa are described, DB are defined and described and DB in relation to FIDIC are explored. Further the advantages and disadvantages of DB are described, the success and application of DB are considered and the role and authority of DB are explored.

Section 6 : Research Design – Dispute resolution research theory and the design of the research are described.

Section 7 : DB Specifications and Agreements in Use on Construction Projects in Southern Africa - DB specifications and agreements in use on construction projects in Southern Africa are described.

Section 8 : Review of DB Decisions/Recommendations – Assessment criteria for better practice DB decisions/recommendations are developed. The DB decisions/recommendations from the projects under consideration are assessed against the criteria.

Section 9 : Analysis of Questionnaire Response Results – The responses to the questionnaire are analysed.

Section 10 : Analysis of Interview Results – The results of the interviews are analysed.

Section 11 : Dispute Board Future – The future of DB in Southern Africa are considered.

Section 12 : Appropriate DB Characteristics – Appropriate DB characteristics are identified.

Section 13 : Conclusions – Conclusions are drawn.

Section 14 : Recommendations – Recommendations are presented.

Section 15 : References – References are presented

Section 16 : Annexures – The annexures are presented.

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1.7 Definition of Terms

From the outset it is important to consider and define the meaning of certain terms for the purposes of this report.

Dispute resolution: The view of Sander (cited in Esser, 1989:473) is that the whole spectrum of processes are included, including ADR, pre-trial negotiations, judicial judgement and other forms of adjudication.

Alternative dispute resolution: Although certain philosophical views exist regarding the meaning of the term (see Section 4.2) Sander's (cited in Esser, 1989:473) view that when referring to ADR one tends to focus on forums of dispute resolution outside the traditional court system, is subscribed to.

Dispute processing: The term emphasises that the purpose or result of the 'dispute resolution' institutions is not always the resolution of disputes.

Conflict and dispute: Some differences in the terms are considered in Section 2.2, however the terms are generally used interchangeably in the report.

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2. DISPUTE

2.1 Section Introduction

In this section:

- The terms 'dispute' and 'conflict' are considered
- The sources of dispute and in particular in construction are identified
- The inevitability of disputes in construction is considered

2.2 Conflict and Dispute

The OED defines conflict and dispute as follows:

Conflict: '*clashing or variance of opposed principles, beliefs*'

Dispute: '*the act of disputing or arguing against something or someone; controversy, debate*'
'*a heated contention, a disagreement in which opposite views are strongly held*'

One could thus conclude that conflict relates to more fundamental differences and would consequently be more difficult to resolve. A dispute appears to be less fundamental, simply a disagreement in which opposite opinions and views are held and of a less serious nature.

Some support for the above contention is found in Burton's (cited by Anstey, 1999:10) distinction between conflict and dispute. He argues that whereas disputes are endemic in all social relationships and a normal feature of interactive networks, conflicts are deeply rooted in human needs. While disputes are open to negotiation and settlement, conflicts cannot be dealt with this way as they centre around threats to fundamental human needs.

Anstey (1999:11) considers this insight to have value but says that the distinction is often blurred. He says that conflictual relations may vary in depth and complexity.

Aubert (1963:158) again distinguishes between conflicts of interest and conflict of values. Conflicts of interest are based on some form of consensus (even if it is only as to agreement that the point in dispute has value) and can be resolved through settlement and negotiation. Conflicts of value are based on some form of dissensus and are fundamental. These are more difficult to resolve. Aubert's conflicts of value would thus be comparable to what Burton considers to be conflicts and Anstey's deep rooted conflict.

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One must not be misled by the ordinary grammatical meaning of words. In connection with philosophy Benatar (2000) says dictionaries reflect usage and dictionaries should not be appealed to as decisive solutions to philosophical problems. In connection with law Du Plessis (1999:230) says that text genre and the 'environment' or context from which the text evolves and in which it is construed, are of great significance.

Considering this and Anstey's approach noted above, one could then for purposes of this work conclude that disputes in the construction industry are conflicts, which are generally not deep-rooted and does not centre around threats to fundamental human needs but it is not uncommon for conflicts of interest to escalate into conflicts of value. Anstey's observations regarding conflict are thus equally applicable to disputes.

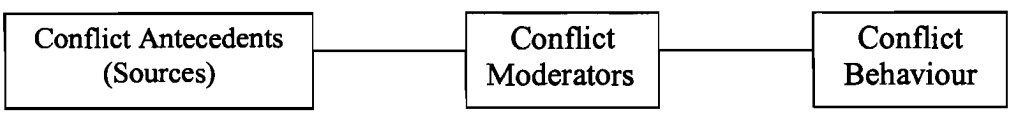
Rahim (1992:369) also offers a definition of conflict which would include disputes, *viz*; '*an interactive process manifested in incompatibility, disagreement, or difference within or between social entities (i.e. individual, group, organisation, etc.)*'

Anstey (1999:6) defines conflict as follows:

'*Conflict exists in a relationship when parties believe that their aspirations cannot be achieved simultaneously, or perceive a divergence in their values, needs or interests (latent conflict) and purposely employ their power in an effort to eliminate, defeat, neutralise, or change each other to protect or further their interests in the interaction (manifest conflict)*'.

Anstey (1999:12) suggests that a full understanding of any conflict must give attention to both structural and process aspects of a relationship, and how they influence each other. Thus sources of conflict, conflict behaviour and the perceptions and feelings of the parties involved require consideration. A simplified model of conflict by Dressler (Anstey, 1999:12) is presented below.

Figure 1 : Conflict Model by Dressler



Source: Anstey (1999:12)

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2.3 Sources of Dispute

Anstey (1999:3) says that all conflict is about change. Change is often a prominent feature of construction. Ground conditions are not what was envisaged, the owner changes his requirements, laws and local authority requirements change, etc. The list is substantial. Although sound change management could minimise conflict resulting from change it more often than not leads to extensive and continuing conflict. Unfortunately change is often used as a vehicle for recovery of losses resulting from poor tendering, poor construction management, competitive tendering procurement systems and the like.

Anstey (1999:13) provides a list the sources of conflict. The causes relevant to the construction industry are:

- Scarcity (of resources) – Scarcity of work and opportunity creates competition, which could be destructive in that the tenderers have to tender unrealistically low to win work. They then attempt to recoup losses through claims, which has a high propensity for resulting in disputes.
- Differing goals - A source of conflict is reflected in relations in which parties are in pursuit of differing goals. It is aggravated when they are interdependent in some way and when there is a scarce resource for which they are competing. Their interdependence produces an inherent and ongoing conflict; neither can afford to destroy the relationship despite competing objectives.
- Co-ordination – Conflict arise within and between groups when, and despite sharing common objectives, they differ as to the appropriate strategies or the importance of various tasks in achieving these.
- Structural imbalances – Structural imbalances occur when there is a real or perceived inequality in control and power. This often happens between a main contractor who is relatively large with substantial resources and a smaller subcontractor. Also between large government and private clients and contractors.
- Information – Information is an important source of power in intergroup relations. Lack of shared information gives rise to power struggles and contributes to mistrust in relations. It also reduces capacity of the parties to understand each other's stances on issues, contributing to the chances of misunderstanding. Instead of matters being worked out on the basis of a common database, they are fought out on the basis of position and principle informed by guesswork and assumption.

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- Interpersonal relationships – Sometimes win/lose situations are created, especially when positional bargaining approaches are used. This places strain on interpersonal relationships, creating tension, and the environment for conflict and dispute is created.

2.4 Sources of Dispute in Construction

In a paper in *The International Law Review* in 1986 Lodigiani (1986:499) recounts his personal observations over a 30 year career. Initially with firms becoming involved in work abroad, once technical, economic and financial aspects had been studied, little attention was paid to claims. He believes that this is attributable to the conviction that the presence of an engineer having adequate authority, and basically playing the role of an umpire, would reconcile in a competent and objective manner the often divergent positions of the employer and the contractor. This belief was given weight by the experience in practice.

Over the years circumstances took place that led to a significant modification of that approach. The employer gradually acquired a more prominent status and intervened more directly in contractual matters, leaving the engineer to deal with design and technical matters. The engineer lost his role as umpire and contractual matters became a object of direct confrontation between the employer and the contractor. Contributing factors were also the change in external conditions such as political facts, inflation, exchange rate instability and fluctuations in cost of capital.

The sources of dispute in construction as stated by various authors are detailed hereunder.

Davies (1992:61) suggests that two principle causes of disputes in the modern building contract are as follows:

- In the traditional type of project procurement there is little time, due to the adverse economic climate, for proper consideration during the design stage to provide sufficient detail to permit the contractors to properly assess the implications of design, etc. upon their programme and therefore on the ultimate financial outcome. The economic climate cause:
  - Designers to restrict the extent of their work at pre-tender stage.
  - Contractors to submit prices which cannot but cause financial problems.

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- Training in the professional construction and commercial sectors has severe shortcomings. For example the training in engineering, architecture and quantity surveying tends to be technical and largely ignore the contractual and management spheres.

Bishop (1992:378) also criticises the education process, saying it does little to look critically at the quality of management techniques in academic and workplace environments. He observes that the construction industry tends to deal with problems in a retrospective manner. Problems becomes disputes before being recognised and dealt with.

The above criticism of the education process is echoed by Hancock (1992:400) who states that '*problems and conflicts within the construction industry are a result of misunderstanding and a lack of perception founded in our education of construction industry professionals*'.

Additional sources of disputes in construction are identified by Revay (1992:201) as:

- The language of usual construction contracts is seldom so clear as not to leave room for disagreement
- Attitude of many owners to shift more and more risk onto the contractor and a similar approach by contractors towards subcontractors
- Owner's attempts at saving money in the wrong places creating grounds for claims, which in turn often lead to disputes:
  - Inadequate site investigations
  - Late start of design efforts
  - Limiting the cost of engineering and design
  - Calling for tenders with an incomplete design and set of drawings
  - Attempting to complete the design through shop drawing review
  - Introducing untimely design revisions without commensurate time extension or additional payment
  - Interfering with the sequence and timing of construction
  - Introducing changes under the disguise of correcting deficiencies

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In a study of Australian building disputes Watts (1992:209) identified some 117 sources of disputes which he grouped under the following headings (frequency of occurrence in brackets):

- Determination of the agreement (26%)
  - Failure by the contractor (58%)
  - Work and the site (23%)
  - Repudiation (19%)
- Payment (26%)
  - Variations (47%)
  - Progress claims (13%)
  - Dayworks (3%)
  - Delay cost (13%)
  - Liquidated and ascertained damages (13%)
  - Retention monies (7%)
  - Rise and fall (3%)
- Site and execution of work (16%)
- Time (16%)
- Negligence and nuisance (13%)
  - Negligence (87%)
  - Nuisance (13%)
- Final certificate/payment (3%)

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McGowan *et al.* (1992:255) say that existing project models fail to reflect the interactive link between costs and time in construction contracts, leading to unsystematic evaluation of the effects of change, and thus frequently to disputes.

Houghton, A. (1992:298) submits that repetitive disputes result form the use of standard conditions of contract which make detailed provisions for the recovery of loss by the owner in the event of default by the contractor, but leaves claims by contractors to be dealt with on general principles, as and when they arrive.

A study conducted by Dalton and Shehadeh (1992:279) shows a significant correlation between the following variables and conflict:

- Co-ordination by Contractor

- Decision making on site (Owner's involvement)
- Type of supervision
- Type of owner
- Owner's co-operation and attitude in supervision
- Standard conditions of contract
- Extent of engineer's authority

Hellard (1992) cites the existence of some 94 different standard contract forms in the UK construction industry as a major contributor to conflict.

Shadbolt (1999:101) is further of the view that, apart form the usual opportunities for dispute, there are also sources of dispute particular to construction in developing countries. This he says is due to the state of evolution of the economy and the law and because the unfamiliarity in business dealings between local construction purchasers and foreign construction suppliers.

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2.5 Inevitability of Disputes in Construction

Hellard, (1988) quoting Roskill wrote '*So long as human nature is what it is there will always be disputes. And those disputes, whatever their character, must be resolved – if society is to exist in a civilised way – as quickly, as cheaply and as satisfactorily as possible.*'

Clegg (1992:140) concludes that conflict is normal and endemic to the form of contractual life which governs construction organisations. Construction is regarded as contentious and plagued by disputes, even more so under the tighter economic conditions of recession.

Revay (1992:202) states that '*the likelihood of disputes (and/or) claims developing in most construction projects today is great ...*'.

In his foreword to the ICE Arbitration Practice, Sir John Donaldson (cited in Dorbig, 1988), Master of the Rolls (United Kingdom), said that he could not imagine a civil engineering contract, particularly one of any size, which did not give rise to some disputes. This was not to the discredit of either party, but is simply the nature of the operations involved. What was needed was a system for resolving those disputes as quickly, economically and sensibly as possible.

Ury *et al* (1988:xii) points out that while some disputes can be prevented, many cannot. Disputes are inevitable when parties with different interests deal with each other. The different interests come into conflict from time to time, generating disputes. This is typical of the construction industry where the one's gain is often the other's loss.

Further Molineaux (1999:1) is of the opinion that the likelihood for claims (which could lead to disputes) in construction, especially heavy civil works, is easily understood. In heavy works construction is carried out with nature and its uncertainty; soil, rock and water of varying grain size, hardness, depth and pressure. He (ibid.:1) contends that the goal for contractual certitude is rarely reached.

In his introductory paper to the Proceedings of the First International Construction Management Conference, titled Construction Conflict Management and Resolution, Lavers (1992:3) sketches a background at that time of a significant rise in conflict, some which results in formal claims and proceed to litigation and arbitration. He concludes that conflict is a feature of the international construction industry.

The above sentiment is reflected in Shadbolt's (1999:101) statement that '*Construction projects are breeding grounds for uncertainty and conflicts between parties because of their scope, scale, duration and complexity*'.

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2.6 Section Summary and Conclusion

In this section:

- The terms 'dispute' and 'conflict' were considered
- Various sources of dispute and in particular in construction were identified
- The inevitability of disputes in construction was considered

For purposes of this work it is concluded that disputes in the construction industry are conflicts and the words would be used interchangeably in this report.

The majority view is that disputes in construction are inevitable and that conflict exists and would continue to do so.

3. DISPUTE RESOLUTION

3.1 Section Introduction

It is recognised that conflict can be functional (as opposed to dysfunctional) and beneficial. So Rahim (1992:376) says that '*conflict must not necessarily be reduced, suppressed or eliminated, but managed to enhance individual, group and organisational effectiveness*'. Smith (1992:29) subscribes to this view and sees the tension in contractual relationships as functional to some extent; a form of creative tension. One would also then accept that disputes in construction are inevitable and that, although one would attempt to reduce it, concentration would be on their management rather than their complete eradication.

Keeping this view in mind and having shown in the preceding section that disputes in construction are inevitable and are on the rise, this section will explore how disputes in the industry are typically managed.

For purposes of this dissertation management and resolution of disputes are considered to be one and the same. Although one could view the former as dealing (management) with disputes as they arise and the latter as dealing (resolution) of disputes which have arisen, Lavers (1992:4) submits that they can be regarded as different versions of similar concepts. Also, in the industry disputes will arise that cannot be dealt with as they arise.

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3.2 Approaches to Dispute Resolution

Ury *et al* (1988:xiv) say that like rain, conflict is inevitable. Properly controlled it can be a boon, too much in the wrong place can create a problem. The challenge is to build a structure that will direct disputes along a low-cost path to resolution.

Hellard, (1988) quoting De Bono wrote '*Conflict resolution is probably the most important area for the future of mankind and the continued existence of the world. Is it good enough to have it served in an inadequate manner?*'
Three major approaches of resolving disputes are summarised in Table 1 hereunder in relation to construction.

Table 1 : Summary of Major Approaches to Dispute Resolution

Approach	Example	Remarks
To reconcile the disputants' underlying interests	Problem solving negotiations, amicable settlement period in construction disputes (FIDIC)	Less costly and more rewarding than rights approach
To determine who is right	Engineer's decision, dispute adjudication board, arbitration, litigation	Less costly and more rewarding than power approach
To determine who has more power	Threats, intimidation.	Dysfunctional

Pruitt and Carnevale, (1993:83) translates the above into the dispute resolution methods that are available for dealing with conflict/disputes. These are presented in Table 2 hereunder.

Table 2 : Dispute Resolution Methods

Approach	Method
Joint decision making (interest approach)	• Negotiation • Mediation
Third party decision making (rights approach)	• Adjudication • Arbitration • Autocratic decision making
Separate action (power approach)	• Retreat • Struggle • Tacit co-operation

These methods are dealt with in more depth in Section 4.6 below.

The most widely used approach, other than simply giving in is the attempt to indicate one's rights. Adjudication is the most frequently followed path. One party will eventually emerge as the winner, its rights upheld, while the other party loses the dispute.

A second widely used form of dispute resolution is based on the wielding of power by one party against the other. It may be political or economic and may be used in tandem with a rights-based approach.

Both power and rights based dispute resolution end up in win – loose situations.

Initially in the construction industry the inclination was to set aside claims during the work, to be resolved at the end of the project. To practical construction people progression

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of the work came first. Also, the contractor's project manager was reluctant to call in the lawyers early as:

- This would suggest failure to cope by the site team
- The lawyer would write antagonising letters which would exacerbate the situation
- High legal costs

Indeed in the first edition of the FIDIC 'Red Book' in 1957, it was stated that '*the arbitrator/s shall not enter the reference until after completion or alleged completion of the Works unless [the parties otherwise agreed]*' (Molineaux, 1995:2).

Molineaux (1999:1) says that today the trend in construction is toward early dispute resolution. The benefits of early dispute resolution are elaborated in Section 5.

Ury *et al* (1988:169) places dispute resolution systems in perspective as follows:

- Interests, rights and power present the framework for dispute resolution.
- The goal is savings and gains. The reduction of costs; the hours wasted in quarrelling, expensive lawsuits and the strain on valued relationships. Achieving gains; release of tension, strengthening of relationships and enhancement of productivity and performance.
- The means to achieve the goal is dispute systems (design) application in managing conflict. Real conflicts of interest (labour/management, ethnic groups) cannot be solved. This view is supported by Anstey (1999). He says that certain relationships are inherently conflictual. However, dispute 'resolution' offers a practical solution. It does not aim to eliminate conflict but simply to deal at low cost with the resulting disputes. Thus the term 'dispute resolution' may be a misnomer. Anstey (1999:30) says that in such a relationship 'the contradiction of goals does not allow for conflict resolution as such, but the dependency the disputants have on e.g. continued production, to meet their needs, obliges them to seek jointly acceptable means of expression of their conflict'. The process is thus one of conflict regulation rather than conflict resolution.

3.3 Construction Contract Provisions for Dispute Resolution

3.3.1 FIDIC Conditions of Contract

The FIDIC Fourth Edition standard form Conditions of Contract (CoC), 'Red Book' are the most widely used standard conditions of contract in the field of international civil

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construction. It is certainly the CoC used in Southern Africa where tenders are invited on an international basis. It is also the CoC edition used for the projects being considered in this report.

It would thus be prudent to consider the provisions of these CoC for dealing with disputes. Although a new generation of FDIC CoC have been published it has only recently become available and has thus not been used as extensively as the previous editions. Also the new edition is fundamental different from the previous editions in the way disputes are handled. This would be treated of later.

3.3.2 Provisions

Dorbig (1988:821) reports that the principles embodied within the general guidelines for FIDIC for drafting of the fourth edition, included close attention to dispute procedures. This resulted in, *inter alia*:

> Maintaining the role of the Engineer in settling disputes
> Inclusion of the amicable settlement period

The FIDIC Third edition did not include the provision for amicable settlement (see e) below). This second step (after an Engineer's decision) draws the attention of the parties to a means of avoiding costly arbitration proceedings which consume both time and effort.

The standard form CoC (fourth edition) allows for settlement of disputes under c 67 as described hereunder. The clause provides mechanisms for resolving disputes between the parties as well as including provisions for disputes to be referred to arbitration as a last resort. By this clause the parties waive their rights to submit disputes related to the contract to any other legal means of dispute resolution, in particular to any public court which might have jurisdiction over the dispute (FIDIC, 1989).

The c 67 provisions are summarised as follows:

a) There must exist a '*dispute of any kind*' between the Employer and the Contractor on '*any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer*'

b) The matter in dispute shall, in the first place, be referred in writing to the Engineer for a decision.

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c) Within 84 days of receipt of such reference the Engineer shall give notice of his decision to the Employer and the Contractor. If he does so, then the decision is '*final and binding*' subject only to arbitration. Severn (1996:1) considers this an '*inordinary long time to do so, despite his familiarity with the project*'

d) If either the Employer or the Contractor is dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before 84 days after receiving the reference, then either the Employer or the Contractor may, within 70 days after receiving notice of such decision, or within 70 days after the day on which the period of 84 days expired, give notice of his intention to commence arbitration, as provided for in the contract.

e) Where notice of intention to commence arbitration has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced 56 days after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made. Severn (1996:1) is of the view that this is a tacit recognition that arbitration can be a long and costly business and thus to be avoided if at all possible

f) Any dispute in respect of which:

(i) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(ii) amicable settlement has not been reached within the period stated in Sub-Clause 67.2

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules.

The sequence and timing of the events are presented in Figure 2 hereunder. For purposes of illustration a dispute is used as the source of the dispute.

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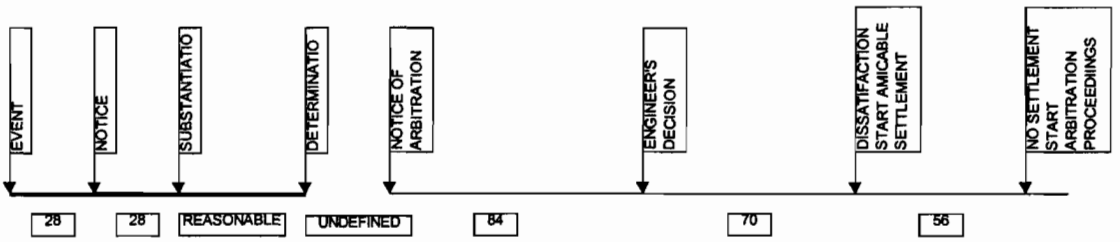
Figure 2 : FIDIC CoC 4th Edition Dispute Resolution Event Sequence



It is evident from Figure 2 that the longest period from the notification of the dispute to commencement of arbitration, should not exceed 210 days.

3.3.3 The Role of the Engineer

The role of the Engineer under the FIDIC 4th edition CoC would be briefly dealt with here, as this is the area where dramatic changes have taken place with the advent of DB.

Under the FIDIC CoC the Engineer has the roles of 'supervisor' (or preferably administrator), certifier and adjudicator or quasi-arbitrator. The role of importance here with regard to dispute resolution is that of quasi-arbitrator. In this role he acts in a judicial or quasi-judicial capacity and must be ever mindful of his duty to act impartially under sc 2.6 of the CoC. The term of quasi-arbitrator for the Engineer in this role was rejected by Mr Justice Purchas in the case of *Pacific Associates Inc v Baxter*[1]. His role thus appears to be that of an adjudicator rather than something similar to an arbitrator (Bunni, 1997:183).

This role is embodied in c 67 which provides that any dispute may be referred the Engineer for his decision (see Section 3.3.2 above). For the clause to come into operation there must be a dispute. Thus a claim or assertion made by the one party and rejected by the other and such rejection not accepted by the party originally making the claim or assertion.

Bunni (1997:185) says that the Engineer should not only be impartial, but must also do so in a logical and reasoned manner. It is advisable for the Engineer to give reasons for his decision. The decision of the Engineer may subsequently be reopened, reviewed and revised by an arbitrator. The matters requiring the Engineer's decision would often relate to the interpretation and application of the terms of the contract. As such, the Engineer would require both technical knowledge and a clear understanding of various aspects of construction law.

[1] [1989] 2 All ER 159

University of Cape Town

3.3.4 Criticism

Seppala (1986:325), referring to the FIDIC third edition, states that '*the method of settling disputes, though certainly imperfect and subject at times, to abuse, enjoys a long tradition in domestic construction contracts in the United Kingdom and the United States*'. However, through the years criticism of this procedure and its underlying principles mounted.

At times the Engineer would be called on to decide disputes that call directly into question his own conduct. Under an English legal doctrine, the Contractor is taken to have known at the time of contracting, and to have accepted, that the Engineer may be called upon to decide certain matters that will place him in a position of conflict between his duty to be impartial and his own self interest. However, an American court[2] stated '*To permit this* [for an architect to pass on his own errors and omissions] *would be an outrageous result not contemplated by the parties, ...*'. In fact such a situation is contrary to the rules of natural justice '*nemo judex in propria causa*' – no one may judge in his own cause.

Seppala (1986:329) questions, by '*present day international standards*', the appropriateness for the Engineer to decide disputes which call directly into question his own conduct. Although the argument can be made that the matter can be referred to arbitration for '*impartial*' hearing (as is argued in the Guide to the Use of FIDIC), the Engineer's decision is immediately '*final and binding*' and must be given effect until an arbitration award can be made. This could take some years. Consequently, the Contractor may be seriously prejudiced by a decision made by the Engineer in a position of conflict of interest before it can ultimately be rectified.

'*Final and binding*' decisions by the Engineer can be successfully challenged under American and English law in certain circumstances. Outside common law countries, contractual positions authorising the Engineer to settle disputes in a final manner are rare or unknown. Consequently, how such a provision would be enforced in such circumstances is difficult to foresee. Seppala (1986:333) questions whether such a provision is appropriate in an international form of Contract.

[2] Paschen Contractors, Inc. v John J. Calnan Co., 13 Ill. App 3d 485, 300 N.E. 2d 795 (App. Ct. ist Dist., ist Div.)

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The Engineer is only required to give notice of his decision and not to give reasons for his decision. Hawker (cited in Dorbig, 1988) expresses disappointment that the Engineer is not required to give reasons stating that this might have provided the parties with a basis for negotiation as a first step to settlement.

The ICC rules of arbitration are the FIDIC default rules for arbitration. These rules are considered ill-suited to the particular needs of a construction dispute (Hawker cited in Dorbig, 1988).

Chapman (2000) suggests that suspicions grew over the years concerning the independence of an Employer's agent to fairly determine disputes.

3.4 New (1999) FIDIC CoC Provisions for Dispute Resolution

The new FIDIC 'Red Book' CoC published in 1999:

- Maintains the role of the Engineer, but it is diminished in the settling of disputes
- Does away with the 'Engineer's decision'
- Retains the amicable settlement period of the fourth edition

This standard form CoC allows for settlement of disputes under c 20 as described hereunder. The clause provides mechanisms for resolving disputes between the parties by way of a DAB as well as including provisions for disputes to be referred to arbitration as a last resort. By this clause the parties waive their rights to submit disputes related to the Contract to any other legal means of dispute resolution, in particular to any public court which might have jurisdiction over the dispute (FIDIC, 1999).

The sc 20.4 provisions are summarised as follows:

a) There must exist a '*dispute of any kind*' between the Parties or '*any dispute as to any, certificate, determination, instruction, opinion or valuation of the Engineer*'

b) The matter in dispute shall be referred in writing to the DAB for a decision.

c) Within 84 days of receipt of such reference the DAB shall give its reasoned decision to the Parties. If it does so, then the decision shall be binding on both parties, subject only to arbitration.

d) If either Party is dissatisfied with any decision of the DAB, or if the DAB fails to give notice of his decision on or before 84 days after receiving the reference, then

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either Party may, within 28 days after receiving the decision, or within 28 days after the day on which the period of 84 days expired, give notice of his dissatisfaction '*notice of dissatisfaction*'.

e) Where a notice of dissatisfaction has been given in accordance with Sub-Clause 20.4 the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced 56 days after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

f) Any dispute in respect of which:

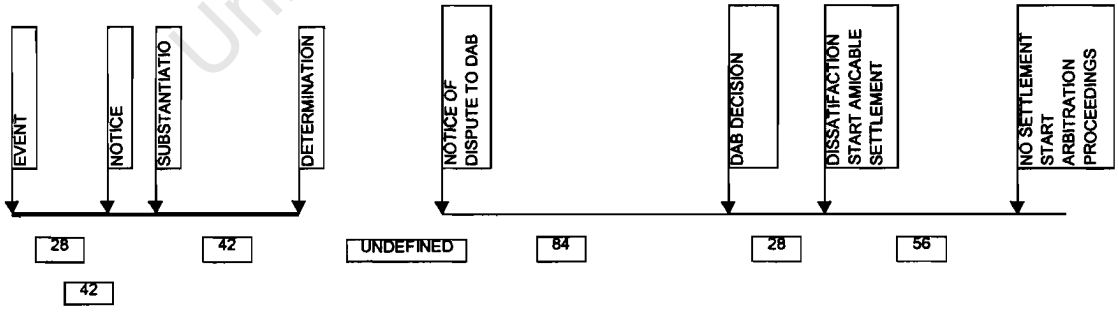
(i) the decision, if any, of the DB has not become final and binding pursuant to Sub-Clause 20.4, and

(ii) amicable settlement has not been reached within the period stated in Sub-Clause 20.5

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules.

The sequence and timing of the events are presented in Figure 3 hereunder.

Figure 3 : FIDIC CoC 1999 Edition Dispute Resolution Event Sequence



It is evident from Figure 3 that the longest period from the notification of the dispute to commencement of arbitration, should not exceed 168 days.

The FIDIC Guidance for the Preparation of the Particular Conditions (1999:19) provides for the Engineer to make pre-arbitral decisions as an alternative. This has been the

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Engineer's traditional role in common law countries as provided for in the FIDIC fourth edition.

3.5 Dispute Resolution System Design

In this section the FIDIC dispute resolution procedures (with DB) are considered in relation to dispute resolution design theory.

3.5.1 Diagnosis

Ury *et al* (1988:20) say that the designer of a dispute resolution system needs to know the answers to the questions stated in Table 3 hereunder. They (ibid:20) contend that diagnosis is essential, as changes are unlikely to work unless it satisfies the needs that lead the parties to use existing systems. Rahim (1992:369) says that a diagnosis should indicate whether there is need for intervention and the type of intervention.

Through the process of diagnosis, by asking the diagnostic questions of what, how and why, it is established:

- What kinds of disputes are likely to arise, how often and between whom.
- How disputes are being handles and where low cost procedures might be used.
- Why particular procedures are being used.

The answers to the questions are considered in Table 3 hereunder in the context of the FIDIC CoC, using a claim that leads to a dispute as an example.

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Table 3 : Diagnosis of FIDIC Dispute Resolution Procedures, with (DRB) and (DAB)

Diagnosis Questions	**FIDIC with DRB and DAB**
What are the disputes about?	
Who are the disputants?	Engineer, Employer and Contractor.
What kind of disputes occurs?	Technical and contractual (sometimes legal issues) Sometimes an emotional element is present
How frequently do disputes occur?	Depends on: ➢ Site staff personalities ➢ Procurement method used see Section 2.2 above
What is causing the disputes?	See Section 2.2 above

Diagnosis Questions	FIDIC with DRB and DAB
How are disputes handled?	
What procedures are being used?	With **DRB** involved: In sequence as follows: ➢ Engineer's Representative's determination (rights) ➢ Engineer's decision (rights) ➢ Dispute Review Board (rights and in some cases also 'negotiation') ➢ Amicable settlement period (negotiation). ➢ Arbitration (rights) With **DAB** involved: In sequence as follows: ➢ Engineer's approval/disapproval (rights) ➢ Dispute Adjudication Board (rights) ➢ Amicable settlement period (negotiation) ➢ Arbitration (rights)
What is the approach, negotiation, rights or power based?	With **DRB** involved: All three. Power is often used concurrent with the other. It is not part of the formal process but inevitable creeps in. The formal procedures above are negotiation and rights based (see brackets). With **DAB** involved: Same as DRB except less negotiation due to the defined adjudication only role of the DAB. However, the pre-DAB process seems to lean more toward negotiation than before. Where in the FIDIC fourth edition the Engineer consulted with the parties before making a determination, in the 1999 edition he endeavours to reach agreement. A determination is only made if agreement cannot be reached.
What are the overall cost and benefit of these procedures.	Early and relatively cheap resolution of disputes unless it proceeds to arbitration when the cost and delay could be substantial. Before arbitration, those familiar with the dispute are involved in its resolution.
Are adjudicatory procedures available?	With **DRB** involved: Yes: ➢ Engineer's determination ➢ Engineer's decision ➢ DRB ➢ Arbitration With **DAB** involved: Yes: ➢ Engineer's approval/disapproval ➢ DAB ➢ Arbitration ➢

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Diagnosis Questions	**FIDIC with DRB and DAB**
How long does it take before a decision is reached?	See Figure 2 and Figure 3
How satisfied are disputants with the outcomes?	This requires a study, but the author's general impression is that in Southern Africa, at least the loser is dissatisfied with outcomes from the DB and arbitration process.
What effect does the procedures have on personal and organisational relationships?	Often negative, but this is often dependant on the personalities involved.
How often does the same disputes recur because they were never actually resolved?	On a single project it does not repeat as disputes are triggered by specific events. However, in the industry the bases for disputes are generally the same. But this is due to procurement and design systems and not dispute resolution systems.
Why are disputes handled this way?	
Why is one procedure used rather than another?	Usually part of the standard form of contract.
Lack of procedures	
Are interest-based procedures available?	In the form of amicable settlement
Does a mediation procedure exist that focuses on interest?	IN some forms the DRB provides a procedure approaching this.
Lack of motivation	
Does the procedure provide opportunity for 'voice'?	Yes: ➢ Due consultations ➢ Statement of case (DB and arbitration) ➢ Rebuttal of reply to statement of case (DB and arbitration)
Do disputants have control over the procedure?	The procedure is determined when entering into the contract, thereafter mutual consent is required for changes. Subject to the contract, the procedure is under the control of the disputants.
Do disputants participate in shaping the outcome?	Yes, through the provision of the procedures for participation
How costly do the disputants perceive the procedure to be in time and money?	It becomes costly when a matter is referred to arbitration.
Does the procedure serve the interests of parties other than the disputants?	Possibly: > Engineer, longer appointment > DB members and arbitrators – creation of need
Does the procedure serve purposes for the disputants other than resolving the dispute at hand? (ulterior motives)	In some instances: > As power tool > Source for projection of income for head office purposes
Lack of skill	
Do people know what procedures are available and how to use them?	Generally yes

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Diagnosis Questions	FIDIC with DRB and DAB
How skilled are disputants in problem-solving negotiations?	Generally not trained in problem-solving negotiations
How skilled are disputants at presenting their case?	Varies
Lack of resources	
Are there people that the disputants can turn to for help – mediators, arbitrators?	Arbitrators and DB
Are the neutrals perceived as fair and unbiased?	Suspicion exists. > Engineer as he may be looking for future appointment with same owner > Engineer as he may have to rule on a fault of his own > DB members as the contractors are potentially the biggest user of their services.
Is the process hampered by lack of norms, precedents, laws, other standards?	No
Is the process hampered by a lack of technical information?	Sometimes restricted in what current knowledge can provide
Do the procedures need to be actively administered by a person?	Yes, generally allowed for
Is a lack of people due to insufficient funding?	Could exist as a result of the competitive tendering environment
Obstacles in organisation and environment?	
In what way are procedures influenced by organisational decision-making procedures?	During amicable settlement, totally influenced by organisational decision-making procedures
How are procedures in use affected by the organisation's formal and informal reward systems?	Could be influenced on the Contractor's side due to the existence of incentive bonuses
What impact does the personnel selection and training system have on the dispute resolution system?	Not known
How does the surrounding culture affect the procedures used?	In Asia a right/wrong approach is contrary to the culture

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3.5.2 Design

Ury *et al* (1988:xv) suggests that the goal is to design a dispute resolution system that provides interest-based procedures for disputants and low-cost rights procedures as backup. The design is summarised and compared with FIDIC DB approaches in Table 4 hereunder.

Table 4 : Comparison of FIDIC Procedures with Design Principles

Design Principle	FIDIC DRB & DAB
1. Focus on interests	Not allowed for as a fundamental principle. The procedures are mainly rights based. Amicable settlement enters at an advanced stage of the process and just prior to arbitration.
2. Build in '*loop-backs*' to negotiation	No formal loop-backs in procedures.
3. Provide low cost rights and power backup	No power back-up. This process is essentially rights based and is thus not a back-up, but the primary element.
4. Build in notification, consultation before, feedback later	Notification of claims and disputes are required. For claims '*due consultation*' with the parties is required is before a determination.
5. Arrange procedures in a low-to-high cost sequence	Low cost amicable settlement is after DRB involvement.
6. Provide the necessary motivation, skills and resources	The parties normally provide site staff. They may not be adequately trained and experienced in dispute resolution. Provision of the Engineer and DB members are procedural requirements.

Ury *et al* (1988:69) say that if the parties are not involved in the process of diagnosis and design, they are less likely to approve the product, no matter how good it is from an objective point of view. In the case of FIDIC developing a dispute resolution system for the CoC it would mean involving all stakeholders, including financier, employer, consultant and contractor organisations. For the development of the FIDIC editions of the CoC this was generally done.

Pruitt and Carnevale (1993:187) say that studies have shown that people place a value on process control, the capacity to regulate the events in a conflict resolution procedure. They (ibid., 187) argue that process control is valued because it produces a sense of procedural justice. They (ibid., 188) say that studies have also shown that the sense of procedural justice is equal to, and in some instances more important than, gain to self as a determinant of satisfaction with decisions by authorities. They also say that Tyler (1987) presented evidence that voice is most effective in producing a sense of procedural justice if it is believed that one's views have been considered in the decision. It is thus concluded that voice and a sense of procedural justice are important for the success of dispute resolution procedures.

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The above findings are hardly surprising as they are in keeping with the principles of natural justice. These are a collection of principles based on conceptions of ideal justice, instinctively known to all mankind. Hutchinson *et al.* (1991:13) say that from antiquity there has existed in the minds of jurists and of philosophers the conception of a body of ideal rules of law. This ideal law is perpetuated in '*the principles of natural justice*'.
These are:

- *audi alterem partem* – hear the other side
- *nemo iudex inpropria causa* – no one may be a judge in his own case
- justice must not only be done but be seen to be done

Tyler (1991:19) concludes from interviews with clients that the order of client satisfaction regarding dispute resolution, in descending order of satisfaction, is as follows:

a) They care most strongly about the procedure by which their dispute is resolved. They place great weight on having the dispute settled in a way that they view as fair. A fair and equitable settlement is the next most important issue.
b) The least important factor is the number or value of the assets, which they end up winning.

3.6 Section Summary and Conclusion

In this section the following was considered:

- Approaches to dispute resolution
- Traditional and new construction contract provisions for dispute resolution
- Dispute system design

It is concluded that:

- The FIDIC standard form CoC approach to dispute resolution is mainly rights based. It has evolved with input from most project participants.
- Disputant acceptance of the dispute resolution system (*inter alia*, through involvement with the design) is necessary for the system to be successful.
- Disputant satisfaction in descending order is:
  - The procedure by which their dispute is resolved producing a fair and equitable settlement
  - The number or value of the assets which they end up winning.

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4. ALTERNATIVE DISPUTE RESOLUTION (ADR)

4.1 Section Introduction

The purpose of the section is to describe the alternative dispute resolution environment in which DB operate and to lay a foundation for considering the position of DB in this environment (see Sections 5 and 12.2).

In this section:

- Alternative dispute resolution (ADR) is defined
- Why and how ADR methods evolved is recounted
- Characteristics of ADR are described in general
- ADR methods in use in Southern Africa and the world are considered
- ADR processes are described in summary
- ADR in construction and its future are considered
- ADR suitability and measures for success are considered

4.2 Definition of ADR

Freeman (1994:xv) says that there is no generally accepted abstract or theoretical definition of ADR as such. He considers that a convenient starting point is that proposed by Lieberman and Henry (cited by Freeman (1994:xv). It is, they suggest,

'*a set of practices and techniques that aim*

1. *to permit legal disputes to be resolved outside the courts for the benefit of all disputants;*
2. *to reduce cost of conventional litigation and the delays to which it is ordinarily subject;*
3. *or, to prevent legal disputes that would otherwise likely be brought to the courts.*'

Brown & Marriott's (1993:9) attempt at defining ADR reads as follows: '*a range of procedures which serve as alternatives to the adjudicatory procedures of litigation and arbitration for the resolution of disputes, generally but not necessarily involving the intercession and assistance of a neutral third party who helps to facilitate such resolution.*'

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Brown & Marriott's (1993:9) definition could be read as to exclude a process of a adjudicatory nature from the ADR process. However, as only litigation and arbitration are specifically mentioned it is considered that the use of '*adjudicatory*' here is to describe the nature of the processes of litigation and arbitration. Otherwise, it is submitted, the words 'such as' would have been used. Thus, it is not considered that they deliberately intended to exclude adjudicatory processes from ADR.

Chapman (2000:1) says that ADR is '*an ill-defined phrase which appears to cover all forms of dispute resolution which are not arbitration or litigation*'.

When considering ADR it begs the question 'alternative to what?' Sander (1985:97) estimates that, at that time in America, 90-95 % of disputes ultimately filed in court, were settled by negotiation, with little or no court litigation. Accordingly he contends that courts do not decide most disputes. He thus concludes that argument for 'alternatives' is not based on the need to find a substitute for court adjudication. He suggests that it is rather based on the need to gain a better understanding of the functioning of these alternative mechanisms and processes. However, this point of view is considered of academic interest only, and for all intense purposes ADR could be considered as alternatives to litigious processes, although not divorced from them.

Galanter's (cited in Freeman, 1995) argument that one should not be '*distracted by the fiction of a radical split between ADR and 'traditional adjudication*'' is thus considered appropriate. ADR does not operate independently of the norms and sanctions of the legal system, they depend upon legal norms and sanctions.

Arbitration was originally an alternative procedure but is now generally viewed as being closer to litigation in its approach. Lavers (1992:4) says that there is a dispute as to what constitutes 'traditional' and what 'alternative' methods. He avers that a majority of authors assimilate arbitration to litigation and not as a part of ADR. Eilenberg (1992:344) has an opposite view and says that ADR '*is regarded as including arbitration*'. Also Molineaux (1999:1) considers arbitration to be an ADR process as the consensual nature of arbitration is at its core.

In large disputes in the construction industry it is certainly the experience that arbitration takes on all the characteristics of litigation. Extensive discovery of documents takes place,

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substantial legal representation is appointed and preparation takes a long period, all resulting in high cost. Arbitration is thus not considered to be part of ADR for purposes of this dissertation. However, it is dealt with here because of its history as part of ADR, its contribution to the appreciation of dispute resolution generally and its influence on the development of many of the ADR methods.

4.3 Development and Characteristics of Alternative Dispute Resolution

Before considering different ADR processes, the need for ADR and its development and characteristics will first be considered.

4.3.1 Need for ADR

As early as 1700 the poet John Pomfret (cited in Brown and Marriott, 1993) wrote '*Law-suits I'd shun, with as much studious care, As I would dens where hungry lions are.*' In 1926, Judge Learned Hand confessed, '*I must say that, as a litigant, I should dread a law suit beyond everything else short of sickness and death.*'

In his introductory paper to the Proceedings of the First International Construction Management Conference, titled Construction Conflict Management and Resolution, Lavers (1992:3) states that there is dissatisfaction with existing traditional (courts and arbitration) methods for resolving disputes. He says that litigation, and often arbitration, are generally seen as frequently very costly, time-consuming, inconvenient and tending to intensify and exacerbate existing conflict.

Bevan (1992:1) says that '*For a long time people have been worried about civil litigation. It is costly, time consuming, worrying and takes a long time to conclude. It is often thought to fall short of fairness.*' He (ibid.:1) says litigation is an adversarial system, which even if its theory works in practice, the system has led to the other side being attacked in a way which precludes co-operation, let alone business association.

Davies (1992:61) taking the view of the UK specialist contractors and subcontractors bemoans '*the arrival in strength of the legal profession*' in construction disputes in the early 1980s. He says that it seems that since the mid-eighties the '*industry has been in the grip of both lawyers and accountants*' and that the '*professional contractor has been forced to take a back seat*'.

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Mackie (1992:303) illustrates how adversarial dispute resolution can evolve into an impasse through deteriorating relationships, as a result of misunderstanding, assumptions and poor communication. MacGregor (1994:13) says that many adjudications may miss the point by failing to meet the real concerns of the parties, thereby dividing the parties even further after one or both loses.

Butler and Finsen (1993:8) say that in recent years the increased unhappiness with litigation as a method of resolving disputes has resulted in a growing movement towards developing more effective alternatives. They consider arbitration to also be the subject of unhappiness as in the hands of lawyers it has often been allowed to become as formal as court proceedings with the result that a formal arbitration may be as time consuming and even more expensive than litigation. They do not consider arbitration to be part of ADR processes.

The costs of dispute resolution by litigation and arbitration include legal expenses, the cost of being away from productive activity while prosecuting the litigation, the cost of lost opportunities, and the cost in terms of stress to the individual and the institution, and damaged reputations. All conflict resolution devices have transaction cost, with litigation and arbitration most probably having the highest. In the final analysis the cost is borne by the project sponsors and eventually by the public at large.

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Shadbolt (1999:102) points out that particular potential problems exist with litigation and arbitration in developing countries:

- Shortage of local lawyers experienced in commercial law and thus even fewer experienced in construction disputes
- Foreign experienced law firms may not be well established in the country
- Language barriers
- It inevitably involves an element of delay which often results in:
  - Escalation of the claim
  - The loss of memory and evidence
  - Development of animosity and poor relationships
  - Distraction of focus from the work of the project

Various authors (Butler and Finsen (1993), Singer (1990), MacGregor (1994), Brown and Marriott (1993), Miles (1992)) present what they believe to be the main factors which, in

their consideration, have led parties to explore alternative methods of dispute resolution. These factors are summarised hereunder.

a) Cost:

The notoriously high cost of litigation (and now also arbitration in some cases). Brown and Marriot (1993:406) say about the courts in the UK, that they are '*indeed like the Ritz hotel, open to all, but in reality only to those who can afford it*'. Most people, including small and medium sized companies, cannot afford the civil justice system.

b) Time:

The long time taken before a dispute is resolved. This results from the lengthy procedures such as discovery and also the fact that the courts are substantially behind and overwhelmed with cases.

c) Disillusionment:

Derek Bok, former president of Harvard University and former dean of the Harvard Law School, described the American system of resolving disputes as '*strewn with the disappointed hopes of those who find [it] too complicated to understand, too quixote to command respect, and too expensive to be of much practical use*'. Harvard law professor Lawrance Tribe adds that the results do not justify the costs: '*Too much law, too little justice; too many rules, too few results*'.

There has been increasing complaints about the cost of delays of conventional arbitration. Arbitration has been placed beyond the commercial reach of many companies who have entered into arbitration agreements in their contracts without being fully aware of the consequences.

There has been increasing awareness that there is a denial of justice to the vast majority of the populations due the delay and cost caused by the procedures of the civil justice systems.

d) Clarity of issues:

Legal advice often only lead to a time-consuming and expensive exercise that obscures the outcome for all the parties involved. The legal process distorts reality; not only speed and

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economy but the real issues in dispute. It is suggested that properly designed ADR processes make it more likely that settlement decisions will be based on the merits of the dispute.

e) Damaged relationships:

Litigation leads to further alienation. The emphasis of courts and other traditional forums on pronouncing right and wrong and naming winners and losers almost always destroys almost any pre-existing relationship between the parties involved. It is virtually impossible to maintain a civil relationship once people have confronted one another across a courtroom. Aubert (1963:158) points out that adjudication changes simple conflicts of interest into conflicts of value. It is backward looking, actions and events are measured against a normative standard, with one disputant held to be in the right, the other in the wrong. Often the rule is that the loser pays the winner's cost, which accentuates the problem.

f) Traumatic experience:

Litigation, particularly if the adversarial method is used, is a traumatic experience, which could lead to further alienation. Lengthy, complex procedures, both costly and time consuming, make the courts appear to be exclusively the province of the rich, the patient, and the hearty.

g) Control of process:

In litigation and high level arbitration the proceedings are very formal and the parties have a very passive role. This does not satisfy the disputant's requirements for control over the process and to a certain extent voice. See Section 3.5.2 above where it is stated that these criteria were identified from studies. The treatment of disputants by professional dispute resolvers escape the disputant's control.

- The person adjudicating the dispute may lack specialised knowledge which may be required for the resolution of the dispute.
- Adjudication produces a winner/loser situation. Some ADR methods attempt to find a solution, which benefits and therefore satisfies both parties.

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It is apparent that pure negotiation between the parties (with no third party involvement) is on the one end of the dispute resolution continuum and arbitration and litigation on the other. ADR can fill the void between careful negotiating and litigation or arbitration.

Kwayke (1993) submits that ADR has proved to be a quick and economical way to settle disputes without resorting to traditional adversarial proceedings

4.3.2 Development of ADR

There is great debate as to how the modern ADR movement originated, whether from:

- Proposals by academics for reform from a conceptual perspective.
- A litigation explosion.
- From grass roots demands for increased access to justice
- From some other source.

Most dispute resolution literature ascribe the development and growth of ADR to a combination of these. Some of the possible origins are further considered below.

Brown and Marriott (1993:ix) are of the opinion that the principal origins of ADR in the United Kingdom (and elsewhere) is the dissatisfaction of many people with the way in which disputes are traditionally resolved. The reference to traditional here means the courts, legal profession and to a certain extent the whole legal system.

Freeman (1994:xi) suggests that there was a move away from the courts, though not necessarily from adjudication, in the early part of the 20th century. But it is only really in the 1980s that the alternative dispute resolution movement has taken off. He (ibid.:xi) relates this to court congestion resulting from a 'litigation explosion'.

According to Freeman (1994:xi) ADR first appeared in areas where adjudication is proven to disrupt or distort continuing relationships - the family, labour relations and long standing business transactions.

One view offered as to the reason for a 'litigation explosion' is that in the sixties, America was characterised by considerable strife and conflict in part from the civil rights struggles and the Vietnam war protests. It is postulated that a legacy of those times was a lessened tolerance and a greater tendency to turn grievances into disputes.

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Also significant was a substantial increase in the statutory creation of new causes of action. As a result the courts found themselves inundated with new filings, leading to judicial congestion resulting in claims that equal access to justice has been denied, and thus grass roots demands. Partly due to these conditions, parties attempted to resolve some of these disputes through ADR mechanisms.

Another contributor to the growth of ADR is considered to be the waning role of some of society's traditional mediating institutions such as the family and the church. A further influence is the discernible recent mood of anti-professionalism.

There is a growing emphasis on interest-based resolution. In this approach the parties seek to break the impasse through negotiation, often with the help of a mediator. It does not focus on which party is 'right' (as in litigation and arbitration), depending on how you ask the question. Through discussion the parties try to understand the nature of the problem they face, their individual interests to be protected, and the options available to solve the problem. The solution will seek to accommodate the interests of both parties in solving the problem. Where, successful, the case will result in a win-win outcome. In a negotiation context, Fisher and Ury (1991) describe this approach as the method of principled negotiation.

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From a review of the ADR processes, it is apparent that there is strong emphasis on interest based outcomes.

4.3.3 Characteristics of ADR

ADR emerged both in and out of courts, in businesses, and in communities. The innovations of ADR methods of settling disputes are diverse but they have a number of characteristics in common, *viz*:

- They exist somewhere between the polar alternatives of doing nothing or of escalating conflict
- They are less formal and generally more private than litigation in open court
- They permit people with disputes to have more active participation and more control over the processes for solving their own problems than do traditional methods of dealing with conflict

- Almost all of the new methods have been developed in the private sector, although courts and administrative agencies have began to borrow and adopt some of the more successful techniques.

The characteristics of ADR are compared with those of litigation and arbitration in Table 5 thus putting the benefits of ADR into context.

Table 5 : Characteristics of ADR (Source : MacGregor quoting Kwayke, 1994)

Characteristics	Litigation	Arbitration	ADR
Place / Conduct	Public court ; Unilateral initiation; compulsory	Private (with few exceptions); bilateral **initiation**	Private ; bilateral initiation voluntary
Hearing	Formal ; before a judge	Formal ; Conforming to rules of arbitration; before an arbitrator	Informal ; before a third party (neutral)
Representation	Legal; lawyers influence settlement	Legal; lawyers influence settlement	Legal only if necessary; disputants **negotiate** settlement
Resolution / Disposal	Imposed by a judge after adjudication; limited right of appeal	Award imposed by an arbitrator ; limited right of appeal*	Mutually accepted agreements ; option of arbitration if dissatisfied
Outcome	Unsatisfactory; legal win or lose	Unsatisfactory; legal win or **lose**	Satisfactory ; business relationship maintained
Time / Cost	Time consuming; uneconomic	Time consuming ; uneconomic	Fast ; economic

*Note: For arbitrations conducted pursuant to the South African Arbitration Act No. 42 of 1965, appeal of the arbitrator's award is excluded (c 28). However, the parties are at liberty to allow in their arbitration agreement for an appeal of the award. However, such an appeal may only be to another arbitrator and not to the court.

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Freeman (1995:xviii) elaborates on the characteristics of specific dispute resolution processes. This elaboration is presented in Table 6 and Table 7 hereunder. He divides the processes into primary and hybrid processes.

Table 6 : Primary Dispute Resolution Processes

(Source : Freeman, 1995)

Characteristics	Adjudication	Arbitration*	Mediation	Negotiation
Voluntary / Involuntary	Involuntary	Voluntary	Voluntary	Voluntary
Binding / Non-Binding	Binding: subject to appeal	Binding, subject to review on limited grounds	If agreement, enforceable as contract	If agreement, enforceable as contract
Third party	Imposed, third-party neutral decision- maker, generally with no specialised expertise in dispute subject	Party-selected third-party decision-maker, often with specialised subject expertise	Party-selected out-side facilitator	No third-party facilitator
Degree of formality	Formalised and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
Nature of proceeding	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests
Outcome	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Private / Public	Public	Private, unless judicial review sought	Private	Private

*Note: Court-annexed arbitration is involuntary, non-binding, and public.

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Table 7 : 'Hybrid' Dispute Resolution Processes

(Source : Freeman, 1995)

Characteristics	Private Judging	Neutral Expert Fact-Finding	Mini Trial	Ombudsman	Summary Jury Trial
Voluntary/ Involuntary	Voluntary	Voluntary or involuntary under FRE 706	Voluntary	Voluntary	Voluntary or Involuntary
Binding / Non-binding	Binding, subject to appeal	Non-binding, but results may be admissible	If agreement, enforceable as contract	Non-binding	Non-binding
Third party	Party-selected third-party decision-maker, may have to be former judge or lawyer	Third-party neutral with specialised subject matter expertise; may be selected by the parties or the court	Party-selected neutral advisor, sometimes with specialised subject expertise	Third-party selected by institution	Mock jury empanelled by court
Degree of formality	Statutory procedure but highly flexible as to timing, place and procedures	Informal	Less formal than adjudication; procedural rules may be set by parties	Informal	Procedural rules fixed; less formal than adjudication
Nature of proceeding	Opportunity for each party to present proofs and arguments	Investigatory	Opportunity and responsibility to present summary proofs and arguments	Investigatory	Opportunity and responsibility to present summary proofs and arguments
Outcome	Principled decision, sometimes supported by findings of fact and conclusions of law	Report or testimony	Mutually acceptable agreement sought	Report	Advisory verdict
Private / Public	Private, unless judicial enforcement sought	Private, unless disclosed in court	Private	Private	Usually public;

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4.3.4 Advantages/Benefits of ADR

As yet, there is no consensus on whether the primary benefits of ADR are the savings of time and money, the increase in the parties' participation, or the achievement of better results.

Accordingly to Mackie (1992), Hollands (1990) and Butler and Finsen (1993), ADR has various benefits. These are as follows:

- Improved communications
- Continued coherence of business relationships
- Active management of the dispute
- More options for settlement
- Speed
- Reduced cost in achieving settlement
- Confidentiality
- Control of process and outcome (allows disputants to participate in the process)
- It overcomes jurisdictional problems in disputes of an international nature.

People gain satisfaction from taking an active role in settling both their own and other people's conflict. They are more satisfied with both the process and the results when they are actively involved in shaping outcomes than when their affairs are placed in the hands of outsiders.

The participants themselves, sometimes aided by a disinterested third party, are more out to produce mutually satisfactory solutions to their own disputes than are outside decision makers. There is evidence to suggest that people who reach agreements themselves are more likely to abide by them than are people who are told what to do.

Non-adjudicated (eg. mediated) settlements are far more likely to preserve any continuing relationship between the parties than is litigation in open court.

In the construction industry contracts periods are often of significant length and could go on for years. Early dispute resolution is thus of vital importance to maintain good relations for the period of the contract. The industry is also of such a nature that parties would most probably find themselves working together on the same project in future.

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Miles (1992:307) argues that while there are many points of law in construction disputes, more often than not the issues narrow down to those of a technical nature. The involvement of the appropriate professional by way of the ADR process, brings into the arena the most naturally suited and trained to argue matters of a technical and commercial nature.

Due to the pressures in the construction industry (e.g. fast tracking) it often happens that a construction contract is only signed some time after construction has commenced. ADR enables the parties to come together in a common arena regardless of the requirements of the contract.

Construction contracts often have a multi-national dimension, which could lead to arguments as to the proper forum and jurisdiction for dispute resolution. ADR techniques can sometimes overcome these impasses.

Other advantages of ADR in relation to construction are:

- It gives a subcontractor direct access to the owner
- Early private resolution would be an attraction to a contractor that does not wish to gain a reputation as being claims orientated
- Early resolution improves the accuracy of projection of the cost at completion
- Insurers find the privacy and cost of ADR attractive. Statistics in the UK show that in settlements paid out, 60p in the £ goes to fighting the case
- ADR can be used to deal with grievances of special interest groups

4.3.5 ADR Disadvantages and Reservations

ADR is not a panacea which will remedy all ills and also has disadvantages:

- Negotiated settlements do not develop standards to govern the behaviour of others involved in similar disputes in future (see the argument of Fiss hereunder)
- They do not punish law breakers or cheaters
- They often do not obviate the need for lawyers
- The do not serve to equalise the bargaining power between participants.

ADR processes have been developed on the premise that settlement is a desirable outcome to litigation due to the costs, risks, delays and uncertainty, etc. associated with litigation. There is a school of thought that questions this premise. The criticism of the settlement

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process (and thus of ADR which assist settlement) is that settlements are not necessarily preferable to resolution of disputes by adjudication and that people should not have their rights to obtain the decision of the court eroded by alternative means of dispute resolution.

Professor Lon Fuller, an American academic, takes the view that adjudication should be the standard instrument of dispute resolution in a society regulated by laws. He criticises mediation as '*all process and no structure*'. Professor Owen Fiss, another American academic, is of the opinion that settlement is not a desirable end to a dispute, being often coerced and lacking in justice, especially where there has been an imbalance in power between the parties (Brown and Marriot, 1993:395).

Brown and Marriot (1993:397) make the point that although litigation has shortcomings and there are many cases for which it is not suitable, there are also many cases for which it is not only suitable but essential. They are of the view that people should not be made to feel that they have failed if they do not settle their dispute but prefer to have it resolved by adjudication.

Another concern expressed by various writers is that third parties who intervene can change the relationship between the parties, as well as their expectations and the nature of the resolution of their issues, without being directly accountable or subject to question or appeal. To overcome this concern a neutral should respect the need for the parties to retain power over the decision-making process and should not try to influence them away from their own decisions. What the process can offer should also be explained to the parties.

Fiss (1984) argues that by diverting cases from courts, society loses the benefit of court – sanctioned judgements. He contends that disputes out of court lacks the legitimacy of cases which are fully adjudicated by judgement.

Other concerns raised include:

- The confusion between adjudicatory and mediatory role and perceptions where people having judicial or other adjudicatory functions engage in a facilitative, mediatory role (e.g. med-arb)
- Where judges or other judicial officers enter the settlement area, the parties may feel coerced by the weight of judicial authority

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- Where judges or other judicial officers enter the settlement area, and a settlement is not reached, the parties may feel prejudiced by the judge knowing their positions
- When a neutral gives an opinion, being aware of confidential information, does he base the opinion on what is known to both parties or on the full information known to him? This quandary can be approached as follows:
  - In many cases the neutral will not receive confidential information of such a nature as to effect his ability to make a fair assessment
  - The neutral may specify that the assessment is based only of commonly shared information
  - The neutral may decide that it would not be right to give an assessment having regard to the parties' confidential disclosures
- It has been questioned whether neutrals from particular professional backgrounds can sufficiently disengage themselves to function properly in the neutral impartial role.
- In ADR processes which involve a summation of the evidence, the query is raised as to whether a sufficiently comprehensive presentation can be obtained without testing the evidence or the credibility of the witnesses.

  It is submitted that:
  - If a case solely turns on issues of credibility, it may not be appropriate for ADR
  - In cases settled before a trial the parties do so without testing the evidence or credibility of the witnesses.

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4.4 ADR Methods in South Africa

In South Africa the emphasis has traditionally been on judicial determination of a dispute. Concentration was thus on substantive legal rights and the apportionment of blame in relation to past events rather than on the parties' present and future interests. (Butler and Finsen, 1993 : 8)

In South Africa ADR has up to a point been virtually non-existent. This is rapidly changing due to the realisation that ADR has a tremendous amount of advantages over traditional methods of dispute resolution. It is considered more flexible and a faster route to settlements which better meet the parties' interests.

Various bodies have formed in South Africa to promote the concept of ADR. Institutes such as the Alternative Dispute Resolution Association of South Africa (ADRASA) and

the Independent Medication Services of South Africa (IMSSA) have played a constructive role in the field of labour relations. These organisations are at the forefront of the drive to create appropriate dispute resolution methods that satisfy the demands of the time.

4.4.1 Small Claims Court

The small claims court is a result of litigation procedures that have been modified in order to meet the needs of the public at large.

The small claims court, which took effect in 1984, involves a neutral party acting as adjudicator in disputes relating to small amounts. The ADR method evolved in order to reduce legal expenses and shorten the litigation process. No legal representatives are allowed in the courtroom and the adjudicator adopts an inquisitorial approach by actively taking part in the proceedings in order to make a judgement (Van der Merwe, 1985).

Unfortunately, because the small claims court has become popular, some disadvantages have developed. Problems relating to the enforcement of awards are common, overcrowding is occurring resulting in extensive delays, and often cases which are brought before the court are based upon pedantic principles.

4.4.2 Short Process Courts and Mediation in Certain Civil Cases

The Short Process Courts and Mediation in Certain Civil Cases Act No. 103 of 1991 makes provision for an ADR technique (type of mediation) in which there are almost no rules relating to procedure. The mediation procedure can take place at any time during the proceedings to a Short Process Court or magistrate's court. The difference between the Short Process Court and the magistrate's court is that in the former, the parties or their representatives can decide on and instigate any action related to the hearing procedure in order to make it more expedient and economic. They may include forsaking any rule of evidence.

The clerk of the court refers the dispute to a mediator appointed under the Act. The mediator's statutory powers differ drastically in at least one respect from those normally conferred on a mediator by agreement. Should a party fail to attend an interview with the mediator after having been duly notified the mediator may issue any order he deems fair.

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The award made during the Short Process Court carries the same weight as that made under Arbitration i.e. it is very difficult to overturn. A mediation proceeding, which may be conducted prior to or after the summons for the institution of a civil action, upon completion, requires the mediator to 'issue an order' which comprises a settlement or an agreement on the issues in dispute.

4.4.3 Other ADR Methods in South Africa

Other ADR methods employed in South Africa include:

- Mediation
- Conciliation
- Mini-trial
- Arb-med
- Med-arb
- Expedited Arbitration

These methods are described in some detail hereunder.

4.5 ADR Methods Internationally

Numerous techniques and methods of resolving disputes have emerged and more so in the international arena. Some of the more prominent methods are discussed hereunder.

4.6 Summary of ADR Procedures

Having briefly looked at the development of ADR, its characteristics, its advantages and disadvantages, some of the more prominent methods are discussed hereunder.

The following ADR processes will be considered:

Elements of binding decision making:

- Adjudication
- Med-Arb
- Expert Determination / Appraisal
- Court-appointed Referee /Rent-a-Judge/Private Judging
- Concilio-arbitration
- Expedited arbitration

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Non-binding

- Mediation
- Conciliation
- Court-annexed Arbitration
- Mini-trails
- Summary jury trials
- Multi-door courthouse
- Ombudsman
- Neutral expert fact finding

In addition arbitration (not strictly speaking an ADR process; see commentary in Section 4.2) and negotiations will be considered for the sake of completeness.

University of Cape Town

4.7 ADR Processes – Binding Elements

4.7.1 ADR Adjudication (not litigation)

Adjudication is viewed as one of the primary dispute resolution processes along with arbitration, negotiation and mediation. It is specific form of ADR in the construction industry.

Chapman (2000:1) says that adjudication is a form of ADR and describes it as a process in which the procedural rules of natural justice apply. He views adjudication as being conducted in a 'judicial temper' rather than being a rigid judicial process and notes the following distinguishing features with regard to litigation, arbitration and mediation:

- It is not controlled by legislation or common law
- It is not administered by the state
- Decisions are not immediately binding
- It is not undertaken pursuant and under the protection of an arbitration act
- It is not subject to international conventions
- Adjudicators are required to decide matters in accordance with contractual and legal frameworks

Positive aspects of adjudication include:

- Aim of a speedy resolution to the dispute
- Moves away from an adversarial system

- Based on investigation by obtaining statements and documents rather than deciding after having the parties contest in a quasi-judicial forum
- Adjudicator is an expert

A negative aspect of adjudication is that as the emphasis is on decision rather than consensus, it lacks finality

The system is suited to the construction industry where the primary objective may be getting the project started again.

4.7.2 Med-Arb and Arb-Med

Med-arb originated in the United States where its primary application is the settlement of labour disputes. It has however been used in Australia as well where it is based upon Section 27 of the Commercial Arbitration Act 1984 (NSW).

This process involves a third person called on by the parties to a dispute, who initially acts as a mediator with the aim of assisting the parties in reaching a settlement to their dispute. He does this by discussing the dispute with the parties (not necessarily in the presence of the other), exploring options that they might find acceptable and at the same time working towards a solution realised by themselves. If the parties reach an agreement then the dispute is resolved. If on the other hand no settlement is reached, the mediator abandon's his role as mediator and proceeds, as an arbitrator, and proceed with the usual formality associated with arbitration.

Med-arb thus allows the same person to both mediate, and if that is unsuccessful, then arbitrate a dispute.

There has been much criticism of this system of dispute settlement and it is debated whether a single person should be allowed to shift roles form mediator to arbitrator. The methods of exchanging information differ considerably between mediation and arbitration. In his role as mediator, the arbitrator has been involved in settlement discussions held without prejudice and has probably discussed the issues with one party in the absence of the other. He may also have formed an opinion based upon information revealed during the process This creates the grounds for a transgression of the rules of natural justice. There is

University of Cape Town

a duty on the part of the arbitrator to observe the rules of natural justice[3] because he must act judicially when making his binding award.

During the process of med-arb the arbitrator must thus be cautions and avoid showing any partiality towards either party. The rules of natural justice must be adhered to at all times and there should be no impression of bias. The arbitrator must not form any opinion during the mediation. There are ways that the arbitrator can prevent accusations of such a nature.

Astor and Chinkin (1992) describe the actions an arbitrator can follow to avoid such accusations as follows:

- an arbitrator could ask parties after an unsuccessful mediation conference to consent in writing to her or his continuing to act as an arbitrator
- an arbitrator could assume only a limited role as a mediator
- an arbitrator could appoint another person to act as mediator having disqualified himself from that role.

The disadvantages of these actions are that the mediation process is jeopardised because of the limited role played by the arbitrator. Furthermore, if, as in the last point, a separate mediator is used, the advantage of one person being well-informed as to all the aspects of the dispute is lost. (MacGregor, 1994:22)

In Australia, there is a Working Group on the Working of Uniform Commercial Arbitration Legislature. They have addressed all the problems relating to Section 27 of the Commercial Arbitration Act of 1984 and have published an amendment to the Act. Section 27 now reads as follows :

'*1. Parties to an arbitration agreement:*
(a) may seek settlement of a dispute between them by mediation, conciliation or similar means : or
(b) may authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them ... whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.
2. Where:
(a) an arbitrator or umpire acts as a mediator, conciliator or intermediary ...; and

[3] Anshell v Horwitz 1916 WLD 65

University of Cape Town

(b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute, no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

3. *Unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice when seeking a settlement under subsection 1.*' (Astor and Chinkin, 1992:147).

This amendment should minimise the risk of procedures being aborted on the grounds of transgression of the rules of natural justice for reasons of bias.

However, med-arb is considered to have more negatives than positives:

> As stated above the mediator/arbitrator learns about matters in the mediation stage which may be confidential, irrelevant and prejudicial to the decision-making phase
> The dual role of the mediator/arbitrator has a significant impact on the way in which the parties approach the mediation phase of the process.

These are fundamental flaws in the philosophy, which creates sufficient suspicion to make the process ineffective. Various variants of the approach have been developed, each with its own particular drawback.

4.7.3 Arb-Med

To overcome the problems of med-arb a process known as arb-med was devised. The roles played by the arbitrator have been reversed. Normal arbitration proceedings commence and the arbitrator prepares his award and sets it aside. The arbitrator now proceeds with mediation in trying to bring the parties to a settlement. If he is successful and the parties arrive at an agreement and the dispute is ended, the award is discarded. However, if no agreement can be reached then the award is published (Butler and Finsen, 1993:203).

Butler and Finsen (1993:203) say that it is unlikely that arb-med would be more economical in terms of time and money than a conventional arbitration. The main advantage appears to be that if a settlement is reached it would be more acceptable than an adjudicated award, which may not satisfy the winner.

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4.7.4 Expert Determination / Appraisal

The definition of expert appraisal as stated by Astor and Chinkin (1992:65) is as follows :

'*Expert appraisal is a process which provides for an objective, independent and impartial determination of disputed facts or issues by an expert appointed by the parties*'.

Kendall's (1992:1) is somewhat more simplistic; '*Expert determination is a means by which the parties to a contract jointly instruct a third party to decide an issue*'. This definition could also be applicable to arbitration, except that the expert is appointed specifically for his expertise.

In this process the expert acts in a non-judicial capacity and the role that he plays is one of inquiry and investigation (McGaw, 1992:634). Fundamentally it is an inquisitorial procedure and part of the contract machinery. This enables the expert to extract the necessary information from the parties. He is not required to receive information from the parties, or, if received, to act on it and is not bound to disclose evidence from one party to another party. Experts are liable for negligence as well as fraud and collusion.

Like an arbitrator the expert has a duty of fairness. There is relatively little relevant case law and therefore there is less certainty as to the enforceability of expert decisions and the duties of experts to the parties.

The determination can be final and binding if the disputants so desire. The expert determination will form the basis for negotiations if the parties decide the outcome is non-binding. Enforceability or reviewability is a matter of contract. The disputants decide upon procedures relating to the exchange of information prior to the commencement of the determination process.

This system seeks to avoid all the formalities that so easily entrap litigation and arbitration, because there is no legislative structure which controls the way in which experts must work in making their determinations. The expert has the great advantage that he is not subject to the delays and formalities associated with arbitration and litigation. The primary difference between expert determination and arbitration seems to be this absence of statutory control which gives a greater deal of flexibility to expert determination. Other than this and the fact that it is inquisitorial, most differences between arbitration and expert determination can be eliminated by contract.

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The parties decide upon and draw up an agreement as to the extent of power and authority the expert shall have, including his envisaged role, hence arriving at a system that is flexible to the needs of the parties.

Burke and Chinkin (1989:403) have the view that an expert differs from an arbitrator in that the latter decided a dispute that had arisen between the parties while the former pre-empted or prevented one from arising.

Where the distinction becomes vitally important is when specialists, such as architects and engineers, become involved in administering a construction contract. Included in their administrative role, is the prevention of potential disputes and resolving those that do occur.

The difference between an expert and an arbitrator was made clear in the case of *Capricorn Inks Pty v. Lawter International (Australasia)*. It was held that the existence of a dispute between the parties was not a determinative test of arbitration.

The reasons were:

- the nature of the enquiry,
- the appointment was to a firm of accountants rather than to a specific named person, as required for an arbitrator,
- the parties should have regarded the enquiry as judicial in nature,
- symptomatic of arbitration is the requirement of the decision-maker to hear the evidence of all the parties and reach a decision based upon that evidence, and finally,
- that an investigative or inquisitorial-type inquiry, such as was performed by the accountants, would be suggestive of appraisal or assessment.

The judgement was upheld by the Full Supreme Court. The function of the accountants was considered as all important.

Burke and Chinkin (1989:406) further state:

'*An arbitral function is to hear and resolve the parties' opposing contentions while an appraisal or expert decision is an appraisal in monetary terms of a property value, or of*

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loss or damage, made through specialist knowledge, or skills, without any requirement of first hearing the parties'.

Kendall (1992:2) summarises further differences as follows:

- Experts' activities are subject to little or no control by the court, from whose decisions there is no appeal, but who may nevertheless be liable for negligence in performing these otherwise unreviewable functions. A partnership or company can be an expert.
- Arbitrators are subject to control by the court, some of their decisions are subject to appeal (not in South Africa) and they are immune from actions for negligence. An arbitral tribunal always consists of readily identifiable individuals.

Expert determination is considered an appropriate alternative to arbitration and litigation and has long been recognised as a proper way of resolving disputes.

4.7.5 Court-appointed Referee /Rent-a-Judge/Private Judging

This system operates in California under the California Reference Statute and it has been termed *'rich man's justice'* by some authors. The case is referred by the court and it involves the parties selecting an acceptable judge (often a retired judge) usually one that is suitable for a particular case. The decision awarded by the judge, is enforceable as if it had been given by the court (Bevan, 1992). The decision can also be appealed (unlike an arbitrator's decision) on the grounds of law or if it is contrary to the weight of evidence.

The advantages of the system are:

- The procedures can be formal and informal depending upon the agreement made between the parties – thus flexible.
- The parties can select the right man for the job.
- Having selected the person the parties would be less likely to appeal.
- Expedient, flexible, convenient and private.

The disadvantages of the system are:

- The costs involved can be exorbitant thus making it available to a minority i.e. wealthy businessmen.
- It does not encourage a move away from adversarial attitudes and is even more adversarial than arbitration.

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4.7.6 Concilio-Arbitration

As alluded to by the name, this process is a combination of conciliation and arbitration. It makes use of all the advantages associated with the informality of the conciliation process as well as the benefits of formal arbitration. It has no formal procedural rules such as the discovery, pleadings and hearing proceedings as in litigation and arbitration.

It is similar to court-annexed arbitration except that it is an agreement between the parties and not ordered by the court.

The concilio-arbitrator examines the case informally, considers the evidence, hears the parties' representations (private meeting or a written submission) and makes a non-binding award. If both parties accept the award it becomes binding.

By making representations, the parties are forced to re-evaluate their cases. As a result of this step negotiations may be facilitated and perhaps the parties will reach a settlement.

Once the concilio-arbitrator has received the information submitted by the parties he must, as soon as possible, make his assessment of the dispute known in the form of a draft opinion. A copy of his opinion is circulated between the parties, allowing them to comment on it before it is finalised. This step allows the parties to re-submit or make amendments to their case if there has been any confusion or misconception by either party.

On receipt of the comments from the parties the concilio-arbitrator issues a final opinion Unless either party objects to the final opinion within a specific time period, it will be binding on the parties.

In the event that one of the parties reject the final award the case would proceed to litigation. If the party who refuses to accept the award does not achieve a significantly better result at the trial, there is a cost penalty. For example if he does not better by an excess of one third, he must pay all legal costs as opposed to the accepting party.

Enforcement of the awards of cost has been held to be invalid in Michigan State, but the Washington and Florida ADR statutes make specific provision for such a penalty, referred to as 'free shifting'.

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4.7.7 Expedited Arbitration

Expedited arbitration is a combination of neutral expert fact finding and concilio-arbitration. It is a process that is widely used overseas and in the United States (Mulligan cited in MacGregor, 1992). In South Africa expedited arbitration is commonly used in the area of labour disputes.

The process is basically as follows (MacGregor, 1992):

- Together the parties select a neutral third person (the arbitrator).
- The parties jointly draft an agreement that details the extent of the neutral third party's powers and whether or not his decision will be binding on the parties. They may even request that he make a recommendation i.e. similar to concilio-arbitration where an opinion is given.
- The procedures that are adopted require the arbitrator to sum up the issues and reach an agreement as to what they are. In the event that this has been successfully achieved, the need for witnesses will be reduced because agreements on the facts relating to the issues will have been reached.

Expedited arbitration manages to remain free from formalities and informal through deliberate avoidance of formalities during the process and by positively addressing the real issues of the dispute. Furthermore, the 'arbitrator' is given full control over the proceedings. Some authors refer to this process as arbitrations which are "not arbitrations" (Myburgh cited in McGregor, 1992), because it lacks all the strict rules of law and evidence usually associated with arbitration and litigation. The neutral advisor / arbitrator has also been called an 'expert', similar to the expert in determinations or appraisals.

As with expert determination and concilio-arbitration, this process requires a high level of skill and competence on the part of the arbitrator as well as the representatives or advisors of the parties who will assist them in the presentation of their cases.

One of the disadvantages of this process is that the disputants are agreeing to be bound by someone else's opinion, which may be difficult to predict. According to Myburgh (cited by MacGregor, 1992), this fails to fulfil one of the most important aspects of acceptable dispute resolution procedure in that the outcome should be conceivably foreseeable.

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4.7.8 Short-form Arbitration

Short-form arbitration has the following characteristics:

- It should involve one dispute, or a limited number as agreed by the parties.
- If it involves only one dispute it would be concluded in one day.
- If it involves more than one dispute, the parties would agree on a revised time scale.
- Each party has the opportunity to present his case to the arbitrator in writing or orally.
- The amount of time available is fairly allocated to each party.
- The arbitrator has a fixed period (7 days) to give a concise reasoned determination.
- The award of the arbitrator would be final and binding.

4.7.9 Amiable Composition

Amiable composition is defined by De Boisséson et De Juglart, (Le Droit Frabcias de l'Arbitrage, 1983:95 as cited in Christie, 1992:259) as follows:

'*A dispension, foreseen by the law itself, from strictly applying the rules of law, joined with the faculty of applying various criteria of interpretation and judgement, especially equity, commercial usages and the conscience of the arbitrator.*'

Christie (1992:259) considers amiable composition to be '*a form of arbitration in which the arbitrator is not bound hand and foot to the law but is empowered to decide in accordance with other criteria.*'

In short, it means that the amiable compositeur has the power to decide in accordance with equity (or seek a business solution) rather than strict law, subject to certain rules. One of which is that the amiable compositeur is bound by the rules of natural justice.

Amiable composition is a French concept which has received recognition outside France. The ICC rules, UNCITRAL Model Law and arbitration rules, the Geneva Covention 1961 and the Arbitration rules of the United Nations Economic Commission for Europe 1966 all provide for decisions *ex aequo et bono* and/or amiable composition specific, if so agreed by the parties. In addition recognition of the concept is found in a substantial number of European countries.

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In the United States arbitrators are not bound to apply the strict rules of law in resolving disputes, so it is not necessary to give them the powers of amiables compositeurs.

The Tribunal de Grande Instance de Paris defines the aim of amiable composition as (cited in Christie, 1992:264):

'*In conferring on the Tribunal the power of amiable composition, the parties have manifested their wish to see their dispute decided not by the application of the rules of law but also obtain an equitable and acceptable solution by an adaptation, if appropriate, of the law to the totality (ensemble) of the factual circumstances governing the relations of the parties.*'

One of the problems with the concept, as commented by Evans J in *Overseas Union Insurance Ltd v AA Mutual Insurance Co Ltd* (1988)[4] that the *Eagle Star* and *Home Insurance* cases left it unclear how far an equity clause displaces the rule that arbitrators must apply the law. In terms of French law an amiable compositeur should generally decide in accordance with the law, making moderate and circumspect use of his equitable powers and giving his objective reasons for so doing. He could give regard to trade usages not yet established as law. He may not depart from the law if it infringes a rule of public policy.

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Rules that are most probably universal would include prohibition against:

- Ruling on matters which were not put submitted for arbitration
- Ruling on the validity of the arbitration agreement
- Limiting the contractual responsibility of a party who has fraudulently violated the contract

There is general (but not universal) agreement that the contract may be moderated but not revised. Moderation is taken to mean, not enforcing a contractual provision which would produce an inequitable result. He could vary the quantum of a duty but not its nature. The power to moderate is usually limited to the non-essential clauses of the contract. It has been suggested that he may also accept a lower degree of proof than normal.

[4] 2 Lloyd's Rep 63, 72

French law does not allow for dealing with unforeseen events, which often happen in long term contracts and amicable composition has come to be regarded as the ideal vehicle for dealing with such events.

The principle has been criticised in some English cases, eg.:

- In *Czarnikow v Roth Schmidt & Co* (1992)[5] Bankes LJ said: '*... to secure that law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association.*'
- In *Orion Cia Española de Seguros v Belfort Mij* (1962)[6] Megaw J stated: '*... arbitrators must in general apply a fixed and recognisable system of law, ...and that they cannot be allowed to supply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles, which, of course, does not mean "equity" in the legal sense of the word at all.*'
- In *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* (1989)[7] Parker LJ stated: '*... a clause which purported to free arbitrators to decide without regard to the law and according, for example, to their own notions of what would be fair would not be a valid arbitration clause.*'

In others again it found support, eg.:

- In *Rolland v Cassidy* (1888)[8] the Earl of Selbourne said: '*...that they* [the words in a clause introducing the concept] *dispense with the strict observance of those rules of law the non-observance which, as applied to awards, results in no more than irregularity.*' and '*... bound* [the amiables compositeurs] *to proceed according to the substantial rules of justice...*'.
- In *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* (1978)[9] Lord Denning disagreed with Megaw, stating: '*...the clause seems to me to be entirely reasonable. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do under a clause as this.*'

[5] 2 KB 484
[6] 2 Lloyd's Rep 257, 264
[7] 1 Lloyd's Rep 485
[8] 13 App Cas 772-3
[9] 1 Lloyd's Rep 361-2

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- Goff LJ[10] added: '*...the arbitrators by express terms of the clause would be able to view the matter more leniently and having regard more generally to commercial considerations than would be done if the matter were heard in court...*'

The current view is that amiable composition has a place in English law, subject to definition.

4.8 ADR Processes – Non-binding

4.8.1 Mediation

The OED dictionary definition of mediation is '*the process or action of mediating between parties in dispute to produce agreement or reconciliation*'.

Mediation is forward-looking, in that it looks to the future and resolutions, which promotes relationships.

Bevan (1992:18) defines the process of mediation as '*the use of a third party to help those in conflict to do things and reach agreements which, unaided, they may never do, or may do so much later in the conflict that each side will have suffered further harm.*'

Mediation consists of investigation and negotiation stages.

The difference in objectives between arbitration and mediation are:

- The objective of arbitration is for the arbitrator to resolve a dispute between the parties regarding past events in accordance with their legal rights.
- The object of the mediator is to facilitate the parties arriving at an agreed solution to their dispute.

Positive aspects of mediation include:

- Future relationships (for future business) can be reserved.
- Informal
- High probability of a speedy and less expensive resolution to the dispute
- It promotes the possibility of a negotiated settlement of parties' interests (see principled method of negotiation hereunder)
- If the mediator's opinion is requested it is not binding

[10] at 363-4

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Negative aspects of mediation include:

- Because of the consensual procedure it depends heavily on the co-operation of the parties. Compromise is often not achievable on long term construction projects where it may prejudice future positions during the currency of the contract.
- Where it takes place before discovery and exchange of experts' reports, one party may agree to a negotiated settlement without being aware of the weaknesses of his opponent's case
- There is a perception that a party who suggests a negotiated settlement is displaying a lack of confidence in his case
- A party may accept a mediator's opinion based on an inadequate investigation
- Even if a settlement is reached, further disputes may arise when trying to reduce the settlement to writing
- The mediator may become involved as a witness in subsequent litigation

Further, Rouse (1988:102) says that one of the main criticisms of mediation is that too often the technical mediator will resort to the '*split down the middle*' solution. Also its greatest drawback is the lack of finality.

The South African Institute of Civil Engineers has introduced into their standard form of CoC mediation as a further dispute-settling mechanism to overcome the problems associated with arbitration.

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4.8.2 Conciliation

The terms conciliation and mediation are often used interchangeably in industry. Some confusion regarding the term conciliation exists. Some see conciliation as the same as mediation, with the conciliator imposing no decision and not giving an opinion. Others see it as being distinct from mediation in that the conciliator does ultimately give an opinion and an assessment as to the likely trial outcome.

Bevan (1992:15) submits that the terms mediation and conciliation are basically interchangeable. Mackie (1991) refers to 'facilitative' and 'evaluative' mediation, the one being on the one end of the mediation continuum and the one on the other end. In 'facilitative' mediation no opinion is given and the mediator attempts to improve the

communication between the parties. In 'evaluative' mediation the mediator attempts to persuade the parties to settle by giving opinions of law, facts and evidence.

'Facilitative' mediation could thus be described as conciliation and 'evaluative' mediation as mediation.

Essentially one can view conciliation as having less active participation from the conciliator than that from the mediator.

Butler and Finsen (1993:11) say that is not important what the process is called, what really matters is that both the conciliator/mediator and the parties to the dispute have a clear understanding of his functions and powers. The powers of the conciliator/mediator are determined by the agreement between the parties.

Conciliation (and mediation) has three fundamental characteristics:

- It originates in an agreement between the parties to call in the aid of a facilitator
- The facilitator has no authority to impose a solution on the disputants as have a judge, arbitrator or expert appraiser
- The process remains flexible at all times and dependent on the willingness of the participants to continue.

4.8.3 Court-annexed Arbitration

Court-annexed arbitration is the process by which the court refers (or orders) a case to be decided by non-binding arbitration rather than by the court. It is also known as court-ordered arbitration.

The courts order cases to be dealt with by a non-binding arbitration in order to reduce congestion in the courts. The arbitrator is court-appointed and cannot be chosen by the parties. Hearings are generally informal and can be held in or out of the court. Rules of evidence may be relaxed and hearing tend to be brief and in summary.

Court-annexed arbitration is most common in the United States of America and aimed at dealing with medium-sized claims.

The main aim of this process is to promote a settlement between the parties. The parties either accept the arbitrator's award or agree on a financial settlement with the aid of the

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information gained from the case. If they cannot arrive at a settlement than the case can be referred to the courts. However, cost disincentives are used in order to discourage this (MacGregor, 1994).

Advantages of court-annexed arbitration are:

- Prompt
- Relatively inexpensive compared with traditional arbitration
- Fair
- Less formal resolution
- Procedural and substantive rights are preserved.
- Confidential

Disadvantages of court-annexed arbitration are:

- Lack of finality as disputants can chose to have a re-hearing

4.8.4 The Mini-Trial

Brown and Marriot (1993:262) argue that the name mini-trial is not really apt, since it is not a trial but a non-binding ADR process. It assists parties to a dispute to gain a better understanding of the issues, thereby enabling them to enter into settlement negotiations on a more informed basis.

It uses a combination of techniques such as mediation, negotiation and advisory arbitration. It is not just another form of private judging or quasi-trial (Bevan, 1992). The procedure is primarily a system whereby disputing parties present their cases to themselves. What this means is that representatives of the employer and construction companies and/or their lawyers sit on the one end of the table and present their case (in abbreviated form) to a 'tribunal' of senior executives of the parties to the dispute. A neutral expert assists this tribunal in most cases.

No determination is made, though the neutral may express a non-binding opinion. On hearing the evidence and arguments, the panel negotiates between the two positions until they reach an agreement. The neutral could also facilitate the settlement discussions.

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The senior executives should have the required authority to make decisions and implement them where necessary. The executives should in no way be involved in the current dispute or have any personal interests therein.

The CEDR has given this process the name of 'Executive Tribunal' and the Chartered Institute of Arbitrators call it 'Supervised Settlement Procedure'.

Advantages of mini-trials are described as follows:

- Brown and Marriot (1993:271) citing Wilkinson say that mini-trials result in prompt settlement in more than 95 percent of the instances where used.
- Also where settlement has not been reached most parties agreed that the money and effort was not wasted as the work done is useful for the trial (or next step in the dispute resolution process).

Disadvantages of mini-trails are described as follows:

- The cost factor is high in comparison to without prejudice negotiations.
- There is a high time investment required by the parties, which includes senior executives.
- The absence of cross-examinations and the abbreviated format of the presentations, may result in some important elements being missed.
- There is the risk that the parties may inform their opponents of their trial strategies and of the weaknesses in their opponent's case.

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4.8.5 Summary-Jury trial

Brown and Marriot (1993:278) describes a summary-jury trial as a variation of a mini-trial conducted before a mock jury who give a verdict which is not binding, but helps inform the parties of the likely reaction of a real jury.

Its primary application would be in countries where civil trials often involve a jury who make a binding decision after receiving all the evidence presented before them.

The idea behind the summary-jury trial is to allow the parties and their representative lawyers to put their cases before a mock jury by way of a brief summary of proofs and arguments. The jury reaches an advisory verdict and the lawyers can question them about their verdict and how they came to it.

It is hoped that a settlement may result from the summary-jury trial and even if it does not, information resulting from the likely verdict issued by the jury should promote an early settlement.

A disadvantage is that the parties have to wait to hear what the verdict of the jury will be, instead of initiating private negotiation with each other. Therefore, if the parties cannot reach a settlement and they proceed with litigation, the summary-jury trial has in effect delayed the proceedings and increased the overall expense incurred by both parties.

4.8.6 Multi-door Courthouse

Brown and Marriot (1993:44) consider the system of multi-door courthouse one of the most significant developments arising out of the relationship between ADR procedures and the court system.

There is a realisation that some dispute resolution mechanisms are more appropriate in certain cases than in others. ADR procedures include a range of processes and tools and techniques that may be used to resolve a dispute in a particular instance. It thus stands to reason that some processes may be more appropriate in certain circumstances than others.

Sander (cited in Brown and Marriot, 1993:45) says that the multi-door courthouse is not '*simply a court but a Dispute Resolution Centre*'. Disputes are analysed by the multi-door courthouse and are then directed to the most appropriate method of dispute resolution. In this way, disputants are sent by way of an intake screening to the correct "door" in the courthouse. All the dispute resolution processes are made available to the disputants under one roof in the courthouse as well as the intake screening function.

The intake screening process considers for example:

- The kind of issues involved.
- What kind of compensation is likely to be awarded if successful.
- Whether witnesses or other evidence will be needed.
- Whether rights need to be protected and what services are available.

The multi-door courthouse advises the disputants as to the alternatives available to them and then guides them towards the dispute resolution mechanism most suited to their needs.

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In theory the process should save time because the disputants are directed to the correct method of dispute resolution right from the outset. Included is the advantage of easy access to the required method of dispute resolution. However the success depends upon the skill of the intake process and the skills of the relevant officials. The intake process is considered to be the key feature of the multi-door courthouse.

4.8.7 Ombudsman

An ombudsman is usually an independent person whose role is to deal with public complaints against administrative injustice and maladministration, with the power to investigate, criticise and make issues public (Brown and Marriot, 1993:279).

It could be argued that the ombudsman does not fall in the ADR ambit, because his role is the examination of grievances rather than the resolution of disputes.

The ombudsman does not have an application in construction disputes.

4.8.8 Neutral Expert Fact Finding

Neutral expert fact finding (NEFF) seems to be a refinement of expert determination. Bevan (1992:17) says that it is based on the problem that arises in complex technical cases, when each side has an expert holding firmly to a view that is diametrically opposed to that of the other.

Although experts are expected and required to maintain professional objectivity, the above position still develops as (Brown and Marriot, 1993:277):

- The parties are unlikely to select an expert who disagrees with their case and thus seek out experts that support their positions
- Not all experts consistently maintain the objectivity that some people might hope for
- Opportunities for the experts to exchange views in a constructive and creative way do not always readily exist.

It can arise either through appointment by the court (USA) or by agreement between the parties.

The idea behind NEFF is for the neutral expert to review the technical evidence and encourage the parties to look critically at their own expert's assessment. The neutral expert

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is in an unenviable position in that his only power in the settlement process is to criticise and weaken the testimony of one or both of the fellow experts.

When the expert has concluded his investigation he advises the parties of his findings, which gives him an opportunity to play a facilitative role if required.

The procedure is non-binding and it is commonly agreed by the parties that the expert's opinion would be admissible in court.

4.8.9 Dispute Resolution Advisor (DRA)

Wall (1992:328) describes the DRA as a hybrid system combining elements from many ADR techniques. It draws from the USA processes of DRB and Project Arbitration and the UK processes of the 'independent intervenor' and the Dispute Advisor.

It is based on the belief that disagreements should be resolved as soon as possible and that the parties should attempt, in the first instance, to resolve the disagreements themselves at site level, before they develop into acrimonious disputes and impact on the relationship between the parties.

In DRA the subcontractor is more directly involved than in other dispute resolution systems. In DRA the parties are also encouraged to communicate problems early and openly and preferably orally, rather than extensive contractual correspondence. Also to view problems as project problems rather than any particular party's problems.

The DRA is jointly chosen and appointed by the parties at the commencement of the contract and the fees are shared equally between the parties. The DRA is an individual that is familiar with construction and possesses dispute resolution skills.

The DRA conducts a series of familiarisation meetings and visits the site on a monthly basis. He assists the site informally with resolving disagreements before they become formal disputes. When attempts at settlement fail the relevant party must give a formal Notice of Dispute. The DRA and site level representatives then have a fixed period to attempt to resolve the dispute. The DRA is free to choose the most appropriate ADR technique to help the parties settle the dispute.

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If this fails the DRA produces a report which contains an analysis of the dispute, the key issues and the DRA's perception as to barriers to settlement. The report is given to senior members of staff of the parties. The report may contain non-binding recommendations or evaluations at the senior staff members so request. The intention is then for the senior staff members to meet in order to attempt to resolve the dispute. The DRA will attend if desired.

If this fails the DRA will convene a short-form arbitration unless the parties have accepted a recommendation to another method of resolution.

4.9 Other Dispute Resolution Processes

4.9.1 Negotiation

Negotiation is not strictly an ADR process, but as it is on the one side of the dispute resolution continuum it will briefly be touched on here, in particular the method of principled negotiations.

Brown and Marriot (1993:18) refer to negotiation as the 'first among equals' of dispute resolution processes. It can stand alone as a dispute resolution process; it is also an ancillary part of most cases commenced by adjudication and is an inherent component of mediation, mini-trial and most other ADR methods.

Maddux (Successful Negotiation, 1988, cited in Brown and Marriot, 1993) defines negotiation as '*the process we use to satisfy our needs when someone else controls what we want*'. Goodman (2000) proffers a wider definition, '*Negotiation is the art and science of obtaining agreements between two or more parties, who are mutually dependent and who are seeking to maximise their outcomes*'.

Brown and Marriot (1993:18) suggest that most disagreements are dealt with in one way or another by negotiation between the parties themselves; relatively few involve legal intercession.

Fisher and Ury (1991:xiv) say that standard strategies for negotiation often leave people dissatisfied, worn out, or alienated and propose the method of principled negotiations.

The method of principled negotiations was developed at the Harvard Negotiation Project and involves deciding issues on their merits.

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- Looking for mutual gains wherever possible
- Where interests conflict, the results must be based on some fair standards independent of the will of either side
- Being hard on merits and soft on people

By focussing on the interests, mutually satisfying options and the merits, results in 'wise' agreements (Fisher & Ury, 1992:14).

The method can be summarised as follows:

- Separate the people from the problem
- Focus on interests, not positions
- Invent options for mutual gain
- Insist on using objective criteria

Benefits of negotiation and in particular the method of principled negotiations are stated hereunder.

- The method of principled negotiations maintains good relationships.
- The method of principled negotiations provides a clear strategy to replace the often reactive approaches people commonly pursue in conflictual situations (Goodman, 2000). Work is often obtained by a lowest bidding process. These circumstances are often characterised by conflict and animosity and negotiations on any issue have great potential for becoming acrimonious.
- By focussing on the problem and not the people the method makes it possible to reach amicable settlements. The participants see themselves as working side by side, attacking the problem and not each other (Fisher and Ury, 1992:11).
- The method is part of the joint decision making class of procedures ('interest orientated approach') which allow disputants to reconcile their separate interests. This overcomes the problem of positions obscuring what one really wants (Fisher and Ury, 1992:11).
- The method allows time to be set aside to come up with a range of possible solutions. It is difficult to come up with solutions when under pressure and high stakes inhibit creativity (Fisher and Ury, 1992:12).
- By focussing on the merits the method allows predicted rather than arbitrary solutions (Fisher and Ury, 1992:12).

University of Cape Town

- The method encourages the development of win-win solutions that are satisfying and lasting.
- The method contributes to positive future relationships.
- The method is capable of locating hidden alternatives that provide benefit to both sides.
- The method provides voice and a sense of procedural justice. Pruitt and Carnevale (1993:187) cites various research findings that conclude that procedural justice is in some cases as important or even more important than gain.
- The method makes reaching an agreement, based on objective criteria, a high priority.
- The method can employ moderate concession making. Moderate concession making combined with active problem solving is likely to lead to win-win solutions (Pruitt and Carnevale,1993 :47).
- The method allows the reaching of gradual consensus without all the transactional costs of digging yourself into positions only to have to dig yourself out again (Fisher and Ury, 1992:14).

4.9.2 Adjudication

Adjudication is a generic term and is a dispute resolution process in which a neutral has and exercises the authority to hear positions put by the disputants and to make a ruling on their dispute which will be binding on them (Brown and Marriot, 1993:18).

Adjudication may occur by:

- Litigation
- Arbitration
- Administrative or statutory tribunals
- Expert determination
- Private judging

In the construction industry adjudication has a specialised meaning where it is a procedure by which a neutral (adjudicator) is empowered and required by contract to make summary binding decisions on disputes arising under the contract without following litigation or arbitration procedures (Brown and Marriot, 1993:19).

Adjudication is now mandatory in the United Kingdom following the Housing Grants and Regeneration Act of 1996.

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4.9.3 Arbitration

For purposes of this dissertation arbitration is not considered an ADR process (see Section 4.2)

In Biblical times Solomon acted as arbitrator in determining the dispute between two women as to who was the mother of the baby. Arbitration was popular in Ancient Rome, particularly in the latter days of the Empire. The first known arbitration was published in the 12th century (Butler and Finsen, 1993).

It is considered by some that commercial arbitration was institutionalised in 1768 when the New York Chamber of Commerce set up its own way of settling business disputes according to trade practice rather than legal principles.

Butler and Finsen (1993:1) defines arbitration as '*a procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties.*'

In the Common Market countries (except the United Kingdom) and in the United States, arbitrators are either not required to decide according to the substantive rules of law or may be authorised by the parties to adjudicate disputes *ex aequo et bono* as amiables compositeurs. In the United States arbitrators are not bound to apply the strict rules of law in resolving disputes In other jurisdictions where arbitration is practised and in the United Kingdom, arbitrators are bound to decide according to the substantive rules of law (Christie, 1992:260).

This difference is in the author's opinion one of the major reasons for the opposing views whether arbitration is part of ADR or not.

Arbitration is similar to litigation, except that it is less formal and private.

Positive aspects of arbitration include:

- The ability to select a decision maker with appropriate expertise for the dispute
- Legal representation not required
- Procedural informality

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- Privacy (thus some confidentiality)
- Speed and lower cost – compared with litigation
- Finality of decision – compared with other ADR processes
- Avoidance of judicial problems
- Justice for all

Negative aspects are:

- Being a process requiring parties to present evidence and arguments in a comprehensive way, it can be long and expensive compared with other ADR processes. Pike (1993a:157) says that normal English arbitration procedure is practically indistinguishable from litigation. It may even be more expensive as payment also has to be made for the arbitrator and the venue.
- Appeals from arbitrator's decisions are severely limited - compared with litigation. This is seen as a positive aspect by some as it brings finality to the process.
- The arbitrator is not able to uncover the 'private agenda' or interests of the parties rather than their positions – compared with other ADR processes
- Its success is dependant on a body of fair and competent practitioners being available
- The advantage of privacy may be lost if there is provision for appeal (not in South Africa as in the event of an agreement to appeal the appeal must be to another arbitrator and not the courts).

Bevan (1992:7) says that arbitration's longevity suggests that it has merits in practice as well as in theory.

University of Cape Town

4.10 Applicability of ADR in Construction

The 1991 American Bar Association (ABA) Forum on the Construction Industry survey on non-binding dispute resolution canvassed the construction bar's attitudes and experiences with mediation, mini-trial, summary jury trial, non-binding arbitration and other ADR processes.

A paper by Stipanowich and Henderson (1992:314) examines the survey. The results concerning general experience with the various processes are summarised in Table 8 hereunder.

Table 8 : Summary Analysis of ABA Survey Results

Process	Finding
Binding arbitration (not part of ADR as stated earlier)	By far the most widely used in construction cases. At least 81.5% of the respondents had participated in at least one arbitration
Mediation	Being extensively employed. Nearly two-thirds of the respondents had participated in at least one mediation.
Mini-trial	Less extensively used. About 20%
Non-binding arbitration	Some 29% of the respondents had participated in at least one non-binding arbitration.
Summary jury trials	Some 9.6 % of the respondents had participated in at least one summary jury trial.

The results of the examination indicate that mediation and mini-trials were considered to be appropriate where:

- The parties wished to maintain an ongoing business relationship
- Privacy and confidentiality was desired
- Disputes needed to be resolved quickly
- An economical process for the resolution of the dispute was essential

The results of the examination indicate that mediation and mini-trials were considered not to be appropriate where:

- The dispute turned on a novel question of law
- The credibility of witnesses was at stake
- The opposing party or its counsel was considered untrustworthy or unlikely to compromise

Miles (1992:306) ascribes the limited use of ADR in the construction industry to the general lack of awareness of what ADR is and what it seeks to achieve.

4.11 ADR Success and Future Prospects in Construction

According to Brown & Marriott (1993:ix), in the United Kingdom both the Law Society and the Bar have produced reports welcoming the introduction of ADR. The lord Chancellor's Department has signalled its approval and ADR has been designated a

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priority area for training of solicitors with hundreds of lawyers having undertaken training in this regard.

Adjudication is now mandatory in the United Kingdom following the Housing Grants and Regeneration Act of 1996.

ADR is not only the domain of the legal profession, as is shown by the development of community mediation and the interest shown in CEDR by commercial concerns and other professions.

Tyler (1991:19) says that ADR programmes can be implemented in ways that will lower cost to disputants and to the court system. Such gains, when found, however, are small. Gains are not automatic and depend on the effective implementation of innovative programmes. Perhaps the most striking aspect of ADR programs which emerges from evaluations is the general popularity of ADR programmes. People typically seem satisfied with informal dispute resolution efforts, often more so than with traditional adjudication, and generally feel committed to the decisions reached in them.

Brown and Marriot (1993:406) are of the view that ADR in the UK would develop in two principle ways:

- An adjunct to the processes of adjudication in litigation and arbitration
- A parallel system to the adjudicatory processes, involving in particular the development of the use and practice of mediation

In their opinion, it is important for dispute resolution in the UK, that professional, industrial and commercial groups take the initiative to establish ADR schemes and ensure that disputes are dealt with by appropriate means using all the resources, processes and skills available.

Although there is some optimism regarding ADR difficulties remain.

The recent resurgence of the alternatives movement has passed through several phases and a more critical and reflective phase has ensued. From this a number of difficult and fundamental questions are emerging:

- What, if any, relationship should exist among the different types of mechanisms. This question assumes importance not only for the disputant who might benefit from some

University of Cape Town

guidance concerning where to take any particular dispute, but also for a society seeking to provide a coherent response to these grievances. A solution could be the concept of a MDC, multi-court house where the options would follow a logical sequence.

- Relatively little is known about the critical questions of ADR. ADR specialists have essentially no sophisticated data concerning the relative time and cost of ADR.

Freeman (1994:xv) also suggests that general consensus about what ADR programmes are supposed to achieve does not exist. The programmes have different agendas, some concerned with time and cost and some with quality. This difficulty in measurement is a reflection of different values.

Miles (1992:307) submits proposals for encouraging the use of ADR in the construction industry:

- An awareness of ADR needs to be created. Once the awareness exists it would be easier to encourage parties to use it.
- He says that the construction industry's traditionally 'macho' approach to resolving disputes needs to be overcome. The incorrect perception that to suggest ADR is a sign of weakness needs to be overcome.

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4.12 ADR Suitability and Measure of Success

To decide on a suitable process, one must first identify what is considered to be a successful resolution for the particular circumstances. In different circumstances different outcomes may be considered to be successful. Despite Freeman's (see Section 4.11) misgivings about the measurement of what makes an ADR system successful, an attempt will be made to define the critical factors for success.

A successful outcome in the circumstances is considered an agreement which (Goodman, 2000):

- Meet the legitimate interests of all sides to the largest extent possible
- Is durable
- Do not damage the relationship of both parties
- Is workable
- Is owned
- Would be ratified by constituencies

- Is unambiguous and complete
- Is achieved within a reasonable timeframe
- Is affordable

Sanders (1985:99) identifies four goals of the alternative movement:

- to relieve court congestion, as well as undue cost and delay
- to enhance community involvement in the dispute resolution process
- to facilitate access to justice
- to provide more 'effective' dispute resolution

It has been found that compliance is as high or higher with decisions following ADR sessions, as with decisions reached in adjudication. Having the opportunity to present one's complaints and work towards a solution in an informal setting is clearly highly valued by disputants and leads to positive feelings.

Brown and Marriot (1993:398) stresses the necessity for using ADR selectively and that practitioners should be aware of the situations in which ADR is not appropriate. They present the following guidelines in deciding whether ADR is appropriate or not:

- Where a party lacks the necessary capacity to contract
- Cases involving issues of constitutional principle, civil rights or matters of substantial public importance
- Where it is clear that the parties need a binding decision which is enforceable as an order of the court or which has value as a precedent
- Where there are apparently intractable issues such as credibility or of law
- Where either party's rights may be lost or prejudiced by using ADR
- Where one party materially abuses the ADR process causing actual or potential prejudice to the other party – delay tactics, misleading a party, no real intention of achieving an agreed solution
- Where the power imbalance is so great that a fair agreement cannot realistically be reached between the parties
- Some codes of practice stipulate when ADR should not be used or when it should be stopped
- Where the parties intend to act illegally or contrary to public policy

University of Cape Town

4.13 Section Summary and Conclusion

In this section:

- Some definitions for ADR were presented.
- It was concluded that for purposes of this report ADR processes are to be considered as alternatives to litigious processes, although not divorced from them.
- Characteristics of ADR were described in general and summarised. The following common characteristics of ADR were identified:
  - They exist somewhere between the polar alternatives of doing nothing or of escalating conflict
  - They are less formal and generally more private than litigation in open court
  - They permit people with disputes to have more active participation and more control over the processes for solving their own problems than do traditional methods of dealing with conflict
  - Almost all of the new methods have been developed in the private sector, although courts and administrative agencies have began to borrow and adopt some of the more successful techniques.
- The need for and development of ADR were described. It was found that the need for ADR was born from the need for processes:
  - That are cost and time effective
  - That do not lead to disillusionment
  - That maintain clarity of issues
  - That do not result in damaged relationships and traumatic experiences
  - That allow control of process
- ADR processes were considered both in South Africa and internationally and described in brief. Particular attention is paid to the concept of amiable composition as it was established that it is can contribute to the DRB concept.
- It was found that the use of ADR in construction was considered by some to be limited. Miles (1992:306) ascribes this limited to the general lack of awareness of what ADR is and what it seeks to achieve.
- It was found that the potential for ADR in construction is substantial (see also Section 11).
- The requirements for ADR success were identified as settlements with specific characteristics.
- The objectives of ADR were also identified and the characteristics of projects suitable for ADR.

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5. DISPUTE BOARDS

5.1 Section Introduction

In this section the following aspects of DB will be considered:

- The need for DB
- Description
- History in the world and Southern Africa
- DB in relation to FIDIC
- Its application
- Its advantages and disadvantages
- Its success

The Employer generally imposes the method of dispute resolution in construction contracts. The Contractor has little say in the matter. He is generally prohibited from qualifying his tender and can thus not insist on the incorporation of one or the other mechanism into the contract.

5.2 Need for DB

The United States Committee on Large Dams (Fraser, 1991:20) points out that despite the best intentions of all parties, problems may still arise that are not easily settled at job level. Assuming that everyone's goal is to avoid the costs and delays of lengthy arbitration and litigation, they propose the use of a DRB. They contend that '*Specifying and implementing a system such as the DRB per a clause contained in the construction contract documents may be one of the most beneficial actions the parties to construction contracts can take in ensuring a successfully completed contract.*'

Pike (1993a:157) uses the analogy of a boxing match and says that there is a similar need in long term construction contracts for 'on the spot' decisions by the Engineer (boxing referee) and the need for arbitrators or judges (boxing judge) to finally resolve disputes. He says that the role of the Engineer has increasingly been questioned for many reasons. The Engineer's decision may also be unacceptable to one or both parties

He is of the view that ADR by means of mediation, mini-trial and the like amounts to no more than structured and formal settlement negotiations, which will only work if the

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parties co-operate. He points out that there is a gap to be filled between this type of ADR and litigation and arbitration.

In the UK this gap was recognised by various construction institutions, including:

- The Joint Contracts Tribunal *Standard Form of Building Contract with Contractor's Design*, 1981 edition (JCT 81) which provides for an adjudicator to be named in the contract at the outset.
- There is provision for adjudication or expert determination in the:
  - Institution of Chemical Engineers' (I Chem E) form of contract, and
  - the Association of Consultants Architects' (ACA) form of contract
- The Institution of Civil Engineers' *New Engineering Contract* requires adjudication of all disputes
- The World Bank SBDW, (1991) which incorporates Part I of the FIDIC 'Red Book' contained the following statement in relation to Sub-Clause 67.3 (arbitration) (note that this statement has been superseded by first the January 1995 edition and now the May 2000 edition):

  'In the case of major projects, IBRD [International Bank for Reconstruction and Development] encourages employers to consider introducing a Disputes Review Board (DRB) into the contractual settlement of disputes procedure. Such a DRB could either replace the Engineer under Clause 67 of the FIDIC General Conditions of Contract or it could review the decisions made by the Engineer under Clause 67. In either case, both parties should then have the right to request that a decision by the DRB be finally settled under an agreed settlement of disputes procedure by an arbitral award or a court decision.'

In a paper in *The International Law Review* in 1986 Lodigiani (1986:499) recounts the events leading to an increase in disputes in the construction industry (see Section 2.5). He also observes that the employers became constrained from a political point of view and due to internal rules, procedures and bureaucratic impediments, reducing their capacity to settle disputes. This resulted in the parties increasingly having to resort to arbitration, which is also considered an unsatisfactory solution. The high cost, lengthy period and the often resulting poor relationships, ultimately causing the victory to be a Pyrrhic one.

Shadbolt (1999:106) also observes that the increased incidence of joint ventures both in consulting and in contracting means that organisations involved in construction are less autonomous and are less able to negotiate settlements of their contractual disputes.

University of Cape Town

The TCCP of UTRC (1991:1) levels the following criticisms at ADR in general:

- Most ADR processes are employed a substantial time after the work has been completed
- The decisions are often made by persons:
  - who have a limited background in the type of work involved, and
  - are not familiar with the specific project
- They start too late, take too long and cost too much

The TCCP of UTRC (1991:1) say that there is a ADR procedure, however, that can provide early attention to disputes during contract performance. They recommend the use of a DRB.

Molineaux (1995:263) says that c 67 in FIDIC 4th 'Red Book' opens the door to ADR and that engineers, in particular in the USA, are inspired by the DRB concept. He suggests that great attractions are:

- Since construction disputes are usually factual and technical, rather than legal, construction professionals should be involved
- The experts are involved early to prevent as well as resolve disputes

5.3 History of Dispute Boards

5.3.1 In the World

Chapman (1999:1) says that the DRB concept originated in the USA where it has been used for over 30 years (Shadbolt (1999:103) says 20). It has been used as a means of avoiding and resolving disputes in civil engineering works, in particular dams, water management projects and contracts for underground construction. The earliest reported use was on Boundary Dam in Washington in the 1960's, where the technical 'Joint Consulting Board' was asked to continue its operation and make decisions regarding conflicts, etc (Shadbolt, 1999:104 and Chapman, 2000:2).

Shadbolt (1999:106) supports the use of a Claims Review Board, and describes the operation of such a board on the El Cajon project in Honduras during the early eighties. The operation of the board was also described by Dr Igor Leto in his paper to the Middle East Economic Digest Conference in London on the '*Settlement of Disputes*' in 1986.

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Jaynes (1993:453) considers this to be the first known application of a DRB on an international project. This board came about as a result of a proposal made shortly after the commencement of the contract by a member of the Employer's panel of experts. Severn (1996:3) says that the DRB differs only in title from the Claims Review Board.

The TCCP of UTRC (1991:1) describes the first DRB as primarily being employed on underground projects, but are currently being employed on many diverse projects.

Chapman (2000:2) is of the opinion that suspicions regarding the owner's agent's impartially grew and as also costs in resolving claims by arbitration or the courts increased, the use of DB grew.

Chapman (1999:2) considers the World Bank to be the foremost funding agency for large projects in the world. In May 1994, the World Bank made the use of its SBDW mandatory on projects for which it provides any financing. In January 1995 a change appeared in the 'Settlement of Disputes' clause. The Bank uses the FIDIC 'Red Book' Part I conditions and provides its own Part II conditions. It is in the Part II conditions that the Bank's, then new, approach to settlement of disputes appeared (Jaynes, 1996:17).

University of Cape Town

In the preface it is stated:

> *'A major change has been introduced with respect to the 'quasi-judicial' role of the Engineer, as set forth in Subsection 67.1 of Part I of FIDIC. For contracts estimated to cost more than US$50 million (including contingency allowances), it will be mandatory to refer disputes in the first instance to a three-member Disputes Review Board (DRB) rather than the Engineer. For contracts estimated to cost less than US$50 million, Employers will have the option of (i) providing for a DRB, (ii) referring disputes to one Disputes Review Expert (rather than to the three-member DRB), or (iii) continuing to provide for the Engineer's Decision under Sub-Clause 67.1 of FIDIC Part I, the third option being available only if the Engineer is independent from the Employer.'*

Compare this with the Bank's position in 1991 as presented in Section 5.2 above which was only a recommendation for the introduction of a DRB.

So the role of the 'independent Engineer' was removed from World Bank works projects in excess of US$50 million, but retained as an option for projects of lesser value than US$50 million.

Also in 1995 FIDIC published a new 'Orange Book' (conditions of contract for Design and Build contract) which provided that disputes are to be resolved by DAB.

In November1996 FIDIC published a supplement (FIDIC, 1996) to the FIDIC 4th edition 'Red Book' CoC recommending DAB as a preferred method of dispute resolution. This followed the approach of the 'Orange Book'. In the foreword to the supplement it states: '*FIDIC agrees that this* [appointment of an expert(s) at the beginning of the contract] *is an acceptable alternative to the Engineer's former role in dispute adjudication*'.

In 1999 FIDIC published new editions of its standard forms of contract and the DAB provision is contained in all three of the FIDIC major standard forms ('Red, Silver and Yellow Books').

In World Bank's *'Sample Bidding Documents for Smaller Contracts'* (World Bank, 1995) they chose to provide for the use of an adjudicator who will review any decision by the Engineer, and any disputes, in the first instance. Molineaux (1995:262) refers to the adjudicator as an '*appellate engineer*'. However, reference to '*decision*' and '*first instance*' in the clauses is somewhat ambiguous and it could be interpreted that their is no 'decision' by the Engineer after a dispute, but that any dispute would be dealt with by the adjudicator '*in the first instance*'.

Further, the publication of the 1995 edition of the Bank's Standard Bidding Documents '*Procurement of Works*' have introduced an ambiguity between this document and the *'Sample Bidding Documents for Smaller Contracts'*. It does not make provision for an adjudicator and also provides three options. The *'Sample Bidding Documents for Smaller Contracts'* generally applies to contracts of value less than US$10 million, however, for complex works such as marine works and water treatment works, the Standard Bidding Documents '*Procurement of Works*' is recommended. From this (Jaynes, 1996:19) concludes that it is likely that the Bank would expect borrowers to use a DRE rather than an adjudicator for contracts expected to cost less then US$ 10 million. He points out the differences between an adjudicator and a DRE.

Since January 1995 a number of amendments (World Bank, 2000a:1) were made to the SBDPW through four corrigenda, (June 1995, June 1996, September 1996 and October 1999), all of which are incorporated in the May 2000 (current) edition.

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In the description of the principle amendments to SBDW, January 1995 edition, the following is stated with respect to dispute settlement procedures:

- '*A new arbitration sub-clause is provided, including rules of procedure from among well-recognized institutions for foreign bidders (COPA 67.3.2)*' (World Bank, 2000a:1)
- *Section XIII, Disputes Settlement Procedures, has been revised and excludes the procedure for settling disputes through an "independent" Engineer*'(World Bank, 2000a:2)'

This further change to the dispute settlement clauses is described in the introduction to the Bank's Part II conditions and reads as follows (World Bank, 2000a:3):

> '*A major change has been introduced with respect to the "quasi-judicial" role of the Engineer, as set forth in Subsection 67.1 of Part I of FIDIC. For contracts estimated to cost more than US$50 million (including contingency allowances), it will be mandatory to refer disputes in the first instance to a three-member Disputes Review Board (DRB) rather than to the Engineer. For contracts estimated to cost less than US$50 million, Employers will have the option of (i) providing for a DRB or (ii) referring disputes to one Disputes Review Expert (rather than to the three-member DRB).*'

So the role of the 'independent' Engineer was removed from all World Bank funded works projects, also those of lesser value than US$50 million.

The World Bank goes on to say in the introduction to the COPA about the SBDW:

> '*They are mandatory for use in works contracts financed in whole or in part by the World Bank (which includes the International Bank for Reconstruction and Development [IBRD] and the International Development Association [IDA], ..., which are estimated to cost more than US$10 million (including contingency allowance) ...*'.

C 67 is marked as 'mandatory' in the COPA (World Bank, 2000c:1), thus it is mandatory even for works of value less than US$ 10 million.

The introduction of the dispute settlement procedure which includes the DRB (and DRE) concept in the SBDW follows Sub-Clause 2.42 of the 1995 *IBRD Guidelines for Procurement*, which states:

> '*In case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall also include mechanisms such as dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement.*'

Chapman (2000:2) says that the new UK 'Adjudication' Act (Housing Grants, Construction and Regeneration Act 1996, effective May 1998) requires almost all UK

University of Cape Town

construction contracts to contain adjudication clauses. He is of the view that the UK industry considers that, for the larger projects, a DRB is preferable to individual adjudicators being required to determine isolated disputes.

Chapman (2000) estimates that by 1999 nearly 500 projects (estimated total value of some US$ 60 billion) have been completed or were under construction utilising DB.

According to Shadbolt (1999:104) DRB are currently known to be in operation in at least 12 'countries' [*sic*] (US, UK, France, Sweden, Denmark, New Zealand, Southern Africa, Uganda, Hong Kong, China, India and Bangladesh).

5.3.2 In Southern Africa

The first project in Southern Africa that could be traced on which a DB was used, is the Phase 1A Lesotho Highland Water Project (1990) in Lesotho. The Phase 1A projects are the Katse Dam, Transfer Tunnels and Delivery Tunnel (North and South). A DRB was first employed (1991) on the Delivery Tunnel North and later (1994) on the rest of the LHWP.

At the time of the review of the tender documentation for the LHWP legal advice considered it prudent to replace the adjudicatory powers of the Engineer under c 67 of the 'Red Book' with a 'Dispute Resolution Board' (as opposed to a Dispute Review Board). The motivations for such a view were:

- The substantial disputes that arose on projects such as the Orange-Fish and Hex River Tunnels.
- The invidious position of the Engineer that has an interest in the outcome of his decision and that he may have to judge in his own case (contrary to the rules of natural justice).

Valuable input was received at the time from Dr Igor Leto, who became known as a DRB member on the EL Cojan hydropower project in Honduras (see Section 5.3.1).

For various reasons a DAB was not provided for in the tender documents that were issued for tendering and which formed the basis for the various contracts.

The Engineer and Employer on Delivery Tunnel North pursued the idea of an independent DRB and the principle was negotiated with the preferred bidder, to whom the contract for

University of Cape Town

the construction of Delivery Tunnel North was eventually awarded. Soon after commencement the DRB was constituted and became active on the project.

For the balance of the LHWP Phase 1A projects the idea of a DRB was only further developed and incorporated into the contracts (some three years after award) after a presentation by AA Mathews (co-author of the book Construction Dispute Review Board Manual).The 'Muela hydropower project, which also formed part of the LHWP did not make use of a DB. Other early projects are the Letsibogo Dam and North-South Carrier Pipeline in Botswana (1996).

Other projects that had/have DB involvement are:

- Rakops – Khumaga Road, Botswana
- Khumaga – Mopipi Road, Botswana
- Ghanzi Road, Botswana
- Maguga Dam, Swaziland
- LHWP Phase 1B consisting of the Mohale Dam, Mohale Tunnel and Matsoku Weir and Tunnel, Lesotho
- Injaka Dam, South Africa
- Paris Dam, South Africa

On both Injaka and Paris Dam it was agreed some time after the commencement of the contract to implement a DRB to deal with disputes which could not be resolved by the parties themselves. Both contracts used the 'Blue Book' General Conditions of Contract 1990. This GCC provides for dispute resolution by mediation (following an Engineer's decision) followed by arbitration. In the case of Paris Dam arbitration followed mediation and in the case of Injaka Dam litigation followed mediation. In both cases it was considered that mediation did not achieve resolution of disputes and it was replaced with a DRB.

University of Cape Town

5.4 Definition and Description

5.4.1 Dispute Review Board

a) Definition

Chapman (2000:1) describes a DRB as a 'job-site' dispute adjudication device.

On their website the Dispute Review Forum (2000a) describes a DRB as '*a panel of three experienced, respected, and impartial reviewers.*

The TCCP of UTRC (1991:5) views the DRB to be a '*forum to foster co-operation between the owner and the contractor, and means for promptly and equitably resolving disputes, claims and other controversies*'.

It says that the DRB does not supersede the Employer's existing dispute resolution methods. It is an earlier, non-binding, intermediate step, directed at avoiding other more expensive, time consuming (and possibly less satisfactory) procedures.

b) Composition

The DRB typically consists of three members, one being the chairman.

However, more members can be provided for. For example:

- On the Channel Tunnel a DRB of five persons was used. While all five members hear disputes, the recommendation is made by the chairman and two members chosen for their particular expertise relating to the dispute under consideration.
- On the new Hong Kong airport the DRG (Disputes Review Group) consisted of six members. Panels of one or three members were selected from the DRG depending on the nature and complexity of the dispute.
- The UK Highways Agency contract provides for a one-man dispute panel.

FIDIC does not approve of the multi-DRB concept saying that the parties may disagree on which DRB to consult and favours a single DRB with members for the different main disciplines on the project (Genton, 2000:6). The 1996 supplement to FIDIC 4th edition 'Red Book' Section A *Guide to Amended Clause 67* suggests that it may be considered appropriate for some projects to appoint a one-person DAB for each major field of expertise relevant to the works, but then also advises of anticipated problems in this connection.

University of Cape Town

Genton (2000:6) is also not in agreement with the approach of several specialised members saying that:

- Each specialist may attempt to show that his field of expertise prevails over the other.
- Experts which are too specialised may neglect the other disciplines, such as financial, technical and contractual.
- A DRB of more than 3 members are more costly and more difficult to co-ordinate.

He says that the DRB must be able to assess all issues (technical, financial, legal, contractual, management etc.) and that the DRB must include a practitioner qualified in contract management and with experience in arbitration. He proposes the presence of a pragmatic lawyer. The author begs to disagree with this proposal on the following grounds:

- Lawyers are trained to win and present his client's case to the best of their ability.
- They mostly deal with issues of principle. Purely dealing with the principle may not resolve the issue.
- Lawyers are not experienced in contract management.
- By nature of their training lawyers are often procedure bound. Many other practitioners with a more appropriate background can come to grips with the DRB procedure and undertake the necessary arbitration studies.

For engineering construction the ideal member may well be an engineer with some legal training.

University of Cape Town

c) DRB Members

i) Appointment

The DRB is organised before the commencement of the contract, the members are provided with the contract documents and familiarise themselves with the project procedures and project participants.

The DRB members may be named in the contract or selected immediately after the construction contract is signed. Severn (1996:4) proposes that the Disputes Resolution Agreement should be negotiated after the 'letter of intent' but before the construction contract is signed. He advocates that the DRB members should be appointed at the time of entering into this agreement.

An early appointment is imperative and the DRB should exist throughout the duration of the contract. Shadbolt (1999:108) says that this is the feature that distinguishes DRB from most other forms of ADR. Membership should also be for the duration of the contract. The obvious advantage is for the DRB to be 'in at the ground floor' and also have continuity. The difficulties of *ex post facto* determinations are thus avoided, particularly the task of reconstructing past historical events. Some lending institutions even make provision in their loan agreements whereby funds are suspended until the DRB has been appointed and has commenced its programme of regular site visits to the project. In some contracts non-appointment constitutes breach of contract (Chapman, 2000:5).

Typically one member is chosen by the Employer and one member by the Contractor, with these members then choosing the third member who is also the chairman. The Employer and the Contractor approve each other's nominees as well as the third member (and chairman). To increase the credibility of the DRB recommendation and to facilitate its acceptance it is important that there is a right of reasonable objection over the other party's nomination.

Another method is for the parties to agree on the chairman, who then works with the parties to select and appoint the other DRB members.

The ICC International Court of Arbitration has also declared its willingness to assist in the appointment of members of DRB when called upon to do so. They would charge a fee for making such appointments as they would when appointing arbitrators for *ad hoc* arbitrations.

The TCCP of UTRC (1991:14) warns that DRB members, employers and contractors must understand that individual DRB members are not the representative of the party that selected them or any party for that matter. The entire board must function as an objective, impartial, and independent body at all times.

ii) Qualifications

The TCCP of UTRC (1991:5) considers the critical element in the DRB process to be the selection of its members. They need to be depended on to be objective and impartial. They

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also need to be respected by the Employer and Contractor and have their complete confidence.

In connection with a DAB, the 1996 supplement to FIDIC 4th edition 'Red Book' Section A *Guide to Amended Clause 67* suggests that the procedure depends for its success on, among other things, the parties' confidence in the agreed members and their personal and professional qualities. It also recommends that neither the member of the one-person DAB or the chairman of the three-person DAB have the same nationality of either party unless both parties are of the same nationality.

Both the Employer and Contractor must perceive the DRB board members as fair and impartial. Accordingly:

- The DRB members must not have a conflict of interest
- Prospective members must make full disclosure of any (past or present) involvement with the project, Employer, Engineer, Contractor, joint venture members of the Contractor and Engineer, as well as close personal relationships

Desirable experience and attributes of DRB members include (Chapman, Genton, Shadbolt):

- Experience in the type of construction involved in the project and the related engineering principles
- Experience in cost and scheduling considerations relevant to the project
- Experience in interpretation of contract documents and claims analysis
- At least one member must have experience in the construction activities most likely to cause problems
- An understanding of the Employer's and the Contractor's perspective of construction
- The third member (and chairman) should compliment the knowledge and experience of the first two
- The third member (and chairman) should have strong leadership capabilities and be able to conduct complicated hearings
- High professional standing in the discipline(s) of the project and respect of their peers
- Open-mindedness and respect for opinions and experience of others
- Be capable of harmonious relationships and trust
- Decisive without being dominant

University of Cape Town

- Ability to be a team player
- Commitment
- Impartiality and objectivity
- Courage of their convictions

To increase the pool of experienced DRB members, the TCCP of UTRC (1991:8) recommends that each DRB have one member that has not served on a DRB before.

d) Role/function

Refer also to Section 12.2 below for a full discussion on the role of DB..

The DRB meets with the owner and contractor when at site and encourages the resolution of disputes at site level. The Dispute Review Forum (2000a) is of the view that the process helps the parties head off problems before they escalate into major disputes.

Its role is to provide an independent assessment on the merits of disputes. Its function is to hear disputes in an informal and communicative atmosphere and provide recommendations for a timely resolution.

The TCCP of UTRC (1991:14) warns that the DRB must never give consulting advice for the solution of problems on the project. Providing advice that later becomes involved in a dispute would destroy the usefulness of the DRB.

The DRB may have jurisdiction over technical and funding matters or separate DRB may be appointed on the same project with different jurisdictions. For example, for the Vasco da Gama Bridge over the Tagus River two DRB exist; one for technical matters and one for financial matters (Genton, 2000:2). Also on the Channel Tunnel Rail Link and Doclands Light Railway Extension to Lewisham projects, two panels have been established on each project. One a technical panel comprising engineers and one a finance panel comprising accountants and financiers (Chapman, 2000:4).

Shadbolt (1999:105) is of the view that the DRB does not have to choose between different viewpoints and can make up its own mind. The members can exercise their own skill and judgement. He says that this would tend to avoid the kind of compromise which result from mediation and arbitration.

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If at any time either of the parties looses confidence in the DRB, so that its role and function would not be fulfilled, it should be discussed with the DRB and the other party as soon as possible. Such loss in confidence should not be allowed to hinder or defeat the dispute resolution process.

It is possible to structure DRB arrangements such that the DRB can also act on disputes between the main contractor and subcontractors.

e) Site Visits and Meetings

The DRB visits and meets at site typically every three to four months during critical construction activities, and less frequent during the remainder of the contract. The frequency also depends on the nature and complexity of the project and the number and complexity of disputes. Whenever appropriate, site visits should be combined with hearings of disputes.

A typical programme for a visit would be for the DRB to be briefed on their arrival, then visit the site, particularly those areas which are the subject of existing or potential disputes. Subsequent to the visit the DRB should prepare a report.

During the meetings the members are advised of progress, developments and potential and existing disputes. DRB members are also provided with periodic (weekly is best) progress reports. These reports could be the Employer's standard progress reports. Accordingly the DRB members should always be familiar with all-important developments on the project. Minutes of regular Employer/Contractor meetings would also enhance the DRB's understanding of the project.

From the above it would also be possible for the DRB to see contentious points developing.

Chapman (2000:6) considers it appropriate for the DRB to convene sessions with the parties during which the DRB asks questions or seeks additional information.

University of Cape Town

f) Operation and Hearings

i) Operation

When a dispute in connection with the works arises which cannot be resolved by the parties themselves, it is referred to the DRB. Where the FIDIC conditions of contract (but in the absence of a DAB) are in use, this is usually after the Engineer's decision. In such a case the dispute may have reached an advanced stage before the formal involvement of the DRB commences. However, there is significant division of opinion whether the function of the Engineer should be retained or not. This aspect is dealt with in detail in Section 5.5.1 below.

In connection with DAB, the 1996 supplement to the FIDIC 4th edition 'Red Book', Section A model terms '*Terms of Appointment for a Dispute Adjudication Board*' in sc 4 e) provides that DAB members shall be available to give advice and opinions in conjunction with other members of the DAB on any matter relevant to the project not being a dispute, when requested to do so by the parties. This provision has been retained in the 1999 FIDIC *General Conditions of Dispute Adjudication Agreement.*

Shadbolt (1999:109) is of the view that before a reference, the DRB can operate on an informal level where matters of concern and potential dispute are brought to the attention of the DRB at meetings held during routine site visits. He believes that at these sessions, held in the presence of both parties, grievances can be aired and a dialogue established between the parties, '*under the watchful eye of the DRB,*' and the DRB can thus act in a facilitative/mediatory/conciliatory role. The author would submit that this scenario is unlikely unless:

- The parties have intended for the DRB to facilitate discussions prior to its formal involvement
- The impartial Engineer is not competent to act objectively and manage the dispute resolution process prior to the involvement of the DRB. Even if he is not competent it is unlikely that it would be admitted and such an involvement supported by the Employer. It is more likely that the Employer would attempt to take matters into his own hands and manage the situation as a matter of pride, especially where the DRB is engaged as a result of funding requirements.

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Also Loots and Fraser (1999:10) says that experience on the Pula 1000 million North-South Water Carrier Project in Botswana, experience has shown that it is preferable for the Contractor to first formulate his position and for the Engineer to give a decision. If the decision in not acceptable the DRB can become involved on the now clearly defined issues.

Chapman (2000:7) cautions the DRB on early informal involvement and stresses that informal operations of the DRB should be undertaken with circumspection. He warns that the role of the professional advisors should not be usurped or the formal role of the DRB be prejudiced by injudicious statements by the DRB.

Disputes should be taken to the DRB as soon as either party recognises that a negotiated settlement is unlikely and the contract provisions should allow for prompt reference. It is not necessary to wait for costs to be calculated. The DRB process can commence on entitlement alone and recommendations made in this regard. Negotiations on quantum may be left to the parties or presented at a later hearing and then decided upon. Many authors support the two step process of :

- A recommendation on principle
- A recommendation on quantum

The DRB members act as experts, not arbitrators, and are therefore not bound by any arbitration law, rules of evidence or the rules of natural justice. However, they must follow the rules for their proceedings set out in the contract (Pike, 1993a:160).

The DRB review process includes detailed submissions by the parties (statements of case, defence and counterclaims, etc.) and a hearing at which each party gives a presentation of his position and answers questions from the DRB and other party.

In arriving at a recommendation the DRB considers the relevant contract documents, correspondence, the submission by of the parties (statements of case, defence and counterclaims, etc.), other salient documentation and the particular circumstances of the dispute. To minimise duplication of effort and expedite review by the DRB, the TCCP of UTRC (1991:15) strongly recommends that the Employer and Contractor jointly prepare a single compilation of relevant background documents and exhibits to accompany the position papers. It is also recommended that the participation of outside experts is limited.

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Pike (1993A:161) proposes that the following documents, as appropriate are submitted to the DRB, according to a time table:

- a claimant's statement of case,
- respondent's defence and/or counterclaims,
- claimant's reply and/or defence to counterclaims
- respondent's reply to defence to counterclaim

Jaynes (1993:453) in turn is of the view that the DRB does not have to adhere to such a '*legalistic*' framework, and is free to adapt its proceedings to fit the needs of the dispute. He says that Pike's proposals are '*closer to arbitration procedures*'.

Many authors recommend that the DRB should be available at short notice to read documents, convene hearings and render recommendations, especially if the members are paid a retainer.

ii) Hearings

It is not unusual for a hearing to be required within six to eight weeks of the application to the DRB. New UK legislation requires a hearing within 28 days (Chapman, 2000:7).

To achieve maximum benefit of the DRB, Shadbolt (1999:110) advocates procedures that are simple, easily understood, fair and efficient for the conduct of the hearings. He advises against protracted formality.

Accordingly simple and clear to the point 'position papers' rather than legalistic, long, convoluted and formal 'pleadings' should be presented. The papers should avoid 'attack-defence' routine which runs the risk of ending up in procedural arguments. Quantification should be explained in the narrative and not merely by arithmetic calculation.

Both parties should be present at the hearings and the DRB should not receive confidential information from either of the parties. The papers (and relevant documentation) should be provided by the parties to each other. Where the proceeding result in further documentation or other evidence to be provided by a party, the DRB should give the other party the opportunity to study the same and prepare and present a response. In such an event an adjournment of the hearing may be required. Shadbolt (1999:110) recommends that there

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should be no audience and only those that are vital to the proceedings should be present. The author is of the opinion that it is unlikely that this recommendation would be achieved given the novelty of DRB, the infrequency of hearings and the desire of the parties to expose and train their staff.

The attendance of legal counsel at the hearings are discouraged. Their presence can inhibit free and open exchange and may introduce an adversarial mood. Pike (1993a:161) on the other hand condones representation '*by lawyers, or other advisors or agents*'. Jaynes (1993:453) again says that the DRB proceedings are informal '*frequently without lawyers or other outsiders*', this implying that the presence of lawyers is not totally uncommon.

Shadbolt (1999:110) describes the procedure for the hearing generally as follows:

- At the commencement each party would outline his position on the basis of his position paper
- Each party should be encouraged to state agreements to facts in the other's position paper
- The DRB would raise initial questions
- Witnesses of fact may be called
- Cross- examination should generally be through the DRB
- Experts may in certain circumstances be beneficial, however this is unusual as DRB members themselves are intended to be experts.
- It is apparent that the hearings would be conducted in an inquisitorial rather than an adversarial fashion.

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Chapman (2000:8) points out that under the new United Kingdom adjudication act, the adjudicator is under an obligation to make any necessary enquiries before reaching his decision.

The TCCP of UTRC (1991:15) encourages informal, orderly questioning and discussion between the parties at the hearing. In complex cases a court reporter can be used to assist in note taking. Video or audio recordings should not be allowed.

iii) Communications

In order to avoid allegations of lack of impartiality, there should be no individual communication between DRB members and employees of the Employer and Contractor.

The DRB chairman should handle any DRB communications with the Employer or Contractor outside that of DRB meetings or hearings.

g) Recommendations

i) Development and Format of Recommendations

After the hearing the DRB meets in private to formulate and write its non-binding recommendation for resolution of the dispute. The recommendation includes an explanation of the DRB's evaluation of the allegations of fact, contentions of contract (and law), the contract provisions and the reasoning which led to its conclusions.

Recommendations of the DRB are that of the majority. Jaynes (1993:458) recommends that the documents establishing the DRB should emphasise the parties' desire that recommendations be unanimous and the DRB members' willingness to seek such unanimity. Chapman (2000:8) considers it unsatisfactory not to have a unanimous decision. He says that if the members hold differing views, these can often be incorporated within the decision without adversely affecting the final outcome. Under some DRB arrangements, arbitration is only permitted in the event that the DRB decision is not unanimous.

The recommendation is made available to both parties. The parties may request clarification of the recommendation or the reasoning which led to it. The DRB as a body (not in individual communication) provides whatever explanation is needed.

The DRB can make recommendations on the merit of the disputes along with guidelines for settlement of quantum.

Guidelines for the preparation and format of recommendations are presented in ANNEXURE P. See also Section 8 in this regard.

ii) Status of Recommendations

The recommendations of the DRB may be:

- Entirely non-binding
- Binding unless notice to arbitrate or litigate is given within a stated time period or if agreed to by the parties

University of Cape Town

- Fully and immediately binding

Pike (1993b:467) advocates that DRB decisions should be binding as with a non-binding decision a DRB is '*no more than structured and formal settlement negotiations, which would only work if the parties co-operate*'.

However, both Jaynes (1993:457) and Shadbolt (1999:105) does not consider this necessary saying that the weight of a unanimous recommendation by DRB experts chosen by the parties after due process, especially if the recommendation may be adduced as evidence in subsequent proceedings, would deter any challenge to a DRB finding. Also a binding decision is more likely to result in a win-lose situation. Attitudes may be formalised, counsel engaged and adversarial approaches developed, aimed solely at winning.

Shadbolt (1999:107) is of the view that recommendations, which are not automatically binding, can produce useful information or observations, covering both equity and the law, and thereby assist the parties in negotiating a fair and just settlement. He further states that experience indicates that almost all non-binding recommendations are adopted by both parties.

Loots and Fraser (199:11) take a strong view that recommendations which are final and binding should be resisted as the DRB is not an arbitration tribunal.

The idea is that the parties would have sufficient confidence in the DRB (technical expertise, understanding of and familiarity with the project conditions, practical judgement, agreed to by the parties) and the fact that the parties had the opportunity to be heard, to facilitate acceptance of its recommendations (Dispute Review Forum, 2000a).

A further reason that non-binding recommendations may find acceptance with the parties is what Chapman calls the 'swings and roundabouts aspect'. It is likely that over the life of the project the parties would have recommendations for and against them. There would thus be both recommendations with which they are satisfied and with which they are dissatisfied.

The TCCP of UTRC (1991:7) recommends that the DRB recommendation be admissible as evidence should the dispute not be resolved by the DRB and proceed to arbitration or

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litigation. Severn (1996:4) and Genton (2000:9) expresses support for this view. Having the DRB recommendation admissible as evidence also improves the chances that the recommendation would be accepted. Loots and Fraser (1999:11) argue against this view contending that the DRB should have the necessary flexibility to come to a sound engineering/contractual solution without fear of transgressing legal minutiae and processes.

It is accepted by most that the DRB is part of the amicable settlement process. Such a process by necessity involves some form of compromise by the parties. If the recommendation is admissible as evidence the parties are unlikely to make any compromises for the fear of being compromised in further adjudication proceedings. The role of the DRB in this respect would thus largely be lost.

Chapman (1999:9) advises that, unlike arbitral awards, DRB recommendations will not summarily be made an order of the court[11]. If a DRB recommendation is, or becomes binding, but is not honoured, it would be necessary to bring an action for breach of contract. In *Drake and Scull Engineering Ltd v McLaughlan and Harvey Plc*[1992][12] it was held that a mandatory injunction supporting the adjudicator's decision was the appropriate remedy. The courts are reluctant to overturn determinations by experts (akin to decisions by adjudicators), even if they believe the determination to be wrong, unless fraud or collusion can be proved or the expert has departed from his instructions or answered the wrong question (thus acting *ultra vires*). It is recommended [to bring certainty to the process (precedent judgement exists)] that the agreement specify that the DRB members act as independent experts. It is important to indicate in the contract whether the recommendation of the DRB would be immediately binding, even if a reference to arbitration has been served (Chapman, 2000:9).

To have the DRB's recommendation rejected as evidence, or not to be made an order of the court (in the event that it became final and binding and it was not honoured), a party could claim legal misconduct on the part of the DRB. However, legal misconduct has no place in South African common law, only actual misconduct. As also noted above a legal error made *bona fide* is not grounds for rejection of an arbitrator's recommendation by the courts (*Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* [1992][13]).

[11] Cameron v John Mowlem [1990] 52 BLR 24
[12] 60 BLR 102
[13] (1) SA 89 (W) at 100B

University of Cape Town

Genton (2000:5) also recommends that the implementation of the DRB recommendation not be delayed by the non-acceptance by one of the parties.

Shadbolt (1999:111) advises that the DRB can, with the agreement of the parties, be asked to give an 'advisory' opinion which is similar to an interim award or judgement (on a preliminary point) in arbitration or the courts. Genton (2000:3) supports this approach, referring to it as the 'flexible' approach, where the parties can ask the DRB for a preliminary written opinion on a question of principle, which often involves interpretation of the contract.

iii) Time for Rendering the Recommendation

Usually the DRB is bound to a time scale within which they must complete their deliberations and render a recommendation. Pike (1993:160) proposes a 140 day period, which is criticised by Jaynes (1993:458) as '*overly generous*'. He submits that on a major project in Africa a 56 day period was allowed, unless the DRB established a different period. Genton (2000:5) recommends a 60 day period. The Tagus Bridge contract stipulates that the motivated opinion of the DRB should be rendered within 10 working days after receipt by the DRB of the response submitted by the defendant. The author would recommend that the use of multiples of seven days, as done in FIDIC, is retained.

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However, Genton (2000:4&8) also criticises the notion of fixing a time period independently of the context, nature of the dispute, the complexity of the required research and calculations and the time needed by the DRB for motivating and editing its opinion. He considers it unrealistic to prescribe a fixed period within which a recommendation must be rendered and proposes that the period be agreed between the parties and the DRB when the dispute arises.

Allowing sufficient time and opportunity for due process would make it difficult for a losing party to persuade its superiors that there is much prospect of winning after further prolonged and expensive arbitration.

The reader is reminded of the opinions of Pruitt and Carnevale and findings of Tyler (1987) presented in Section 3.5.2 that suggest that people place a great value on process control and the capacity to regulate the events in a conflict resolution procedure because it

produces a sense of procedural justice. It was found that procedural justice is equal to, and in some instances more important than, gain to self as a determinant of satisfaction with decisions by authorities. Voice is most effective in producing a sense of procedural justice, if it is believed that one's views have been considered in the decision. It was thus concluded that voice and a sense of procedural justice are most important for the success of dispute resolution procedures.

iv) Time for Accepting/Rejecting the Recommendation

For non-binding recommendations the parties usually have a fixed period within which to note their rejection of the recommendation, in the absence of which the recommendation becomes binding. Genton (2000:4) argues that having a fixed period has two major disadvantages, *viz*:

- If the dispute proceeds to arbitration there may later be others and more than one arbitration may be required.
- Often the time specified is too short to allow sufficient reflection and opportunity for the parties to reach a settlement. This problem can be overcome by allowing an amicable settlement period subsequent to affirming the notice to arbitrate, as is done in the FIDIC 1999 edition of the 'Red Book'

h) Duties of the Chairman

The role of the chairman is considered of fundamental importance to the success of the DRB. His duties can be summarised as follows (Shadbolt, 1999:111 and Chapman, 2000:12):

- Chair all meetings and ensure that the important issues receive attention during the limited time during which the DRB members and parties are together
- Understand the contractual and technical issues involved
- Lead discussions between the parties and the between the DRB members during their deliberations
- Strive for consensus between DRB members
- Ensure fair play during hearings
- Act firm without being autocratic

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- Where informal questioning and discussion takes place between the parties at the hearing he must ensure that this does not impede the hearing and that the hearing proceeds in an orderly manner.
- To delegate work to the members according to their expertise and reserving for himself those areas where he feels he is best able to contribute
- Act with integrity and competence and ensure that his other board members do the same

The chairman's demeanour must not be arrogant, ill-tempered, overly talkative, patronising or inconsiderate.

i) Cost

i) Cost of DRB

DRB usually cost (in 1996 terms) from $ 1 000 to $ 2 000 per member per one-day meeting. Total cost over the life of the project has ranged from 0.04 to 0.51 percent of the total contract cost. The TCCP of UTRC (1991:10) believes that the cost is more than offset by the Contractor's lower bid prices.

The World Bank (2000: 2) provides a basis for DRB member fees as follows:

- Retainer per calendar month of three times the ICSID arbitrator's daily fee ($ 900 in 1996), plus
- A daily fee equivalent to the ICSID arbitrator's daily fee.

The cost of the DRB is typically shared equally between the parties. Typically payment is made by the Contractor and the Employer reimburses his share through the monthly certificate. It is customary for the chairman to receive an extra allowance for his chairman duties.

ii) Award of Costs

Pike (1993a:161) proposes that the DRB awards costs, just as a court or arbitrator would do and that the DRB could punish a party attempting obstruction, by the award of costs to the other party. This is consistent with his opinion that DRB decisions should be binding. He says that it would deter repeated applications to the DRB about the same matter. He points out that that no doctrine of *res judicata* applies to a DRB.

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However, Jaynes (1993:453) say that typically DRB costs are left to lie where they fall under the provisions establishing the DRB. He considers awarding cost running the risk of being counter productive as:

- A party may be inhibited to take a dispute to the DRB because of potential increased liability for his fees in excess of the 50/50 split
- The converse is that a party may be tempted to take a dispute to the DRB in the hope of getting his liability for fees reduced to less than the 50/50 split

5.4.2 Dispute Adjudication Board

Severn (1996) proposes that a Dispute Resolution Agreement is negotiated at the start of the contract, which would either be a DRB, a Disputes Advisor or decision by the Engineer. This is in keeping with the DAB principle in the FIDIC 1999 edition.

Genton (2000:1) points out that it is difficult to make a distinction between the terms DRB, DAB and Expert Committee. The principle difference between a DAB and a DRB seems to be that a DAB adjudicates and renders a binding recommendation, whereas the DRB generally renders a non-binding recommendation, but could also render a binding one. It also dispenses with the 'Engineers decision' of c 67 of the FIDIC 'Red Book' as opposed to the earlier DRB where this role of the Engineer was retained.

Adjudication is used in the NEC contract and FIDIC in its 1999 'Red Book' edition, uses a DAB.

The 1996 supplement to FIDIC 4th edition 'Red Book' Section A *Guide to Amended Clause 67* recommends that the DAB's decision should briefly set out:

- The matter in dispute
- The relevant facts
- The principles (including contractual provisions) to be applied
- The basis for the decision

5.5 Dispute Boards and FIDIC

At the time of drafting the fourth edition the 'Red Book', FIDIC considered the use of third parties such as arbitral referees, mediators and conciliators in order to assist the parties in achieving settlement, as possibly helpful in special circumstances (Dorbig 1988:835). They finally considered it best left to the parties to decide when a dispute arose and did not

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consider it necessary to impose requirements in this respect. No guidance on this is provided in the Guide to the Use of FIDIC fourth edition.

In the 1999 edition of the FIDIC 'Red Book' provision is made for a DAB.

5.5.1 Dispute Review Board

Three alternatives exist and are discussed hereunder.

a) Integration of DRB into C 67

On several of the projects considered in this report, an extra step was included in the FIDIC fourth edition dispute resolution procedure. It entailed the use of a DRB should either of the parties be dissatisfied with the Engineer's decision rendered pursuant to c 67.

The relevant procedures which includes the DRB are described in some detail under the relevant projects.

As noted in Section 5.2 above, the World Bank 1991 SBDPW initially encouraged the introduction of a DRB into c 67 of the FIDIC 'Red Book' in this fashion.

Genton (2000:8) says that this procedure makes the work of the DRB '*difficult and unsatisfying*', citing associated delay (6-8 months) and rigidity as the main reasons.

Loots and Fraser (1999:9) view the DRB as an enhancement of the Engineer's role. They say that the Engineer may feel some relief from the

> '*somewhat awesome responsibility of the probable consequences of his decision under Clause 67, particularly if that is highly unfavourable to one or both of the parties. His impartiality can be more freely expressed knowing that there is a cost effective and less adversarial board of appeal prior to arbitration*'.

b) DRB in Lieu of the Engineer's Decision

A matter over which there is significant division of opinion is whether the function of the Engineer with regard to a decision should be retained or not.

Pike (1993a:159) expresses the view that it would generally be appropriate for the Engineer to decide in the first instance.

Molineaux (1995:263) says that, at that time (prior to January 1995), the World Bank had not elected to promote the substitution of the Engineer with a DRB.

University of Cape Town

However, in their current Dispute Settlement Procedure (Version 1 and 2) (World Bank, 2000:9) for use with FIDIC 4th the World Bank chose to make the use of DRB mandatory for projects of value in excess of US$50 million. For projects of value less than US$ 10 million they give Employers the option to use a DRB or Disputes Review Expert (DRE). They would enter on the reference when the parties cannot resolve a dispute notified by either party by a Notice of Dispute. Here the dispute is not referred to the Engineer in the first instance for a decision. See also Section 5.3.1 above. Jaynes (1996:18) says that the DRE functions as a '*one-person DRB*'.

Arguments for and against retaining the function of the Engineer according to Jaynes (1993:455) and Pike (1993b:468) are described hereunder.

Arguments for retaining the function of the Engineer:

- His detailed knowledge of the project
- An outsider deciding disputes would enjoy less confidence from the Employer than the Engineer enjoys
- The Engineer, if in disagreement with the outsider's view would so inform the Employer, creating a strong likelihood of arbitration ensuing
- It enables a later and more informed view to be taken by the Engineer at the time of the formal c 67 request for the Engineer's decision
- Such a decision crystallises what the dispute is all about
- The Engineer is compelled to commit himself

Arguments against retaining the function of the Engineer:

- Even if the Engineer is an independent consultant, he is paid and employed by the Employer. He would hope to secure future work from the Employer and thus find it difficult to be truly objective in evaluating disputes involving the Employer's interests
- The Engineer is in many instances in fact part of the Employer's organisation, especially if the Employer is a government or parastatal organisation
- The disputes may involve acts or omissions by the Engineer, with consequent doubt about the Engineer's ability to sit, unbiased, in judgement upon himself. As discussed in Section 3.3.4 above3.3.2 above, this is against the rules of natural justice, *nemo judex in propria causa* – no one may judge in his own cause.

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- The structure and timing of the procedure leads to delays in dispute resolution, thus jeopardising a primary benefit of the DRB process, that of a quick resolution
- The DRB members are intended to be expert in the type of construction involved in the project, and are often so recognised by the Engineer himself. As such the parties presumably have confidence in the skill and impartiality of DRB members, having agreed their appointment
- The DRB does not supplant the Engineer and great weight is accorded to his views
- The use of a DRB does not preclude amicable settlement and arbitration or litigation
- The DRB possibly brings a greater impartiality
- The DRB probably brings a wider spectrum of perspectives to bear on the decision earlier in the process

In FIDIC's 1994 'Orange Book' c 20 and provides for a decision by an independent 'expert' in lieu of the Engineer's decision of c 67 in the 'Red Book'. The FIDIC 1999 ('1st Edition) 'Red Book', 'Silver Book' and 'Yellow Book' makes provision for a DAB instead of the Engineer's decision (the 'Silver Book' does not have an Engineer at all).

As noted in Section 5.3.1 above, the World Bank 2000 SBDPW (World Bank, 2000:c) makes the introduction of a DRB into c 67 of the FIDIC 'Red Book' mandatory. It removes the role of the 'independent Engineer'.

c) DRB Recommendation before the Engineer's Decision

Molineaux (1995:265) suggests that an advantage of having the DRB act first is that it is already established and knows the job and it can act objectively and directly on the dispute, whereas typically an Engineer's decision may take the full 84 days allowed. The author sees little merit in this approach as an Engineer's decision has the same advantages (knows the job, can act objectively). The possible concern is the length of time taken. The DRB may typically have 56 days to act, which is not a great advantage over the 84 days provided to the Engineer. In any event the 84 days can be changed to 56 days in the particular conditions, if this is of concern.

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5.5.2 Dispute Adjudication Board

In November1996 FIDIC published a supplement (FIDIC, 1996) to the FIDIC 4th edition 'Red Book' CoC recommending DAB as a preferred method of dispute resolution. This followed the approach of the 'Orange Book'. In the foreword to the supplement it states:

> '*Traditionally the FIDIC Conditions of Contract have given authority to the Engineer to give a decision in the event of a dispute arising between the Employer and the Contractor. In recent years there has been a move away from this particular role of the Engineer and various alternative methods for dispute resolution have been developed. The particular alternative which is finding increasing favour for the FIDIC type of contract for civil engineering construction is the appointment of an expert or experts at the beginning of a contract, who keep in touch with work in progress by means of visits at regular intervals and are then available to act in resolving disputes should any arise. FIDIC agrees that this* [appointment of an expert(s) at the beginning of the contract] *is an acceptable alternative to the Engineer's former role in dispute adjudication*'.

The FIDIC (1999 edition) provides for the appointment of, and decision by a Dispute Adjudication Board (DAB). The FIDIC (1999) CoC defines a DAB at sc 1.1 as '*the person or three persons so named in the Contract, or other person(s) appointed from time to time under Clause 20*'.

The DAB effectively replaces the Engineer as the first port of call in the event of a dispute. Sc 20.4 requires for disputes to be '*adjudicated*' by a DAB. The CoC (sc 20.3) provides for the appointment of a member to the DAB in the event of the parties failing to agree the DAB within 28 days of the commencement date or a replacement person within 42 days after which a member declines or becomes incapable to act. There is allowance for an appointing authority to be stated in the CoC.

The essential characteristics of the DAB are (sc 20.2):

- The DAB shall comprise either one or three persons '*the members*'.
- In the event of three persons, each party shall nominate one member for the approval of the other. The parties shall agree on the third member, who shall act as chairman.
- The agreement between the parties and the DAB shall incorporate the General Conditions of Dispute Adjudication Agreement contained in an Appendix to the CoC.
- The terms of remuneration shall be agreed when the terms of appointment are agreed.
- Each party shall be responsible for paying one half of the remuneration.
- The appointment of any member may be terminated by mutual agreement of the parties.

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- The appointment of the DAB shall expire when the discharge becomes effective or at such other time as the parties shall mutually agree.
- The parties may agree to jointly refer a matter to the DAB for an opinion (not the decision provided for in sc 20.4).
- Neither party shall consult the DAB without the agreement of the other party.
- The DAB renders a binding decision (compare with the DRB's non-binding recommendation)

Both parties to the Contract shall promptly give effect to the DAB's decision unless and until it is revised by amicable settlement or arbitral award.

FIDIC Guidance for the Preparation of the Particular Conditions says that the adjudication procedure depends for its success on, amongst other things, the parties' confidence in the agreed individual(s) who will serve on the DAB. Therefore, it is essential that candidates for this position are not imposed by either Party on the other Party; and that, if the individual is selected under Sub-Clause 20.3, the selection is made by a wholly impartial entity.

Salient provisions of the General Conditions of Dispute Adjudication Agreement (DAA) are (parties in the context hereunder includes the Engineer):

- Effective date and resignation (c 2)
- Notice of DAB taking effect (c 2)
- Warranty by the member(s) for (c 3):
  - impartiality
  - experience in the work being carried out under the Contract, in interpretation of contracts and fluency in the language of the Contract
- The Member shall (c 4):
  - Have no interest (including financial) in the parties or Contract
  - Disclose previous employment by any of the parties as consultant
  - Disclose personal and professional relationship with any of the parties and previous involvement in the project
  - Not be employed as consultant by any of the parties for the duration of the DAA
  - Comply with the procedural rules and c 20.4 of the CoC
  - Not give advice to the parties

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- Not enter into any discussions regarding future employment by any of the parties
- Ensure availability for site visits and hearings
- Become conversant with the Contract and the progress of the works
- Treat all details in connection with the Contract as confidential
- Be available to give opinions as provided for in sc 20.2

- The Employer or Contractor (and their staff) shall not seek advice from the DAB other than as provided for in the Contract and DAA
- The Employer and Contractor undertake that the Member shall not, in connection with the Contract (c 5):
  - Be appointed as arbitrator
  - Be called on as a witness
  - Be liable for any claims
- Members are jointly and severally indemnified by the Employer and Contractor (c 5)
- The Employer or Contractor to provide security for a sum for reasonable expenses for site visit and hearing (c 5)
- Payment arrangements for (c6):
  - Retainer fee per month
  - Daily fee
  - Reasonable expenses
  - Tax levied in the country
- Termination of DAA (c 7)
  - 42 days notice of termination by the Employer and Contractor
  - Resignation by the Member
  - Termination for non-compliance
- Remedy for default of the Member (c 8)
- Disputes to be settled by arbitration in accordance with the ICC rules (c 9)

The annexed procedural rules provide for:

- Site visit intervals (70 < interval < 140 days)
- Time and agenda for site visits
- Attendance and co-ordination of site visits
- Provision of documentation
- Hearings and requests for documentation and arguments from the DAB

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- Power of DAB to adopt inquisitorial procedures, exclude certain persons from the hearings and to proceed *ex parte*
- Wide ranging powers for, *inter alia*, determining hearing procedures, jurisdiction, making use of specialist knowledge, ascertaining facts, opening up and reviewing documents, deciding on payment of interest, deciding on interim relief, etc.

It is instructive to note that FIDIC does not prescribe procedures for the hearings and presentations of arguments, leaving the decisions in this regard to the DAB.

The 1999 FIDIC Clauses and General Conditions of Dispute Adjudication Agreement (including the annexed procedural rules) are included as ANNEXURE O to this dissertation.

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5.6 Advantages of DB

Advantages of the DRB pointed out by TCCP of UTRC (1991:5), Chapman (2000:11) and Shadbolt (1999:105) and others are:

- Reduction in disputes
  - Wall (1992:332) contends that because the DRB sits on all disputes during the project, the parties will become familiar with how the DRB looks at particular types of issues. The parties will be able to predict how the DRB will react and keep that in mind when negotiating among themselves, thus settling many disputes before it reaches the DRB level.
  - The TCCP of UTRC (1991:1) contends that experience has shown that just the existence of the DRB has the effect of reducing disputes and resolving them before they reach the DRB. The reason could of course be that the parties lack faith in the DRB and choose to resolve the issue and not give the DRB the opportunity to make a perceived random recommendation.
  - Fewer spurious claims are advanced and fewer meritorious claims are rejected.
- Reduction in cost
  - Wall (1992:334) says that research by the Technical Committee on Contracting Practices of the Underground Technology Research Council has indicated that significant tender price reductions can be achieved when Disputes Review Boards are incorporated into the contract.

- Contractors' bid prices are lower, as they do not have to allow for contingencies to cover less effective dispute resolution procedures.
- Where the DRB replaces some of the Engineer's adjudication and other dispute resolution functions, his terms of reference would exclude these duties, resulting in a cost saving.
- The preparation for a DRB is substantially less costly than for arbitration and litigation.

➢ Reduction in time for dispute resolution

- It eliminates years of wasted time and energy in litigation.
- Disputes can be settled soon after they occur (as little as two to three months after the dispute arises), before they escalate and become a source of friction and ill will that lasts for the duration of the contract. It has also been argued by Myers (1991, cited by Shadbolt, 1999) that should resolution be delayed the claim permutates until, by the time it reaches the adjudication stage, it no longer resembles the original claim.
- Disputes are settled soon after they occur, before the parties adopt rigid entrenched positions.

➢ Improved dispute resolution process

- The knowledge that respected and trustworthy experts are familiar with the project and will recommend a fair settlement reduces the posturing and gamesmanship that occur in conventional dispute resolution processes.
- The parties retain control of the process.
- The Contractor does not have to resort to threat tactics of stopping work on meritorious claims.
- The task of preparing for and making a presentation to the DRB encourages the parties to properly document their positions, and this, in itself, encourages resolution.
- Claims and defences are more carefully prepared and more credible as there is a natural desire not to appear foolish before the DRB, or be seen as unhelpful or exaggerating.
- The DRB recommendation includes a factual discussion and technical analysis that fully explains the suggested settlement.

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- It deals with the problem remote from site relationships and is thus not influenced by it.
- Prior knowledge of the project provides factual background without consuming hearing time.
- As the DRB is appointed at the commencement of the project and undertakes regular visits to site and regularly reviews reports and documentation, the DRB is up to date on the subject of the dispute at the time that it arises. The theory is that it becomes part of the project and can influence the parties during the contract period.
- The DRB does not preclude ultimate recourse to arbitration or litigation.
- Contracts often do not allow the determination of entitlement with certainty and many disputes concern non-absolute matters. The DRB can devise solutions which avoid 'win-lose' situations.
- The expertise of DRB members expedites the processing of factual and technical information.
- It does not need to produce a compromise result. It does not have to choose between different viewpoints and can make up its own mind. However, the author is of the view that this is not consistent with the role of the DRB, stated by some (Wall, 1992:331 and TCCP of UTRC, 1991:5), to settle disputes. The word settlement may imply agreement reached through compromise. This may, however, not be the intention and just an unfortunate choice of words with lends itself to an ambiguous interpretation.

➢ Improved relationships

- The existence of the DRB fosters a co-operative relationship between the parties.
- Parties are less inclined to send acrimonious correspondence which can damage relationships.
- Providing a DRB communicates the owner's intention to be fair in solving problems and pay valid claims promptly during the course of the work, rather than by litigation long after construction is complete.
- The parties can focus their efforts on the work, in the knowledge that they would receive fair treatment by the DRB.

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- Improved chance for acceptance and settlement
  - Although DRB recommendations are generally not binding on either party, both will thoroughly consider and place great significance on the findings of an impartial, respected DRB.
  - If a knowledgeable and impartial panel has developed an informed opinion it is difficult to reject it in good faith.
  - Allowing sufficient time and opportunity for due process would make it difficult for a losing party to persuade its superiors that there is much prospect of winning after further prolonged and expensive arbitration.
  - The DRB provides a rational, impartial review of disputes by mutually accepted experts.
- Wide application
  - The DRB does not dilute the authority of the Engineer.
  - The DB mechanism can be incorporated into different contract types.
  - On a project the DB mechanism can be incorporated into different contracts using the same DB. The project thus benefits from a consistency of approach under all the project contracts.
  - It fills the gap created by the absence of a judicial system experienced in commercial construction matters.

5.7 Disadvantages of DB

Wall (1992:332) lists disadvantages as:

- Cost of maintaining a three person tribunal – Lodigiani (1986:502) points out that this cost needs to be offset against savings of not proceeding to arbitration and can be viewed as an 'insurance premium' against the risk of arbitration
- The non-binding recommendation lacks finality
- The DRB may loose credibility in the eyes of a party(ies) if the situation arises where the DRB makes recommendations which appear to favour the one party at the expense of the other, or which neither party finds acceptable
- Once this lack of credibility occurs, the advantages of the system are compromised

There as views that:

- The authority of the Engineer to manage the project is diluted – the author considers this to be a misconception.

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- The introduction of a further step between the Engineer's decision and arbitration increases the time for resolving the dispute - the counter argument is that the number of disputes are reduced substantially and that the additional time (up to six months) is not excessive given the time that the arbitration process is likely to take.
- The hearing and recommendations are private and there is no record of case law being built up – this is legitimate but also applicable to ADR processes.

The DRB also has to contend with the same criticism which has long plagued the impartial Engineer. Where the Engineer has been criticised that he naturally takes the side of the Employer as he cannot afford not to and does not have the courage to stand up to his Employer, so can the DRB. The DRB members' potentially largest employer is the contracting fraternity, with less Contractors going around than owners.

5.8 Success of DB

The Dispute Review Forum (2000b) contends that '*the DRB process has proved itself beyond expectations*' and goes on to list some forty entities that use or promote the use DRB on their construction projects.

They submit that in terms of US dollar value the use of DRB around the world has had a growth compounded annually of 50 percent. The total value of completed, current, and planned projects involving a DRB is currently some $53 billion. In addition to the 221 completed projects involving a DRB, some 200 current projects make use of a DRB.

Campbell (1994:18) says that experience has shown that non-binding DRB have had a dramatic success rate with respect to party acceptance. If a knowledgeable and impartial panel has developed an informed opinion it is difficult to reject it in good faith.

Shadbolt (1999:106) says that it is said that the DRB has a high success rate and that users are generally very satisfied with the system. He observes that where DRB had been in use disputes had been resolved by the time the project had been completed. The author is aware of at least one project where this has not been the case.

Chapman (2000:2) expresses the view that almost one thousand disputes have been the subject of DRB decisions but there have been few occasions (under 20 cases reported to date) where a DRB's decision on a substantive dispute has been referred to arbitration or the courts.

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5.9 Application

The TCCP of UTRC (1991:5) considers DRB to be applicable whenever a construction project involves geotechnical, construction, or contracting features that might lead to substantial claims or disputes, in particular:

- Subsurface excavation
- High-technology facilities
- Difficult construction methods
- New, untried construction methods
- Large, complex projects

Chapman (1999:1) is of the opinion that the DRB concept is ideally suited to the larger projects, to projects which are 'international' (i.e., contracting parties from differing countries) and to multi-contract projects such as mass transit railways, power stations and the like. For long term concession projects the idea is to change board members to suit the various stages of the project (construction, operation and maintenance, etc.)

Pike (1993a:159) is of the view that a there-man DRB will only be suitable for 'heavy' projects involving '*hundreds or thousands of millions of pounds*' and that an adjudicator will be suitable for less '*weighty*' projects. Jaynes (1993:454) again is of the opinion that DRB can successfully be used on smaller projects, to which Pike (1993b:468) replies that for smaller projects an adjudicator is sufficient and it is better to incur the cost of one expert rather than three. A simplistic analysis of DRB costs over a period of 15 years and also a comparison with ICC Court arbitration cost conducted by Jaynes (1993:454) suggests that DRB costs should not be a deterrent to using a DRB. He further points out that World Bank support for the DRB indicates their satisfaction that the mechanism is cost-effective.

In their SBDW the World Bank places a monetary value on the project size in deciding when to use a DRB. For contracts estimated to cost more than US$50 million (including contingency allowances), it is mandatory to refer disputes in the first instance to a DRB rather than the Engineer. For contracts estimated to cost less than US$50 million, employers have two options (a DRB or a DRE; see Section 5.5.1 above).

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The 1996 supplement to FIDIC 4th edition 'Red Book' Section A, *Guide to Amended Clause 67,* suggests that a three member board would be appropriate for contracts of value in excess of US$25 million.

Shadbolt (1999:101) is of the view that DRB are particularly suitable in less developed countries and in particular on major projects with many participants from different countries.

Chapman (2000:2) advises that, although DRB have their origins in the construction industry, they are now also found in the financial services industry, long-term concession projects and operation and maintenance contracts.

Further criteria for project selection for the use of a DB are given as follows:

- If ownership of the structure is short lived, the process requirements are unlikely.
- The more repetitive construction is for the employer the more opportunity exists for the process.
- If the stakeholders have an attitude of problem solving the more potential there is for the process.
- The larger the number of project participants the higher the need for the process.
- Commitment to the process is required by all the participants.
- Receptive funding and regulatory interest improves the potential for the process.

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5.10 Section Summary and Conclusion

The need for a DRB was identified as resulting from:

- The desire to avoid the costs and delays of lengthy arbitration and litigation.
- The role of the Engineer increasingly being questioned for many reasons.
- The Engineer's decision possibly being unacceptable to one or both parties.
- The gap to be filled between ADR by means of mediation, mini-trial and the like and litigation and arbitration.
- Changes in the world wide construction arena resulting in the parties increasingly having to resort to arbitration, which due to high cost, lengthy periods and the often resulting poor relationships, ultimately causing the victory to be a Pyrrhic one.

- Increased incidence of joint ventures both in consulting and in contracting meaning that organisations involved in construction are less autonomous and are less able to negotiate settlements of their contractual disputes.
- Most ADR processes not being applicable to construction.

The earliest reported use of a DB was on Boundary Dam in Washington in the 1960's and the El Cajon project in Honduras constructed during the early eighties is considered to be the first known application of a DRB on an international project.

In Southern Africa the earliest reported use of a DB was on the Delivery Tunnel North, forming part of Phase 1A of the LHWP.

The following aspects of a DRB were also dealt with in this section:

- Definition
- Composition
- DRB members
- Role/function
- Site visits and meetings
- Hearings and procedures
- Recommendations
- Duties of the chairman

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It was found that there is great pressure to replace the 'independent Engineer' with a DB. The World Bank makes the use of a DRB mandatory (or DRE on smaller projects) and FIDIC allows for a DAB.

Also in this section:

- Several advantages and disadvantages regarding DB were listed.
- DB success and its application were considered.

On the face of it the advantages given for using DB seem to outweigh the disadvantages. It is reported in the literature that substantial success has been achieved in the use of DB.

Jaynes (1993:458) says that the '*essence of the DRB concept is amicable co-operation towards a shared goal of using the DRB to avoid adversarial combat as a means of*

resolving disputes'. He continues that '*the key to the success of any DRB structure is the desire of the parties that it succeed*'.

Pike (1993b:470) on the other hand is of the view that 'DRB' procedures which allow a binding decision and awarding of cost can handle an '*adversarial combat*'. This is in line with the concept of a DAB.

From the literature survey it is concluded that the DRB concept is intended to be part of the amicable settlement process. The fact that certain DRB can make binding and certain non-binding 'recommendations' complicates the issue.

The author is of the opinion that a DRB can be operated in three ways:

- Adjudication only in accordance with provisions of contract and rules of law.
- Adjudication based on provisions of contract and rules of law but supplemented by interpretation, judgement, equity, commercial usages and the conscience of the arbitrator.
- A two component recommendation consisting of the above two approaches.

The above is elaborated on in a later section. Shadbolt's (1999:105) view that the DB does not have to choose between different viewpoints and can make up its own mind, is considered to be only applicable to the process of the second bullet above.

The type of DRB adopted must clearly depend on the nature of the project and the parties.

It is clear from its application by FIDIC and even its name, that the DAB is an adjudication process, resulting in a binding recommendation.

The DRB mechanism may well be the preferred system of dispute resolution as it provides:

- The opportunity to secure objective and impartial experts
- Informality of procedure and reduction in cost and time of dispute resolution
- Credibility of the disputes resolution system among participants

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6. RESEARCH DESIGN AND PROCESS

6.1 Section Introduction

In this section dispute resolution research theory and the design of the research are described.

Firstly a broad perspective of dispute process research theory will be presented and then the relevance of aspects of the theory to dispute resolution research would be provided. As the research was conducted on a qualitative rather than a quantitative basis, only a few elements of the theory described were eventually used. However, it was considered prudent to present the theory here for background purposes.

Finally the design of the research, which includes a questionnaire and interviews, is described.

6.2 Dispute Resolution Research Theory

6.2.1 Research Framework

Esser (1989:470) makes four points:

a) The reporting of empirical results is framed by the conceptual perspective of the author.

b) While the frameworks facilitate understanding of certain aspects of dispute resolution, they also distract from other aspects.

c) The conceptual frameworks are not specific to individual evaluators but are shared by implementers and consumers of published materials.

d) By shaping perceptions and expectations these frameworks help shape motivations, actions, structures for implementation and strategies of reform.

Dispute resolution methods are complex. In order to describe and evaluate the success of a given method, researchers must structure their observations, measurements, and reports to highlight a few characteristics or variables which are, in the opinion of the researcher, particularly significant. While a framework facilitates understanding it also diverts attention from aspects deemed irrelevant by the framework's perspective. For example, measuring time to make an arbitrator's award may increase knowledge of time in arbitrations but this focus on time diverts attention from interaction between disputants,

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counsel and the arbitrator within this time which actually cause resolution of the dispute. The understanding of certain aspects comes at a cost. While the framework helps understanding of the data which the focus deems significant, it diverts attention from other observations which may have a great, if not greater, significance for knowledge of dispute resolution.

Frameworks cannot be totally divergent, as the researcher has to consider the audience. The minimal agreement as to the nature of disputes and dispute resolution processes makes it possible for members of diverse occupations such as law, social work, engineering, etc. to see themselves as members of a shared field.

In planning, conducting and reporting the research, the author has been mindful of the framework through which processes of dispute resolution is understood.

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6.2.2 'New Formalism' Approach

Esser (1989:474) advises that the dispute process evaluation literature combine a particular perspective on dispute processing with particular methods of social science research. He considered at the time that the 'New Formalism' was the predominant conceptual perspective in the dispute processing field. Impact analysis is an empirical social science investigation whose assumptions and methods were considered to be well suited to the 'New Formalism' approach.

The following three prepositions constitute the 'New Formalism' approach:

a) There are a small number of essential types of procedures for the resolution of disputes. Each has distinctive characteristics which make each procedure well suited to resolve certain types of disputes.

b) Each society establishes a number of dispute processing programmes forming a system which functions effectively or ineffectively depending on:
   - Type of programme included
   - The type of jurisdictional boundaries it defines for each
   - The manner in which the programmes complement each other

c) The ineffectiveness of an existing system can be explained and reforms for correction can be proposed based on dispute resolution theory

The approach is presented in Table 9 hereunder.

Table 9 : Outline for a General Theory of Dispute Processing ('New Formalist')

Source : Esser (1989:479)

			Type of Mechanism				
			X_1	X_2	X_3		X_k
	Type of Dispute	W_1	Y_1	Y_2	Y_3		Y_k
		W_2	Y_5	Y_6	Y_7		Y_1
		W_3	Y_9	Y_{10}	Y_{11}		Y_m
		W_k	Y_a	Y_b	Y_c		Y_z

Where:
$X_k = a_1 + a_2 + a_3 + \ldots a_k$
$W_k = b_1 + b_2 + b_3 + \ldots b_k$
$Y_k = c_1 + c_2 + c_3 + \ldots c_k$
X_k = type of mechanism
W_k = type of dispute
Y_k = type of outcome
a_k = mechanism characteristics
b_k = dispute characteristics
c_k = outcome characteristics

Data must be collected in a manner which insures its validity and presented in a form which allows for cross-comparison. The method of choice in dispute processing evaluations has tended to be 'impact analysis'.

Impact studies have the following three elements:

a) Theory has component elements. Impact analysis observes these elements and relates them to one another. The primary elements are the problem, the activities, the outcome of interest (objectives) and the sub-objectives.

b) There must be some means to test the theory – termed the design.

c) There must be a way of quantifying a programme's effectiveness. Usually statistics is used (quantitative).

New Formalist assumptions promise that if essential information is extracted from a sufficient number of evaluations, the pattern of results should reveal matches which reveal optimum results.

6.2.3 Application of Theory

Considering the three elements of impact studies:

a) The primary elements are:
   - the problem: the unresolved dispute
   - the activities: DB characteristics of process i.e. the agreement and procedures
   - the outcome of interest (objectives): resolution of the dispute

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- the sub-objectives: *inter alia* cost effective, quick, the recommendation must be satisfactory (also to the losing party), etc.

b) Testing of the theory – see (c)

c) Due to the limited database (thus a limited number of evaluations) available for the research into DB in Southern Africa the impact analysis of the outcomes have been undertaken in a qualitative rather than a quantitative manner. DB effectiveness was assessed by considering industry perception. The measure of success is not necessarily objective but also subjective and can thus be gauged from industry perception. However, a limited quantitative analysis was also carried out which is presented in Section 8.

For reasons stated above the research undertaken for this report is limited to certain aspects of the New Formalist approach and does not employ its full perspective, resulting in the following framework:

a) Two mechanisms (X_k) are considered, that of a DRB and a DAB, DB being the subject of this research.

b) The number of evaluations ($_k$) are limited to 19 disputes which is a substantial portion of the database available in Southern Africa at the time (Section 10).

c) The types (W_k) of disputes are all construction disputes centring mainly around the interpretation of the contract

d) The mechanism characteristics (a_k) are described in Sections 5 and 7

e) The dispute characteristics (b_k) are described hereunder.

f) The outcome types (Y_k) and outcome characteristics (c_k) are considered in Sections 8 and 12.

Goldberg, Green and Sander (cited in Esser, 1989:491) identify six characteristics (b_k) for distinguishing disputes by type (W_k). The characteristics are as follows, for the majority of the disputes under consideration:

a) Relationship between disputants (ongoing or not): ongoing

b) Nature of the dispute (polycentric, novel legal issue, etc.): interpretation of contracts

c) The amount at stake: from R 3,000,000 to R 99,000,000

d) The speed of processing the dispute: not considered specifically but it was generally done within the periods allowed for in the DB agreement

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e) The power relationship between the disputants (eg. bargaining strength): equal.

6.3 Data, Information and Opinion Gathering

Data and contracts information relating to DB on projects were gathered by visiting or contacting the project authorities for a number of civil engineering construction projects in Southern Africa. Eventually core data and information were obtained on some eight large projects, ranging in value from some R 180 million to in excess of one billion Rand and two smaller projects. DRB were appointed on nine of the projects with a DAB on one.

Information and opinions on DB were gathered through the use of a questionnaire. As the concept of DB is new in Southern Africa the knowledge base is confined to only a few people, thus resulting in a small research base.

Opinions on certain key issues were further explored by the conduct of a limited number of interviews.

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6.4 Questionnaire

The questionnaire was mostly sent and responded to by e-mail while a few were sent and responded to by facsimile.

The objectives of the questionnaire was to establish:

- Industry exposure to DB
- History of DB in Southern Africa
- Reasons for using and for not using DB on projects
- Sentiment towards DB
- Perceptions regarding DB

The target group consisted of employers, contractors, legal and engineering consultants and DB members. The questionnaires were not only confined to Southern Africa but were also sent to world renowned international DB members and consultants to gain a broader perspective.

To achieve its objective the questionnaire was structured as follows:

- Section 1: Consists of a table where the respondent had to insert project type, year, name (optional), value (in the stated year and including contingencies and escalation)

and the involvement of the respondent. The response was used to gauge experience of the respondents to:

- Assign weight to the balance of the response
- Gauge experience with DB in Southern Africa

- Section 2: Consists of a table where the respondent had to insert the respondent's view on which known ADR process is best represented by a DB. The responses present views on where the DB fits in the ADR processes. This is a significant issue which determines the manner in which the DB is perceived and operates. There are many divergent views in the literature regarding this issue.
- Section 3: Consists of a table where the respondent has to insert projects in Southern Africa which use DB. The purpose is to contribute to the knowledge of the history of DB in Southern Africa.
- Section 4: Consists of tables where the respondent had to insert the reasons for using and not using DB. The purpose is to establish the reason for the use or otherwise of DB and establish whether there is a growth in DB use.
- Section 5: In this section opinions are solicited regarding:
  - The principle of Dispute Adjudication Boards
  - The principle of Dispute Review Boards
  - Whether DB are impartial
  - Whether DB presents value for money
  - Whether DB are an essential part of the dispute resolution process

  The purpose is to establish perceptions and sentiment regarding DB.

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6.5 Interviews

The purpose of the interviews was to further explore opinions on key issues pertaining to DB.

Interviews were conducted as follows:

- Legal consultant – 1
- Engineering consultant – 1
- Dispute board members – 2

Informal ad hoc discussions were also held with persons from employer bodies.

The interview results are analysed in Section 10.

6.6 Section Summary and Conclusion

In this section dispute resolution research theory and the design of the research were described.

The following aspects of dispute resolution research theory were described:

- Research framework
- 'New Formalist' approach
- The elements of impact studies in relation to this research
- 'New Formalist' approach as applied in this research

Data and contracts information relating to DB on projects were gathered by visiting or contacting the project authorities for a number of civil engineering construction projects in Southern Africa. Eventually core data and information were obtained on some eight large and two smaller projects.

A questionnaire was used to establish:

- Industry exposure to DB
- History of DB in Southern Africa
- Reasons for using and for not using DB on projects
- Sentiment towards DB
- Perceptions regarding DB

The target group consisted of employers, contractors, legal and engineering consultants and DB members.

Interviews were conducted to further explore opinions on key issues pertaining to DB.

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7. DB SPECIFICATIONS AND AGREEMENTS IN USE ON CONSTRUCTION PROJECTS IN SOUTHERN AFRICA

7.1 Section Introduction

In this section DB specifications and agreements in use on construction projects in Southern Africa are described.

7.2 DB Specification and Agreement

Severn (1996:4) refers to the agreement setting out the basis for dispute resolution on the contract as a Disputes Resolution Agreement.

Pike (1993a:159) is of the view that DRB clauses (Dispute Resolution Agreement) and procedures must be elaborate as:

- There is no arbitration law and applicable standard rules to supply details
- The decisions of the DRB could be absolutely crucial to one or both parties, and therefore it must be ensured that each party has a reasonable opportunity to put its case, and be heard.

He says that often the procedures for the DRB are modelled closely on the ICC Rules of Conciliation and Arbitration.

The provisions (specifications and rules and procedures) for DB published in the 1999 edition of FIDIC and the TCCP of UTRC (ASCE) as well as those for DB used on the various projects, are compared in summary form in ANNEXURE C.

7.3 Project A

7.3.1 Project Description

The project consists of:

a) A water delivery tunnel approximately 21,9 km long of 5,10 m nominal excavated diameter and, where lined with concrete of 4,50 m finished diameter.

b) An inverted steel lined tunnel siphon (3,40 m dia.), an inverted cut-and-cover siphon , access adits, two ventilation shafts (0,20 m lined dia.), bypass (vertical shaft of 3,00 m lined dia. 30 m deep), surface structures.

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c) Commissioning of the Works and remedying of defects in the Works

d) The operation and / or maintenance of various facilities during the period of construction.

e) Fulfilment of other general contractual obligations *inter alia* in respect of such matters as programming, construction and quality control, medical, safety, training, environmental and liaison requirements, etc.

The construction contract value is approximately equivalent R 550,000,000 (1999).

The CoC for the project was the FIDIC 4th edition 'Red Book', reprinted 1987 with editorial amendments.

The event sequence for the dispute resolution process for the project, involving a DRB, is presented in Figure 4 below.

7.3.2 DB Contract Provisions (Dispute Resolution Agreement)

No provision was made in the contract for a DRB being part of the dispute resolution procedure. The DRB came about as a result of the Employer and the Engineer pursuing the implementation of a DRB on the project. The principle was discussed and agreed with the preferred bidder during the contract negotiations. The DRB was constituted and implemented during the early stages of the project.

7.3.3 DB Agreement

The concept used on the project can be likened to a mini-trail in that the case is presented to senior members of the organisations of those involved. Those members have authority to make recommendations and decisions.

a) Appointment and Composition

The 'Memorandum on Operation of the Board' confirmed the appointment of three DRB members. The agreement departed from the norm of independent members and instead, provided for 3 persons that were principles (senior directors) of the organisations involved in the project, being the Employer, Contractor and Engineer. The agreement provided for no chairman, with each of the members having equal status. The members had to have decision making authority and be demonstrably remote from the 'policies and emotions' of the contract.

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This is a concept that was also advocated by the United States Committee on Large Dams (Fraser, 1991:21) which said that the generally applied ADR processes share the common goal of resolving disputes through the involvement of senior principles from the disputing parties' organisations. They are generally sufficiently removed from the dispute issues to provide objectivity in the negotiation and the authority for settlement.

However, Loots and Fraser (1999:9) says about the concept: '*In reflection such a constitution is not sufficiently independent or impartial and is not entirely free from possible external accusation of collusion in adverse circumstances*'. They point out however, that the costs of the system are limited in comparison with other systems and that its recommendations stand the greatest chance of acceptance by the parties.

b) DRB Members

The members changed over the life of the project.

c) Role/function

The agreement describes the role of the DRB as twofold:

i) Firstly
- Monitor the performance of the contracts
- Receive oral presentations from the Contractor, Engineer and Employer on their perceptions of the contractual climate

ii) Secondly
- To intervene only after the Engineer has given his decision pursuant to sc 67.1 of the CoC, but before the parties proceed to the amicable settlement process pursuant to sc 67.2. The board would decide the procedure to be followed for each particular dispute.

Loots and Fraser (1999:7), in referring to the DRB on the project, considers:

- The DRB to be '*a process of conciliation*' and part of the amicable settlement requirement of FIDIC
- The purpose of the DRB being to offer the parties a practical route to amicable settlement

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- The role of the Board as '*quasi-mediotorial*' in attempting to find settlements acceptable to both parties
- The Board acts as mediator

Use was also made of the combined wisdom and experience of the DRB during their regular site visits. While this was not formal, Loots and Fraser (1999:10) believe that the board's visits greatly enhanced the approach of the parties due to early focus on contentious issues and the seniority of the DRB members' opinions.

It is clear that in this instance the DRB was actually part of the c 67 amicable settlement procedures.

d) Operation

The operation of the DRB was specified in relatively simple terms with a minimum of procedural constraints, with the DRB deciding on the detailed procedures. It initially consisted of a 2-page document which was expanded later by formal agreement between the parties. One of the items of expansion was early access by the Engineer to the board.

Loots and Fraser (1999) report that the following was considered in the development of the procedures:

- The requirement that the DRB include in its formal recommendation any extra-contractual or equity considerations employed in arriving at its recommendation, as well as substantiation for adopting such an approach
- The question of whether the DRB should become involved in problem solving prior to or after the Engineer's decision
- The use of the combined wisdom and experience of the DRB during their regular site visits in a pre-emptive role

Early access by the Engineer (before his c 67 decision) to the board was initiated by the DRB itself. Loots and Fraser (1999:9) considered this to be a positive development and worthy of serious consideration, even where wholly independent DRB are used.

e) Visits and Meetings

Provision is made for visits at approximately quarterly intervals or as found necessary (presumably by the parties and/or the board).

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The Engineer would arrange the programme for each site visit. The visit would precede oral presentations from the Contractor, Engineer and Employer on their perceptions of the contractual climate. Short written versions were to precede the oral presentations, to be with the DRB one week before each visit. The board would produce a report on each visit, presenting its views reached by consensus.

f) Recommendation

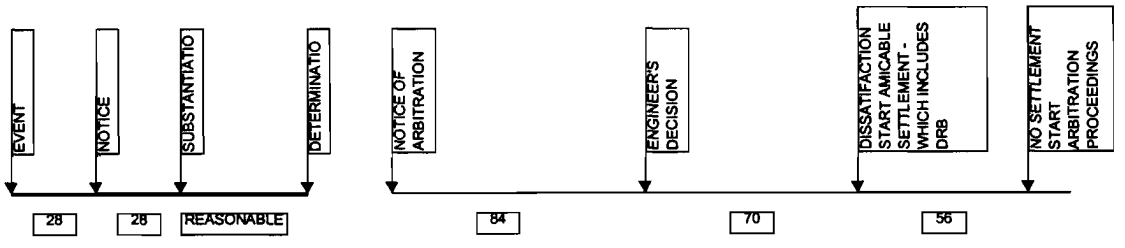
The recommendation is not binding and 'advisory' in nature. A formal agreement was entered into by the parties whereby al the DRB activities would be without prejudice and not admissible as evidence in further proceedings. This agreement also provided that the recommendation would not become final and binding unless written detailed acceptance by both parties had been submitted to the Engineer for implementation within a defined period.

Loots and Fraser (1999) say '*It* [the Board] *should strive for a recommendation consistent with applicable laws and contract provisions.*

7.3.4 Event Sequence

The provisions of the FIDIC 4th edition, as amended for Project A, is presented in timeline format hereunder. In the timeline, for purposes of illustration, the event giving rise to the dispute has been taken to be a claim.

Figure 4 : Project A Dispute Resolution Event Sequence



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7.4 Project B

7.4.1 Project Description

The project consists of:

a) A water delivery tunnel approximately 15,1 km long of 5,10 m nominal excavated diameter and, where lined with concrete, of 4,50 m finished diameter.

b) Two inverted steel lined tunnel siphons (3,40 m dia.), intake works circular concrete structure of 24,00 m outer dia. to a 5,00 m dia. vertical shaft, tunnel bifurcation, twin gate shafts (3,85m lined dia.), underground gallery, supply and installation of mechanical and electrical equipment, access adits, five ventilation shafts (0,20 m dia.), air release shaft (3,85 m dia.), adits and shafts for dewatering, flow measurement provisions, permanent dewatering systems, landscaping, fencing, etc.

c) Commissioning of the Works and remedying of defects in the Works

d) The operation and / or maintenance of various facilities during the period of construction.

e) Fulfilment of other general contractual obligations *inter alia* in respect of such matters as programming, construction and quality control, medical, safety, training, environmental and liaison requirements, etc.

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The construction contract value is approximately equivalent R 325,000,000 (1998).

The CoC for the project was the FIDIC 4th edition 'Red Book', reprinted 1987 with editorial amendments.

The event sequence for the dispute resolution process for the project, involving a DRB, is presented in Figure 5 below.

7.4.2 DRB Provisions in the Contract

No provision was made in the contract for a DRB being part of the dispute resolution procedure. The DRB came about in September 1994, some three years after the commencement of the contract, after a presentation on DRB to the project participants by a well known DRB authority.

a) The Agreement

The '*Disputes Review Board (DRB) Employer and Contractor Agreement*' provides for dispute resolution by DRB on the project as described hereunder.

The agreement is valid from its signing until:

- The DRB has made recommendation in respect of all disputes and other issues referred to the board, or
- Payment has been effected under the final certificate (sc 60.8 of the conditions of contract, or
- The return to the Contractor of the performance security, or
- The expiration of the time set for the selection of s replacement DRB member

whichever is earlier.

The agreement shall be suspended on the resignation of a member until his replacement.

Disputes between the parties regarding the agreement shall be finally settled by arbitration pursuant to sc 67.4 of the CoC.

b) Appointment and Composition

One DRB member is chosen by the Employer and one DRB member by the Contractor, with these members then choosing the third member. The three members then choose a chairman from among themselves. The Employer and the Contractor approve each other's nominees as well as the third member and the chairman. The first two members shall be approved within 63 days of the agreement and the third member within 56 days after the first members' appointment. In the event of an impasse the third member shall be selected jointly by the Employer and Contractor.

The appointment of the DRB members shall initially be for two years, after which a member's appointment may be renewed by agreement of the parties.

c) DRB Members

Required experience is in:

- The type of construction involved in the contracts
- The interpretation of contract documents

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No member may have a conflict of interest between his appointment as DRB member and his personal interests, such as:

- An interest in any party to the contracts or financial interest in the contracts (other than fees for DRB member services)
- Have been or be employed or have financial ties with a party to the contracts (other than fee based consulting services)
- Substantial prior involvement with the larger project of a nature which may compromise impartiality

d) Role/function

In the preamble to the '*Disputes Review Board (DRB) Employer and Contractor Agreement*' it is stated that:

- by virtue of sc 67.2 of the CoC [FIDIC 'Red Book'] the parties are obliged to attempt to settle disputes amicably
- the parties are desirous of minimising the time, effort and costs necessary to resolve disputes which may arise

It is further stated that the parties have considered the establishment of a DRB as a means of achieving these two objectives (without detracting from their normal responsibility to amicably and fairly settle their differences).

It can thus be concluded that the establishment and operation of the DRB is an attempt at amicable settlement as provided for in sc 67.2 (and at minimising the cost, effort, etc associated with disputes). Here the DRB is thus a mechanism for amicable settlement of disputes.

It further states that the objective of the DRB is to make recommendations in respect of disputes for which a notice of intent to commence arbitration has been given.

e) Operation

The Employer's, Contractor's and DRB members' duties with regard to supply of documents, services, travel arrangements and the like are set out in the '*Employer, Contractor and Disputes Review Board Agreement*' (see Section 7.4.3 hereunder).

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The board shall be convened for hearings within 49 days of the notice to commence arbitration.

f) Visits and Meetings

The DRB shall visit the site at regular intervals at a frequency to be agreed by the parties after consultation with the board and depending on the progress of the works.

g) Recommendations

The DRB shall render its recommendation to the parties (with a copy to the Engineer) within 56 days of the commencement of the hearings. The recommendation shall be in writing and include the reasoning for the recommendation. If either party is dissatisfied with the recommendation, or it is not rendered within the required time, the dissatisfied party may reconfirm the notice of commencement of arbitration. Arbitration may commence 28 days after such reconfirmation.

The recommendations of the DRB shall not be final and/or binding on the parties.

The agreement is silent on the express issue of whether the DRB's activities would be with or without prejudice and admissible or not as evidenced in further proceedings. However, it does say that deliberations of the DRB shall be undertaken without prejudice to the strict and legal rights of the parties.

h) Compensation

Retainers, fees and expenses shall be shared 50/50 between the Contractor and the Employer. Payment will be made in accordance with the '*Employer, Contractor and Disputes Review Board Agreement*' (see Section 7.4.3 hereunder).

7.4.3 DRB Agreement

a) The Agreement

At the time of entering into a DRB Agreement between the parties, a separate DRB agreement was entered into between the parties and the DRB members.

The '*Employer, Contractor and Disputes Review Board Agreement*' provides for dispute resolution by DRB on the project as described hereunder.

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In the case of ambiguities or discrepancies between the agreement and c 67 of the CoC, c 67 shall prevail.

DRB members can resign from the DRB after giving 70 days notice. A notice of renewal or termination of a DRB member's term shall be given no less than 70 days prior to the expiration of such term. The appointment of any DRB member may also be terminated by agreement between the parties, with 70 days prior notice. A DRB member is not allowed to assign his duties.

The DRB members act in an independent capacity and not as an employee or agent of any of the parties. The DRB members are indemnified against any personal or professional liability arising from the activities and recommendations of the DRB.

b) Role/function

The DRB if formed solely to render its recommendations after hearing disputes between the Employer and Contractor, during and after the completion of the works or repudiation or termination of the contract.

c) Procedure

The DRB shall determine the procedures to be followed during the hearings. The DRB shall keep a formal record of the hearing if requested by either party to do so.

The chairman of the DRB shall preside over the hearings and during such hearings the DRB members shall not disclose individual opinions.

In the hearings the parties shall present the evidence and arguments put before the Engineer for purposes of his decision pursuant to c 67.1 of the CoC. The board may request and receive further clarification of such evidence and arguments. If either party presents new evidence or arguments, the other party may request that it be referred to the Engineer for comment, which comment shall be presented to the DRB at the hearings.

After the hearings are completed the DRB shall meet privately to formulate its recommendations. The board shall make a concerted effort to reach a unanimous

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recommendation. If this proves not to be possible, the majority shall submit the recommendation and the minority shall submit a separate report.

Neither the Employer nor the Contractor shall communicate with DRB members without indicating his intentions to the other party. All DRB members shall receive copies or notification of all information provided to any individual DRB member.

d) Duties of the DRB

The duties of the DRB and its members are:

- To select members as detailed in Section 7.3.2 above
- Ensure their availability
- Each member to keep a current working file containing all the documents supplied by the Employer and generated by the DRB
- Each member shall be conversant with the development of the contracts by studying the documents received
- Visit the site once every six months or as requested by the parties, to acquaint themselves with the progress of the works and status of contractual matters
- During the site visit encourage the settlement of disputes
- Treat all details of the contracts and all activities of the DRB as private and confidential.

e) Duties of the Employer

The Employer would supply each DRB member, through the chairman, with one copy of:

- All contract documents and supplementary contract information
- Progress schedules, progress reports
- All documents pertinent to actual disputes
- All documents pertinent to potential disputes, if the parties agree

The Employer's transmittal letter will be copied to the Contractor and Engineer. Any document provided by the Employer to the board shall be copied to the Contractor if he so requests.

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The Employer, with the co-operation of the Contractor, shall co-ordinate travel arrangements, etc. for DRB visits hearings and the like. The Employer will arrange conference, secretarial and copying facilities for the DRB during its visits and hearings.

When notice to commence arbitration as to a dispute has been given pursuant to sc 67.1 of the CoC [FIDIC 'Red Book'], such notice shall also be a notice requiring the dispute to be referred to the DRB.

f) Duties of the Contractor

The Contractor shall provide to the Employer one copy for each DRB member of any documents which he considers supplementary to those already furnished to the DRB by the Employer, for transmittal to the DRB as above.

g) Visits

Site visits would be every six months or as requested by the parties. The request to visit the site would give 49 days notice and include a proposed agenda agreed to by the parties. All site meetings conducted by the DRB shall be attended by the Employer and the Contractor, and if appropriate the Engineer. At the discretion of the DRB, prior to its departure, it shall prepare a report on the visit and issue it to the Employer and the Contractor, with a copy to the Engineer.

i) Compensation

The submission of invoices is described. Payment will be made within 60 days of receipt of invoices by the parties.

Compensation would be as follows:

- Monthly retainer for:
  - Being available for hearings, site visits, etc.
  - Keeping files and remaining up to date with project developments
  - Office and overhead expenses (secretarial services, copying, telephone, fax, stationary, etc.)
- Daily fee
  - Maximum of two days travel to and from site
  - Eight hour or more working day on official visit, meetings or hearings

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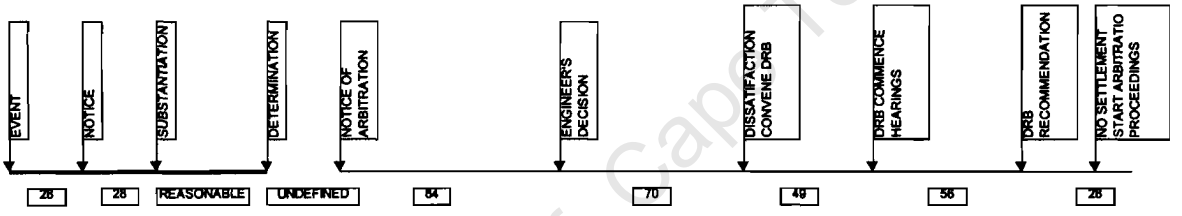
- Each working day spent in the home office after a referral on preparatory studies for hearings
- Expenses - reasonable and necessary travel expenses
- Escalation – retainer and fees to be fixed for the initial two year term, where after it may be adjusted by mutual agreement between the DRB and the parties.

7.4.4 Event Sequence

The provisions of the FIDIC 4th edition, as amended for Projects B-D, are presented in timeline format hereunder. In the timeline, for purposes of illustration, the event giving rise to the dispute has been taken to be a claim.

Figure 5 : Projects B-D Dispute Resolution Event Sequence



7.5 Project C

7.5.1 Project Description

The project consists of:

a) A water transfer tunnel approximately 44 km long, concrete lined to nominal diameter of 4,35 m and excavated by tunnel boring machine (TBM). Steel lined sections to an internal diameter of 3,35 m.

b) A multi-gated intake tower (80 m high and 25 m dia.) and access bridge, supply and installation of mechanical and electrical equipment, access adits, three ventilation shafts (1,3 m dia.), production of aggregates for use on other contracts.

c) Commissioning of the Works and remedying of defects in the Works

d) The operation and / or maintenance of various facilities during the period of construction.

e) Fulfilment of other general contractual obligations *inter alia* in respect of such matters as programming, construction and quality control, medical, safety, training, environmental and liaison requirements, etc.

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The construction contract value is approximately equivalent R 1,300,000,000 (1998).

The CoC for the project was the FIDIC 4th edition 'Red Book', reprinted 1987 with editorial amendments.

The event sequence for the dispute resolution process for the project, involving a DRB, is presented in Figure 5 above.

7.5.2 DRB Provisions in the Contract

See Section 7.4.2 above

7.5.3 DB Agreement

See Section 7.4.3 above.

7.6 Project D

7.6.1 Project Description

The project consists of:

a) Geotechnical exploration in the quarry area and site of the dam.
b) Cofferdams, river diversion tunnels and foundation treatment.
c) A double curvature concrete arch dam together with a spillway plunge pool and tailwater dam
d) Outlet structures for future tunnels .
e) The design, supply, installation and commissioning of mechanical and electrical equipment, instruments and equipment for a mini-hydro electricity generating station in the dam.
f) Commissioning of the Works and remedying of defects in the Works
g) The operation and / or maintenance of various facilities during the period of construction.
h) Fulfilment of other general contractual obligations *inter alia* in respect of such matters as programming, construction and quality control, medical, safety, training, environmental and liaison requirements, etc.

The construction contract value is approximately equivalent R 1,300,000,000 (1998).

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The CoC for the project was the FIDIC 4th edition 'Red Book', reprinted 1987 with editorial amendments.

The event sequence for the dispute resolution process for the project, involving a DRB, is presented in Figure 5 above.

7.6.2 DRB Provisions in the Contract

See Section 7.4.2 above.

7.6.3 DB Agreement

See Section 7.4.3 above.

7.7 Projects E

7.7.1 Project Description

The project consists of three individual projects.

Project EA comprising of:

a) A water transfer tunnel approximately 31,8 km long of generally 4,5 m nominal excavated diameter and lined with nominal 250 mm thick concrete lining.
b) Intake works comprising bellmouths, intake tunnels (170 m and 320 m), a 9,0 m diameter intake gate shaft (lined with 450 mm thick concrete) and intake operating gallery and access adit.
c) Supply and installation of mechanical and electrical equipment and a surface operating building.
d) Commissioning of the Works and remedying of defects in the Works.
e) The operation and / or maintenance of various facilities during the period of construction.
f) Fulfilment of other general contractual obligations *inter alia* in respect of such matters as programming, construction and quality control, medical, safety, training, environmental and liaison requirements, etc.

The construction contract value is approximately equivalent R 1,000,000,000 (2003).

Project EB comprising of:

a) A water transfer tunnel approximately 5,7 km long (span of approximately 4,0 m) with nominal 300 mm thick concrete lining.

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b) A mass gravity weir, approximately 15 m high and 180 m long constructed of uncut grouted stone masonary and mass concrete.

c) Supply and installation of mechanical and electrical equipment to the intake structure.

d) An inclined access adit and the development of a quarry for concrete aggregate

e) Commissioning of the Works and remedying of defects in the Works.

f) The operation and / or maintenance of various facilities during the period of construction.

g) Fulfilment of other general contractual obligations *inter alia* in respect of such matters as programming, construction and quality control, medical, safety, training, environmental and liaison requirements, etc.

The construction contract value is approximately equivalent R 200,000,000 (2001).

Project EC comprising of:

a) A dam comprising a concrete faced rockfill embankment approximately 145 m high and containing about 7 million m^3 of material and a concrete lined ungated spillway

b) Two horseshoe shaped diversion tunnels – one approximately 6.7 m diameter, unlined, 650 m long and one approximately 5.5 m diameter, concrete lined, 560 m long

c) The development of a quarry for concrete aggregate

d) Commissioning of the Works and remedying of defects in the Works

e) The operation and / or maintenance of various facilities during the period of construction.

f) Fulfilment of other general contractual obligations *inter alia* in respect of such matters as programming, construction and quality control, medical, safety, training, environmental and liaison requirements, etc.

The construction contract value is approximately equivalent R 400,000,000 (2002).

The CoC for the projects is the FIDIC 4th edition 'Red Book', reprinted 1992 with further amendments.

The event sequence for the dispute resolution process for Projects E, involving a DRB, is presented in Figure 6 below.

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7.7.2 DRB Provisions in the Contract

The contract provides for dispute resolution by DRB on the projects and these provisions are as described hereunder.

The appointment, rules of proceedings and remuneration of the DRB did not form part of the contract. Instead, in the memorandum of understanding (MOU) it was stated:

'*The Employer or the Contractor as the case may be shall agree to any reasonable proposal of the other for the appointment, the rules of proceedings and the remuneration of a three person Dispute Review Board for the purpose of carrying out the function allocated to the Dispute Review Board by Sub-Clause 67.2 of the Conditions of Contract.*'

a) Appointment and Composition

This was not described but reference was made in the MOU to '*a three person Dispute Review Board*'.

b) Role/function

Not stated in the provisions of the contract.

c) Operation

C 67 provisions up to the notice of intention to commence arbitration have been retained. Thus the Engineer has 84 days to render his decision and the parties have 70 days to advise dissatisfaction with the Engineer's decision and give notice of intention to commence arbitration. Pike (1993a:159) proposes that the 84 day period be reduced to 56 days. He also proposes to retain the Engineer's decision before any reference to the DRB.

The c 67 provisions have been extended to provide for a DRB as follows:

- Where notice of intention to commence arbitration has been given pursuant to sc 67.1 such notice shall in addition be considered as a notice requiring the dispute to be referred to the DRB.
- Arbitration shall not be commenced until the conditions for the DRB and amicable settlement have been fulfilled.

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- Within 49 days from the day on which the one party gave notice to the other of his intention to refer the matter in dispute to arbitration the DRB shall be convened by the party giving the notice and shall commence hearings on the matter in dispute.
- Within 56 days from the start of the hearings, the DRB shall complete the hearings and render its reasoned recommendation in writing to the parties (with a copy to the Engineer). The DRB may propose a longer period for the agreement of the parties.
- If either of the parties are dissatisfied with any recommendation of the DRB, or if the DRB fails to render its recommendation within the prescribed period, then within 56 days of issue of the recommendation, the party which issued the notice of intention to commence arbitration may confirm it in writing to the other party. There appears to be no provision in the contract for the instance where the party which did not give the notice of intention to commence arbitration, is dissatisfied with the recommendation and wishes to proceed to arbitration. This apparent omission is rectified in the *Disputes Review Board Agreement*, subsequently negotiated pursuant to the provision in the MOU.
- Upon the issue of such confirmation the arbitration of the dispute shall not be commenced unless a further attempt has first been made by the to settle such dispute amicably.
- Arbitration may be commenced within 56 days from the day on which the notice of intention to commence arbitration, whether or not this further attempt at amicable settlement has been made.

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Reference to the DRB is only once a dispute arises, that requires the Engineer's decision (pursuant to sc 67.1 of the CoC), and a party (or both) is dissatisfied with the Engineer's decision and accordingly notifies his intention to commence arbitration. There can thus be no question of potential disputes being referred to the DRB for resolution, as was done on Project A. This would largely negate any preventative role (if any) that may have been intended for the DRB. Also, the view exists that one of the duties of the impartial Engineer would be dispute avoidance (although this function may be hampered for reasons stated elsewhere) and the DRB should deal with disputes that cannot be avoided by the traditional FIDIC machinery.

However, it is instructive to note in connection with a DAB, the 1996 supplement to FIDIC 4th edition 'Red Book' Section A *Guide to Amended Clause 67* suggests that the parties

should not discard the possibility of jointly seeking an opinion from the DAB on any matter relevant to the avoidance of a potential dispute.

d) Visits and Meetings

Provision is made for visits at approximately quarterly intervals or as found necessary (presumably by the parties and/or the board).

e) Recommendation

Schedule A, Part 2 of the *Disputes Review Board Agreement* sets out the requirements for the recommendations. See Section 7.7.2.

7.7.3 DRB Tri-Partite Agreement

a) The Agreement

The timeline for the dispute resolution process for the projects is presented in Figure 6 below. The '*Disputes Review Board Agreement*' sets out the terms under which the DRB members have agreed to serve. An annexure (*Schedule A*) sets out the procedural rules for the DRB.

Certain clauses of the agreement are modelled on the 1996 supplement to the FIDIC 4th edition 'Red Book', Section A model terms with the same name. The 1996 FIDIC model terms are enclosed as ANNEXURE K. The clauses are in the main body: 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 23 and in Schedule A Part 1: 1, 2, 3, 5.

The agreement states that the parties have agreed that the DRB shall comprise three persons.

In the agreement the word 'claim' is used which may lead to some confusion with the use of 'claim' in connection with c 53 of the CoC. It would have been clearer if the word 'contention' had been used.

There is no specific provision for dealing with discrepancies and ambiguities between the CoC and the agreement. Thus in terms of common law the agreement would prevail, on the

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basis that if a later provision qualifies an earlier provision, effect is given to the later qualification *(Hayne & Co Ltd., Kaffrarian Steam Mill Co Ltd* [1914][14]).

The agreement shall take effect on the date that the parties and the last of the DRB members have executed the agreement.

The parties agree that no DRB member shall:

- Be appointed as arbitrator on the contract unless agreed by the parties in writing.
- Be called as a witness to give evidence in any dispute before an arbitrator or court unless requested by both parties and accepted by the DRB member
- Be liable for any claims in the discharge of his function unless he acts in bad faith. The parties indemnify the DRB member against such liability.

The law governing the agreement would be the law of the country.

In the event of disputes in connection with the *Disputes Review Board Agreement*, it shall be finally settled by arbitration under the ICC rules

It is not stated when the agreement terminates.

b) Appointment

The members were appointed by agreement of the parties. The process was not formally committed to a written agreement. In the payment clauses, reference is made to the '*initial twelve months period of tenure*' but nowhere is it stated that the initial period of tenure would be 12 months and how such tenure is renewed, and what happens if it is not renewed.

The DRB members are appointed in their personal capacities and may not assign, delegate or subcontract any of the tasks under the agreement or DRB rules.

The DRB members act in an independent and impartial capacity and each disclose to the parties prior to his appointment that:

- He does not have any personal relationship with any director, officer or employee of the parties or the Engineer

[14] AD 363 at 369)

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- He does not have any prior involvement in the overall project which is not known to the parties

The DRB member shall be under a continuing obligation to disclose in writing any circumstance which might call his impartiality or independence into question. DB members may accept appointments as arbitrators, adjudicators or mediators in other projects in which the parties are involved.

Further, DRB members may not:

- Have an interest (financial or otherwise) in any party to the contracts, the Engineer or financial interest in the contracts (other than fees for DRB member services)
- Have been or be employed as a consultant by the either of the parties or Engineer, except as disclosed in writing above
- Be employed as a consultant or otherwise by either of the parties or the Engineer without prior written consent of the parties and other DRB members
- Give advice to either of the parties or the Engineer concerning the conduct of the larger project, other than as provided for in the agreement
- Enter into discussions or make an agreement with either of the parties regarding employment by either of them after ceasing to be a board member.
- Give advice or have consultations with the Employer, Contractor or Engineer regarding the contracts other than provided for in the agreement

Each DRB member warrants that he is:

- Experienced in the type of construction involved in the contracts
- Fluent in the language of the contracts
- Experienced and skilled in the interpretation of contract documents and the weighing up of evidence on fact and its credibility

DRB members can resign from the DRB after giving 8 weeks (56 days) days notice.

The appointment of any DRB member may be terminated by agreement between the parties, with 8 weeks (56 days) prior written notice.

No provision is made for procedures for replacement of a member.

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c) Role/function

The DRB is constituted to carry out the function particularly described in c 67 of the CoC. The DRB shall make recommendations of the resolution of disputes as described in the agreement.

The DRB shall use its combined expertise and experience and base its findings and recommendations on the provisions of the contract and established principles of law found applicable to the facts and circumstances derived from the information provided by the parties. This is closer to adjudication than to recommendations for settlement.

With respect to the hearings the function of the DRB is to receive and hear the contentions of the parties and to make non-binding recommendations to the parties for the resolution of the dispute before them.

The DRB shall act as a board of impartial experts. Note Chapman's comments in this regard presented in section 5.4.1 above. If the DRB members act as experts, the question of liability arises. An adjudicator would have no liability under common law in South Africa (*Hoffman v Meyer* [1956][15], but note that there is currently some debate in this regard) whereas a certifier or valuer would. Possibly the answer lies in that in the DRB the adjudicator acts as an adjudicating expert (thus no liability) and the certifier and valuer acts as certifying and valuing experts (thus attracting liability) respectively. Where a contract exists an action for damages would be contractual rather than delictual. However, in terms of the agreement, a DRB member shall not be liable for any claims in the discharge of his function unless he acts in bad faith. The parties indemnify the DRB member against such liability.

In the event that the parties or the Engineer claim that the issue between the parties, or between one of them and the Engineer, is not a dispute, entitling reference to the Engineer for a decision under sc 67.1 of the CoC, such contention shall be deemed to be a dispute for the purposes of being dealt with by the DRB (only – no other purpose). This is an interesting issue which raises the question as to the DRB's position if such position is questioned; a party contending that an issue is not a dispute that kicks of the process for the DRB to enter onto the reference. The party may contend that that any DRB

[15] (2) SA at 756A-C

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recommendation is null and void as it had no authority to make a recommendation in the first place and would thus be acting *ultra vires*. Can the DRB make a recommendation on such an issue? Thus, is the DRB competent to decide on the validity of the DRB clauses which empowers them to act. See Chapman's comments in Section 5.4.1 above. He says that the courts are reluctant to overturn determinations by experts (akin to decisions by adjudicators), unless fraud or collusion can be proved or the expert has departed from his instructions or answered the wrong question.

Another situation may arise where the existence of contract is disputed or a contract is terminated, repudiated or completed. Do the DRB clauses survive and can the DRB decide if they have survived?

Although more stringent rules apply in arbitrations, these matters often surface there. In connection with arbitration the current position in South Africa is (Finsen, 2000:16):

- If the clauses are severable from the rest of the contract and it is not being attacked as invalid, then the arbitrator may arbitrate on the question of whether the remainder of the contract is valid.
- If the arbitration clause itself is being attacked, it is submitted that he cannot act. An arbitrator cannot make an award on the question whether or not he can make an award. If this was possible, he would be able to create authority for himself where none existed.
- Where the parties have completed all their duties under the contract and a dispute subsequently arises regarding, for example, liability for a latent defect, it has been held that the arbitration clause is still alive and may be invoked (*Van Heerden v Sentrale Kunsmis Vereniging (Edms) Bpk* [1973][16]).

In the final analysis it may not be a real issue, as the party simply does not accept the DRB's recommendation. Where it would become an issue is where the DRB's recommendation may be submitted into evidence in further proceedings (arbitration or litigation) or it has become binding and is not honoured. It is recommended that for a recommendation to become final and binding it should be expressly accepted rather than by default with the passing of a fixed period during which no objections are raised.

[16] (1) SA 17 (A)

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d) Procedure

Documents made available to the DRB from time to time by either party, shall simultaneously be sent to the other party.

Where the Contractor or Employer (or both) gives a notice of intention to commence arbitration pursuant to c 67.1 of the CoC, the DRB shall conduct a hearing into the dispute. The hearing shall be conducted within 49 days of the notice to commence arbitration.

The preparations and conduct of the hearing shall be as set out in *Schedule A, Part 1*. The agreement states that the DRB has full authority to conduct hearings as it thinks fit, and shall not be bound by any rules of procedure (including the rules of natural justice?) other than the DRB rules in the agreement, which *inter alia* provides as follows:

- The DRB shall not express any opinion during any hearing on the merits of arguments advanced by the parties.
- After the hearing is concluded the DRB shall convene in private to formulate its recommendations.
- If a dispute is put to the DRB for a recommendation on a matter of principle, it shall only make a recommendation on the quantum if the parties cannot resolve the issue on the basis of any merits found, on express request from either or both party(ies).
- All communications between the DRB and either of the parties, and the hearings shall be in English.
- All such communications shall be copied to the other party and board members
- The case before the DRB shall be confined to what is stated in the request for an Engineer's decision pursuant to sc 67.1 of the CoC. The confinement only applies to the ambit of the dispute but not the arguments presented in position papers and at hearings in support of stated positions.
- Within 14 days of notifying his intention to refer the dispute to arbitration the claimant shall serve a statement of case on the defendant, with a copy to each DRB member and the Engineer.
- Within 21 days of receiving the statement of case, the defendant shall serve his response to the statement of case on the claimant, with a copy to each DRB member and the Engineer.
- The defendant's case before the DRB shall be confined to this response.

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- The statement of case and response shall set out in reasoned detail the nature of the factual contractual and legal bases of the case of the relevant party and shall be accompanied by a bundle of copies of the documents upon which the party relies as evidence.
- If the DRB is of the opinion (either by its own volition or on the application of a party) that it is necessary or desirable to seek clarification of anything in the statement of case or response, the chairman of the DRB may (within 14 days of the response to the statement of the case being served) serve a request for clarification of the statement of case or response on the relevant party. The relevant party shall provide the clarification to each member of the DRB (and a copy to the other party) within 14 days of the request for clarification. This is the only departure allowed from the statement of case or response.
- Within 56 days of the receipt of the recommendation, each party must notify the other of his satisfaction or dissatisfaction with the recommendation of the DRB. The agreement does not make provision for copies to the DRB or Engineer. There is also no stated remedy in the event that either or both parties do not give the notice of satisfaction/dissatisfaction.
- The notice of satisfaction/dissatisfaction will be confirmation of the notice of intention to commence arbitration pursuant to sc 67.2 of the CoC, irrespective of which party gave the notice. This provision rectifies the apparent omission eluded to in Section 7.7.3 above, in that the contract does not provide for the instance where the party which did not give the notice of intention to commence arbitration, is dissatisfied with the recommendation and wishes to proceed to arbitration
- A party may unilaterally copy relevant reports and documents to the DRB members. Such reports and documents shall also be copied to the other party.
- The matters shall be without prejudice, legally privileged, non-disclosable and non-admissible in any arbitration or court proceedings:
  - The DRB's findings as to the facts of the dispute
  - The recommendations made by the DRB
  - The reasoning on which the DRB's recommendations are based
  - The fact that the disputes and parties' contentions have been referred to the DRB

  This arrangement leaves the impression that the parties expect the DRB recommendation to possibly contain some element of compromise.

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- If either party of the DRB are of the opinion that the DRB members do not have the competency to deal with some aspects of a dispute referred to them, the DRB shall seek the assistance or advice of a person nominated by the board or either of the parties, and agreed to by the parties. Here is an opportunity for delay if a person willing to accept the appointment must first be found and the parties must also agree to his appointment. The additional cost for such a person shall be met equally by the parties. The DRB may propose a longer period for rendering its decision.

Specific hearing procedures are not specified. The parties and the DRB subsequently agreed the hearing procedures. It is not said whether formal record of the hearings shall be kept of who would preside over the hearings. The duties of the chairman are not specified.

e) Duties of the DRB

The duties of the DRB and its members are:

- To acquaint themselves with the progress of the works and with commercial and contractual issues by site visits and by documents made available to them from time to time for the purpose.
- Ensure their availability for site visits and hearings
- Observe the DRB rules
- Each member to keep a current working file
- Each member shall become conversant with the development of the contracts by studying the documents received
- Visit the site once every six months or as requested by the parties
- Treat all details of the contracts and all activities of the DRB as private and confidential.

Note that the previous project provision that the DRB shall encourage the settlement of disputes during the site visits, have not been retained.

f) Duties of the Employer

The parties shall through the Employer furnish each board member with a copy of the contract documents. It would make sense to identify who exactly is responsible for this.

To make payment to the Contractor for his share of cost of the DRB.

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The Employer, with the co-operation of the Contractor, shall co-ordinate site visits.

The Employer will arrange a meeting room, secretarial and copying facilities for the DRB during its visits.

g) Duties of the Contractor

The parties shall through the Employer furnish each board member with a copy of the contract documents.

To make payment to the DRB members for the cost of the DRB.

h) Visits

Site visits would be at least once every six months or as requested by the Employer and/or the Contractor. The agreement states that the purpose of the visits would be for the DRB members to acquaint themselves with the progress of the works and with commercial and contractual issues. Schedule A again states that the purpose of the visits is to enable the DRB to '*become and remain acquainted with the progress of the Contract and of any actual or potential problems or claims.*'

All site meetings conducted by the DRB shall be attended by the Employer, the Contractor, and the Engineer (note, not '*if appropriate*' as in the previous project). Prior to its departure the DRB shall prepare a report on the visit and send copies to the parties and the Engineer (note, not '*at the discretion*' of the DRB as noted for a project above).

i) Recommendation

The DRB shall use its combined expertise and experience and base its findings and recommendations on the provisions of the contract and established principles of law found applicable to the facts and circumstances derived from the information provided by the parties.

A distinguishing feature of this agreement is that it clearly sets out the requirements for the recommendation. This is considered to be a serious omission from the other DRB agreements reviewed.

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The requirements are set out in *Schedule A, Part 2* of the agreement, and includes the following:

- Introduction stating:
  - the name, number and effective date of the contract
  - number an title of the dispute under reference
  - general contract background
- Statement of dispute stating:
  - a full description of the dispute as presented by each party (recitals)
  - each element of the relief sought
  - the basis of each claim (allegations of fact contentions of law/contract)
  - each response maintained by the parties (common cause and divergence)
- Analysis and findings stating:
  - The DRB's findings on the merits of each element of the claim (this appears to be confined to the claims put forward by the parties; thus apparently the DRB may not identify other bases of claim with merit to settle the dispute?)
  - The DRB's findings on the merits of each element of cost adjustment or any other relief found due to a party (it is not clear whether this is confined to the claimed relief or a relief identified by the DRB?)

(Note Shadbolt's (1999:105) view presented in Section 5.4.1 above, that the DRB does not have to choose between different viewpoints and can make up its own mind and exercise their own skill and judgement. He says that this would tend to avoid the kind of compromise which result from mediation and arbitration.)

  - The DRB's analysis, justification and findings supporting the recommendation
  - References to all contractual statutory or other (applicable) authority relied upon by the DRB in making its findings and recommendations.
- Recommendations containing:
  - The DRB's specific recommendations for resolution of the dispute
  - The recommendations must be consistent with and follow from the above analysis
- Dissenting opinion:
  - Any dissent by any DRB member(s) to the findings and recommendations made by the majority of the DRB members (it does not say whether the dissenting member needs to be identified)
  - Explanation of the reasons for the dissent with the findings and recommendations

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- Certification

In arriving at its recommendation the DRB shall take account of:

- Its own experience and expertise on technical and contractual matters
- Matters of disputed fact
- Contentions of the parties

The DRB shall endeavour to reach unanimous decisions, but if this is not possible the majority shall make the recommendations.

j) Compensation

Payment to the DRB members shall be shared equally between the parties.

The submission of invoices to the Contractor is described. The Contractor will make payment within 56 days of receipt of invoices. Failure by either party to make payment, would be a default under the contract, to be treated pursuant to c 63 and c 69 of the CoC.

Also in such an event:

- The other party may make payment to maintain operation of the DRB and recover such payment and associated cost.
- The board member may suspend his services until payment is made or resign his appointment.

Compensation would be as follows:

- Monthly retainer for:
  - Being available for 49 days notice or hearings, site visits, etc.
  - Keeping files and becoming and remaining up to date with project developments
  - Office and overhead expenses (secretarial services, copying, telephone, fax, stationary, etc.)
  - All other services to be performed except those hereunder

  The monthly retainer shall reduce to one half after issuing of the Taking Over Certificate and to nil after the issuing of the Defects Liability Certificate
- Daily fee
  - Maximum of three days travel to and from site
  - Each day on official visit, meetings, hearings or preparation of recommendations

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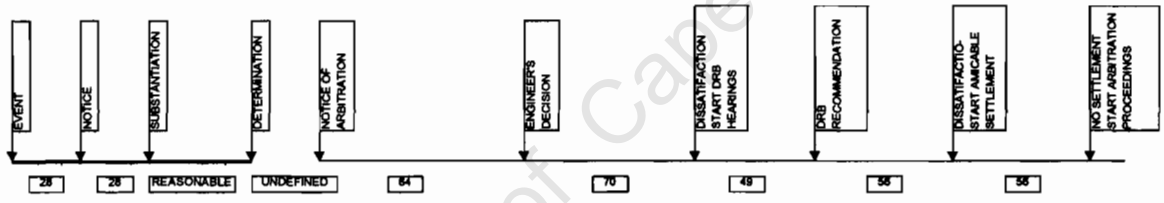
> Each day spent reading the parties' submissions in preparation for a hearing

- Expenses - reasonable and necessary travel expenses, to be paid in the currency of the fees
- Escalation – retainer and fees to be fixed for the initial twelve month term, whereafter it may be adjusted by mutual agreement between the DRB and the parties, on the basis of the CPI for the country of currency of payment.

7.7.4 Event Sequence

The provisions of the FIDIC 4th edition, as amended for Projects E, are presented in timeline format hereunder. In the timeline, for purposes of illustration, the event giving rise to the dispute has been taken to be a claim.

Figure 6 : Projects E Dispute Resolution Event Sequence



7.8 Project F

7.8.1 Project Description

The project consists of:

a) River diversion works consisting of diversion tunnels (8 m x 7 m and 8 m x 9 m in cross section and 410 m long) and upstream and downstream coffer dams 15 m high.

b) Concrete intake works consisting of a 12 m internal diameter and 102 m high tower and shaft., an access bridge and bifurcation of the outlet tunnel.

c) Mechanical and electrical equipment

d) Main dam a clay core rockfill dam, 750 m long at the crest by 113 m high.

e) A clay core rockfill saddle dam 300 m long and 15 m high

f) Concrete spillway, chute and deflector bucket and road bridge along the top of the spillway consisting (9 No x 25 m spans).

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g) A power station, access areas and anciallary works. 2 No x 19MW hydroelectric turbines, generators, valves and associated electrical work

h) Commissioning of the Works at various stages and on completion and remedying of Defects in the Works.

i) The operation and / or maintenance of various facilities during the period of construction.

The construction contract value is approximately equivalent R 430,000,000 (2001).

The CoC for the project was the FIDIC 4th edition 'Red Book', reprinted 1992 with further amendments.

The event sequence for the dispute resolution process for the project, involving a DRB, is presented in Figure 7 below.

7.8.2 DAB Provisions in the Contract

The contract provides for dispute resolution by DAB and these provisions are as described hereunder.

The procedure adopted for this project is that provided for in the 1996 supplement to the FIDIC 4th edition 'Red Book', Section A for the implementation of a DAB. The FIDIC c 67 Particular Conditions of Application amendments to allow for the DAB are included in ANNEXURE I. These conditions were generally included *verbatim* except for the following:

- The DAB shall comprise three suitably qualified persons as members.
- The DAB will not be empowered to act unless the party referring the dispute provides the following documents:
  - Written opinion, instruction, determination, certificate or valuation of the Engineer.
  - The party's written objection to such opinion, instruction, determination, certificate or valuation of the Engineer.
  - The Engineer's written response to such objection.
  - Written definition by the party of the dispute
- In proceedings before an arbitrator(s) the parties shall be limited to the evidence or arguments previously put before the DAB. FIDIC provides that the parties shall not be limited.

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Some specific features of the c 67 amendments are:

- The Employer, Contractor and Engineer must give effect forthwith to a decision by the DAB
- Arbitration may not commence unless a notice of dissatisfaction with the DAB decision (or lack thereof) is given within 28 days
- Arbitration may not commence until after a 56 day amicable settlement period (even in the absence of an amicable settlement attempt)
- DAB decisions shall be admissible as evidence in any arbitration.
- If a party fails to comply with a decision of the DAB which has become final and binding, such failure itself may be taken to arbitration, and not be subject to the amicable settlement restriction.
- Disputes after the expiration of the DAB appointment shall be settled by arbitration.
- Provision is made in the Appendix to Tender for the number of arbitrators and the place and language for arbitration.

The appointment, rules of proceedings and remuneration of the DRB did not form part of the contract. Instead, in the memorandum of understanding (MOU) it was stated:

'*The disputes procedures are to be clarified as follows:*

- *The terms of appointment of the DAB will be agreed between the parties.*
- *Time constraints on procedures preparatory to reference to the DAB will be established by mutual agreement.*
- *The process of Amicable Settlement will continue to apply in the event of the dissolution of the DAB.* [the amicable settlement process is thus not tied to the existence of the DAB]
- *The requirement for three arbitrators is deleted and replaced by: One or more arbitrators will be appointed in the event of a dispute proceeding to arbitration. Refer to Clause 67.4 – Arbitration" of the Particular Conditions of Contract as amended*'.

a) Appointment and Composition

In the Appendix to Tender and in the CoC provision is made for:

- Three DAB members

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- DAB members to be appointed by the President of FIDIC, or a person appointed by him, in the event that the parties cannot agree on the appointment of the members.

b) Operation

The agreement places procedural constraints on the party wishing to approach the DAB.

c) Decision

In arbitration the parties are confined to the documents and arguments previously placed before the DAB.

d) Compensation

It is instructive to note that the default fee in the absence of agreement is that for arbitrator's as established by the ICSID. As all the DAB members are from neighbouring South Africa, the agreed remuneration is less.

7.8.3 DAB Terms of Appointment

a) The Agreement

Soon after the commencement the contract, a DAB agreement was entered into by the parties and the DAB members. The agreement is termed '*Terms of Appointment for a Dispute Adjudication Board*'. The agreement is modelled on the 1996 supplement to the FIDIC 4th edition 'Red Book', Section A model terms with the same name. The 1996 FIDIC model terms are enclosed as ANNEXURE K.

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These provisions were generally included *verbatim* except for the following:

- C 2 – The agreement shall take effect when each of the members have executed the agreement, instead of when the last of the three members has executed the agreement.
- C 3 – The prior involvement of two DRB members with their appointing party is acknowledged.
- C 6 – The monthly retainer has not been reduced to 50% after the issue of the Taking Over Certificate.
- C 6 – The daily fee has been changed to an hourly rate.

Some specific features of the agreement are:

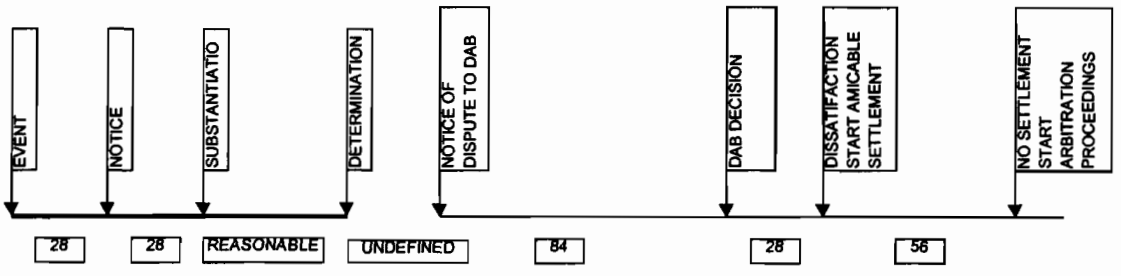
- Sc 1 b) – DAB resignation notice, as 'reasonable time'
- Sc 4 e) – The DAB members shall be available to give advice and opinions in conjunction with other members of the DAB on any matter relevant to the project not being a dispute, when requested to do so by the parties.
- The notice period for availability for site visits and hearings is 28 days (compare with 49 days on the other projects)
- Appendix A c 5 provides that hearings are at the discretion of the DAB.
- Appendix A c 5 provides that the DAB shall act as a panel of impartial experts and not arbitrators.
- Appendix A c 5 empowers the DAB to adopt an inquisitorial procedure and refuse admission to hearings or audience at hearings, other than the parties and the Engineer
- Appendix A c 5 allows the DAB to proceed with two members in the absence of one.

The agreement does not include a set procedure for the conduct of the hearings, nor for the time for submission of arguments and documents. Also the sequence and types of statements and responses are not detailed.

7.8.4 Event Sequence

The provisions of the FIDIC 4th edition, as amended for Project F, are presented in timeline format hereunder. In the timeline, for purposes of illustration, the event giving rise to the dispute has been taken to be a claim.

Figure 7 : Project F Dispute Resolution Event Sequence



7.9 Smaller Projects

Information on other smaller projects were also obtained but not to the same detail as for the above projects. This information is presented hereunder.

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7.9.1 Project G

The project consists of a double curvature arch concrete dam some 72 m high. The construction contract value is equivalent R 90,000,000.

It was agreed some time after the commencement of the contract to implement a DRB to deal with disputes which could not be resolved by the parties themselves. The contract used the 'Blue Book' General Conditions of Contract 1990. This GCC provides for dispute resolution by mediation (following an Engineer's decision) followed by arbitration. It was found that mediation did not achieve resolution of the disputes and it was replaced with a DRB.

The DRB recommendations were non-binding which reportedly led to some frustration.

7.9.2 Project H

The project consists of an embankment dam some 60 m high. The construction contract value is equivalent R 280,000,000.

It was agreed some time after the commencement of the contract to implement a DRB to deal with disputes which could not be resolved by the parties themselves. The contract used the 'Blue Book' General Conditions of Contract 1990. This GCC provides for dispute resolution by mediation (following an Engineer's decision) followed by arbitration. However, in this case the GCC was amended to allow litigation to follow mediation. The parties considered that mediation would not achieve resolution of the disputes and it was replaced with a DRB.

An interesting feature of the DRB agreement is that should the recommendation of the DRB be wholly in the favour of the defendant, then the claimant would pay the DRB cost. Otherwise the cost of the DRB would be shared equally between the parties.

7.10 Comparative Summary of DB Provisions

A comparative summary of DB provisions are enclosed as ANNEXURE C.

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7.11 Essential Differences in DB Approaches

The essential differences (from a principle point of view) in the DB approaches used on the projects under consideration were identified. These are summarised in Table 10 hereunder.

Table 10 : Essential Differences in DB Approaches

	Process Type	Time of Appointment	Included in Tender Documents	Decision/ Recommendation
Project A	Consultative	Early	No	Non-binding
Projects B, C and D	Amicable settlement	Late	No	Non-binding
Projects E	Adjudication	Early to late	Yes	Non-binding
Project F	Adjudication	On commencement	Yes	Binding

The above is apparent from the CoC and the DB agreements. The process type is primarily apparent from the DB agreement but also from where it appears in the dispute resolution process (see event sequence timelines).

7.12 Section Summary and Conclusion

In this section the analysis of the following aspects of eight projects are described:

- Project scope
- DB Contract Provisions (Dispute Resolution Agreement)
- DB Agreement and procedural aspects
- Dispute resolution event sequence

The DB approaches were summarised identifying the essential differences between the approaches.

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8. ASSESSMENT OF DB DECISIONS / RECOMMENDATIONS

8.1 Section Introduction

The purpose of this section is to assess how the DB decisions/recommendations assessed compare with recommendations and requirements in this regard and whether the recommendations have achieved its purpose, *viz*:

- To provide the reasoning for the DB's recommendations
- To provide a 'tool' for settlement negotiations
- Acceptance by the parties

It is not intended to asses the accuracy of the recommendation as it would be inappropriate to render an opinion without the benefit of all documentation (eg. statements of case and defence) and attendance at the hearings. Such an exercise would be time consuming and is outside the scope of this dissertation.

Due to the sensitivity of DB recommendations and the view that is held by some that the DRB process is that of mediation (details of recommendation/agreement not made known), the detailed analyses of the decisions/recommendations are not included in this report. The results of the assessment are presented in general terms.

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8.2 Assessment Criteria

The guidelines for DRB recommendations presented in TCCP of UTRC (1991:67) and the Construction Dispute Review Board Manual (Matyas, *et al*, 1996:141) were considered. Also considered were the DB agreement recommendation requirements for Project E and better practice for reasoned arbitration awards. Some of the above guidelines are presented in ANNEXURE P.

From the various guidelines referred to above assessment criteria were established. These are summarised in Table 11 hereunder. Inherent also in a DRB recommendation would be how the DRB perceives it role, e.g. that of mediator or that of adjudicator.

Table 11 : Summary of Assessment Criteria

1. Contract references: ➢ Name, Number and date of contract ➢ Number, title of dispute
2. Description of contract background relevant to the dispute
3. Description of Dispute - Summary description of facts giving rise to the dispute – recitals
4. Statement(s) of dispute ➢ Contractor's position > Full description as presented > Basis for each claim - Identify allegations of fact - Identify contentions of law/contract - Applicability of referenced precedence judgements > Responses > Relief requested ➢ Employer's position > Full description as presented > Basis for each claim - Allegations of fact - Contentions of law/contract - Applicability of referenced precedence judgements > Responses > Relief requested (counterclaims)
5. Recommendations – specific and consistent with analysis and findings
6. Analysis and Findings ➢ Allegation of facts and evidence > Allegation of facts and evidence accepted/rejected – with reasons > Applicability of referenced precedence judgements accepted/rejected – with reasons ➢ Contentions of law/contract - Findings on merits of each contention ➢ Quantification (or principles thereof) of relief for each contention ➢ Reasoning (analysis and justification) supporting the recommendation ➢ Questions for clarification and responses to be noted ➢ Documentation reviewed to be referenced ➢ References to all contractual, statutory, or other applicable authority relied upon by the DB in making its findings and recommendations.
7. Dissenting Opinion – reasons for dissent
8. Certification – agreement of relevant members with findings or otherwise

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8.3 Qualitative Assessment

Some 15 recommendations/decisions were assessed in detail. Summaries of the assessment results are presented under the assessment headings hereunder.

8.3.1 Contract References

The name and number of the contracts were generally stated. The numbers and titles of the disputes were generally stated.

8.3.2 Description of Relevant Contract Background

The relevant contract background was never stated.

8.3.3 Description of Dispute

Summary descriptions of facts giving rise to the dispute were given in some instances but were not always clear. Generally reference was made to the statements of case.

8.3.4 Statement(s) of Dispute

a) Positions of the Parties

i) Full description as presented

Salient points were generally presented. The cases as presented by the parties were described only in summary.

ii) Basis for each claim

Allegations of fact and contentions of law/contract (contractual basis) were generally not presented clearly or not in sufficient detail. In some cases it was noted in the recommendation that the contractual basis had specifically been omitted.

iii) Responses

Responses of the parties to each other's statements of case were not stated. These are most probably incorporated in the relevant statements of case, except for those presented at the hearings.

iv) Relief Requested

Often the relief requested was described in qualitative (in principle) rather than quantitative terms.

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8.3.5 Recommendations

Recommendations were generally specific and consistent with analysis and findings. Often the reasoning for recommendations appeared not to be based on the provisions of the contract or law. The reasons were often given as being reasonable or equitable to achieve an amicable settlement.

In one case relief was recommended which exceeded that sought by the claimant.

Often a DB would change the format and level of detail of its recommendations.

In some instances recommendations were made on issues not raised as contentions.

8.3.6 Analysis and Findings

Reasoning for the acceptance/rejection of allegations of fact and contentions of law/contract were not always clearly stated.

Findings on the merits of each contention of law/contract were often either not stated or not clearly stated.

Often the quantification of relief for each contention was on a principle basis, for the parties to carry out the detailed calculations.

Only one DB always stated the questions put to the parties for clarification and their responses.

Only one DB always specifically stated the documentation reviewed.

In only one recommendation was there reference made to contract law principles. No reference was made to precedence case law in any of the recommendations.

Except in one instance, no dissenting opinions were noted.

All but one recommendations were signed but none contained certification that the members agreed with the findings or otherwise.

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8.4 Quantitative Analysis

A quantitative analysis was undertaken of some 19 decisions/recommendations as follows:

- Amounts of extensions of time and additional payment claimed and value recommended
- Who the disputes were declared by
- In who's favour the decisions/recommendations were
- Who accepted/rejected the decisions/recommendations

The results of the analysis are presented in Table 12 and in Table 13 hereunder.

Table 12 : Summary of Quantitative Analysis of Decisions/Recommendations

	Initiated By	For	Partially	Accepted/ Settled	Rejected
Employer	0	3	9	16	3
Contractor	19	7		14	5

The table indicates that the Contractor initiated the reference to the DB in each case and that the decisions were generally in the favour (see also Table 13 hereunder) of the Contractors. It also shows that the majority of recommendations were either accepted or the dispute was settled after the recommendation was made, with the Contractors rejecting more recommendations than the Employers. Some 26% of disputes were not resolved at the time of writing. One of the disputes was ongoing at the time with the other four already referred to arbitration. Thus, 21% of disputes could definitely not be resolved by involving a DB.

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Table 13 : Summary of Quantitative Analysis of Decisions/Recommendations; Total Amounts

	Claimed	Engineer's Decision	DRB Recommendation
Additional Payment (Rand equivalent)	277,000,000	25,000,000	116,000,000
Extension of time (days)	768	39	402

It is of interest to note that the midway between the Engineers' decisions and the amounts claimed totals 126,000,00 equivalent Rands. If the amount of the Engineer's decision is added, the 50/50 compromise position would be 151,000,000 equivalent Rands, whereas

the DB' decisions/recommendations totals 116,000,000 equivalent Rands. The DB decisions/recommendations are some 77% of the 50/50 compromise position. The proximity of the amounts could be pure coincidence or it could be indicative of a propensity for a DB to 'split the difference', like Ulysses steering a middle course between the two extremes of Scylla on the one side and Charybdis on the other (Butler and Finsen, 1993:256).

For extensions of time the equivalent figures are 404 days compared with 402 days granted. With respect to delays the DB decisions/recommendations are 100% of 50/50.

Unfortunately the database (19 values) is too small to make conclusive deductions.

8.5 Achievement of Recommendation Objectives

Whether the DB decisions/recommendations have achieved the purpose stated in Section 8.1, are considered hereunder:

a) To provide the reasoning for the DB's decision/recommendation

Although reasoning is generally provided, it was often not stated on which provisions of the contract or law it was based. This purpose was not entirely achieved.

b) To provide a 'tool' for settlement negotiations

Out of 19 disputes referred to the DB 14 were settled. However, the settlements were not all strictly according to the recommendations of the DB. This purpose was generally achieved.

c) Acceptance by the parties

As stated above, although 14 of the 19 referred disputes were settled, the settlements were not all based on the recommendation of the DB. This purpose was not entirely achieved.

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8.5.1 Observations

It is instructive to note that:

- On one occasion the DB refrained to make a recommendation on the basis that the matter was not sufficiently developed, and on another due to the insufficiency of arguments presented.*
- In the recommendations the reasoning for the statements by the parties and the DB were not always readily apparent
- In one instance the DB stated it's annoyance with one of the Employer's statements, apparently designed to influence the deliberations of the DB.
- In some instances the DRB stated that certain considerations have been presented to assist the parties in their consideration of the way forward, thus giving the impression that finality has not been achieved.
- In one instance the DB chose not to give a clear recommendation on certain issues as it felt that the matters had not been sufficiently developed and argued.* One would expect a recommendation of an invalid claim in the absence of the claimant being able to prove his claim on the balance of probabilities. The DRB made the point that the DRB is still an amicable way of resolving disputes.
- In some instances certain aspects of relevant contract documentation were criticised by the DRB.

*(compare this to the Engineer that has to make a determination or give a decision, irrespective of the quality and completeness of a claim – see *Compagnie Interafricaine de Travaux v South African Transport Services* [1991][17]).

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8.6 Section Summary and Conclusion

From the assessment the following was concluded:

- The recommendations generally relied heavily on reference to the statements of case and other documentation for detail. Consequently insufficient detail was presented in the recommendations to fully appreciate:
  - The contractual positions of the parties
  - The contentions of contract and law
  - The allegations of fact
  - The evidence presented

[17] (4) SA 217 (A)

- The recommendations generally did not clearly state the contractual/legal basis for the recommendations. Also the allegations of fact and contentions of law by the parties were not always specifically dealt with. Consequently insufficient detail was presented in the recommendations to fully appreciate:
  - Which allegations of fact and contentions of contract and law were accepted and which were rejected.
  - The reasons for such acceptance and rejection.
- The lack of reference to contract law principles, precedence cases and reasoned recommendations based on the provisions of the contract, indicate that the DB tended to operate on a settlement rather than a rights (adjudicatory) basis.
- The DB generally considered itself as part of the amicable settlement process as:
  - Many references were found to equitable, reasonable and amicable settlement. An apparent distinction between adjudication and settlement was evident.
  - In one instance it is stated in the recommendation that it is a recommendation for the parties to amicably resolve their differences (thus indicating amicable settlement).
  - The DB stated its role as making a recommendation on the basis of engineering practice and contract management.
  - The DB stated that it applied its experience and judgement in order to reach equitable recommendations.
  - The DB stated that a certain quantification analysis is considered 'reasonable'
  - The DB stated its responsibility to make an independent, impartial recommendation for the resolution of a dispute. It must rely, inter alia, upon its professional judgement as to what is reasonable and what will best serve the interest of the parties.
- Some recommendations appeared to be outside the authority of the relevant DB. The DB considered positions other than the contentions made by the parties and made recommendations which were not based on the provisions of the contract. However, this may be a question of interpretation of the brief of the DB. In the preamble to a DB agreement reviewed it is stated that the parties are obliged to settle disputes amicably and that they wish to minimise time, effort and cost necessary to resolve disputes and that the DB is a means of achieving such objective. It is not clearly stated whether the DB has a adjudication or settlement (or a combined) role to play.

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- There appeared to be little evaluation or investigation into proof of evidence with some DB tending to take evidence/assertions on face value, unless disputed by the other party, resulting in the shifting of the burden of proof.

From a quantitative analysis of disputes referred to the DB and the outcomes of the process, it was established that:

- The Contractors initiated the reference to the DB in each case.
- The DB decisions were generally in the favour of the Contractors.
- The majority of recommendations were either accepted or the dispute was settled after the recommendation was made.
- Contractors rejected more recommendations than the Employers.
- Definitely 21% of disputes could not be resolved by involving a DB.

It was established in connection with the purpose of DB decisions/recommendations stated in Section 8.1:

a) To provide the reasoning for the DB's decision/recommendation - This purpose was not entirely achieved.

b) To provide a 'tool' for settlement negotiations - This purpose was generally achieved.

c) Acceptance by the parties - This purpose was not entirely achieved.

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9. ANALYSIS OF QUESTIONNAIRE RESPONSE RESULTS

9.1 Section Introduction

The questionnaire used is presented in ANNEXURE A. The responses are analysed in this section.

9.2 Response Ratio

Questionnaires were sent out and responses received as presented in Table 14 hereunder.

Table 14 : Distribution of Target Group and Questionnaire Responses

	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total
Sent	11	4	9	8	7	39
Responded	4	3	3	5	7	22
Ratio	36%	75%	33%	63%	100%	56%

It is evident from Table 14 that the response ratio was 56% with the DB members being the most responsive. Besides the first request for responses, at least one reminder for outstanding responses was sent and in some cases a further follow-up was done by telephone.

Employer response was disappointing especially as employers with previous DB exposure were specifically targeted.

It was difficult to find contractors with DB experience. Those that were identified generally responded. It is concluded that where local construction firms are involved in large projects with DB, it is often as joint venture members with the overseas partners dealing with the contractual aspects.

As far as the legal consultants are concerned, claim consultants were targeted specifically, the theory being that if there is anyone in the legal profession with DB experience/knowledge it would be them. However, the response was low from which is concluded that claims consultants in Southern Africa has little experience and knowledge of DB.

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The response from engineering consultants was reasonable.

A 100% response was received from DB members clearly being confident to respond and desirous to further the cause of DB.

A number of the respondents are people with extensive overseas experience.

A test as to possible bias resulting from high and low responses from specific groups revealed that a maximum of 2 % bias could be introduced. This is considered insignificant and the responses of the different groups were consequently not weighted to prevent any bias.

9.3 Personal Experience with DB

The personal experiences of the respondents with DB are presented in Table 15 hereunder.

Table 15 : Respondents' Experience with DB

	Project Value*			Involvement				
	V<50 U$	50<V< 100 U$	V>100+ U$	Counsel	DB Member	Drafting of Clauses	Contractor	Other
No	10	15	48	4	33	12	9	38
%	14%	21%	65%	4%	35%	13%	9%	39 %

*Note: V=value in year of the project, Contract Price plus contigencies and escalation
A substantial number of the projects were from outside Southern Africa and many projects were common among respondents

It is clear from the table that the respondents have experience of a number of large projects.

Type of projects included:

- Civil
- Civil and Building
- Civil and Electrical and Mechanical
- Civil and Operating

The civil projects included:

- Dams

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- Roads
- Tunnels
- Light rails
- Railways
- Airports
- Power plants

Years of projects ranged from 1988 to 2001.

Project values ranged up to US$12 billion for projects outside of Southern Africa and approximately US$1 billion for the largest Southern African project.

9.4 Where Does DB Fit?

The question posed was:

'*To which ADR process do you consider the indicated type of DB to be the closest (mark box with x)*'

The respondents' opinions of which ADR process a DAB and a DRB is the closest to are summarised in Table 16 and Table 17 respectively hereunder.

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Table 16 : Summary of Reponses Regarding DAB and ADR

ADR Process	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total	%
Mediation	1			1		2	10%
Arbitration		1			1	2	10%
Med-arb	2		1			3	15%
Neutral expert fact finding	1					1	5%
Conciliation							
Adjudication	2		1	4	5	12	60%
Other (state)							

The majority of respondents were of the opinion that the DAB is the closest to an adjudicatory process (arbitration/adjudication – 70%). From the literature survey and analyses the author concurs with this opinion. It is concluded that those in the industry with knowledge of DB are generally clear on where the DAB fits as an ADR process.

Table 17 : Summary of Reponses Regarding DRB and ADR

ADR Process	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total	%
Mediation		1	1	4	2	8	34%
Arbitration	1				1	2	9%
Med-arb							
Neutral expert fact finding	1					1	4%
Conciliation	3				2	5	22%
Adjudication	1		1	2	1	5	22%
Other (state)		1			1	2	9%

From the table it is evident that those in the industry with knowledge of DB have divergent opinions as to where the DRB fits as an ADR process. This conclusion is supported by the findings from the literature survey and interview results.

The trend is towards a settlement (mediatory/conciliatory - 56%) role.

The response from a experienced and senior DB member indicated that he clearly considered the DRB as a part of the amicable settlement process. He specifically referred to amicable '*negotiations*'.

9.5 Reasons for Using/Not Using DB

9.5.1 Reasons for Using DB

The responses regarding the principle reasons for using DB are summarised in Table 18 hereunder.

Table 18 : Reasons for Using DB on Projects

Reason	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total	%
Simply followed the standard form of contract **which had** DB provision		1		5	3	9	15%
Funding agent requirement to use	3			2	10	15	25%
Not satisfied with standard form of contract dispute resolution mechanism	7	1	1	5	6	20	32%
Want to be in forefront of new developments				2	3	5	8%
Other	9				3	12	20%

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The table reveals that the most prominent reasons for using a DB are dissatisfaction with the existing (at the time) standard form contract dispute resolution mechanisms and funding agent requirements. From the literature survey it is concluded that funding agent requirements are also a result of dissatisfaction with the existing (at the time) standard form contract dispute resolution mechanisms.

Other reasons put forward for the use of DB on certain projects were:

- Possibly North-American influence
- A natural development of the mediation era
- Far east bent towards ADR
- World Bank support and funding of DB
- Avoiding arbitration
- Reducing cost if dispute proceeds to arbitration
- The relevant employer (government) lacks contractual capacity and looks towards the DB to avoid disputes
- Possibly to minimise cross border disputes
- Possibly a follow-on from recent large projects in the sub-region

Funding agents requiring inclusion of DB were given as:

- World Bank
- Various Export Credit Agencies
- European Community

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9.5.2 Reasons for Not Using DB

The responses regarding the principle reasons for not using DB are summarised in Table 19 hereunder.

Table 19 : Reasons for Not Using DB on Projects

Reason	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total	%
Simply followed the standard form of contract which **did not have** DB provision	5	3		3	3	14	48%
Funding agent requirement **not** to use							
Satisfied with standard form of contract dispute resolution mechanism				6		6	21%
Do not want to be in forefront of new developments – 'wait and see'							
Habit and custom	1			2	3	6	21%
Other	2	1				3	10%

The table reveals that the major reason put forward for not using a DB is that a standard form of contract, which do not have a DB provision, is simply followed. Habit and custom are also part of this.

Other reasons given for not using a DB were:

- Employer resistance, either budget or pride induced
- The Engineer is there to deal with matters so there is no need to pay for a DB on top

9.6 Perceptions of DB

9.6.1 Principle of Dispute Adjudication Board

The question posed was:

'*What is your opinion on the principle of a Dispute Adjudication Board as contained in the latest version of the FIDIC standard form of contract?*'

Some of the opinions offered by the respondents are presented ANNEXURE B.

It is apparent that the opinions range from support for the principle, to '*we will have to live with it*' and '*international conditions are not best suited for local conditions*'.

Reasons given in support include:

- Possibly producing more finalities.
- DAB encourages the parties to settle their disputes amicably.

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- The DAB removes the onus of adjudication of disputes from the Engineer and hence is probably more transparent and fair.
- It works to stop disputes to go to arbitration.
- Relief to Engineer.
- Impartiality.
- Formality.
- Accelerates the claims resolution process.
- It enables a Contractor to obtain some payment at an earlier time without the costs and delay due to arbitration.

Concerns expressed include:

- The reason that DB have been adopted, which is the acceptance that engineers lack the integrity to be independent and impartial, will be ultimately damaging to the administration of contracts.
- International conditions are not best suited for local conditions.
- The DAB tends to encroach on the role and effectiveness of the Engineer. The Engineer has a role under the contract and the removal of the Clause 67 decision function is not a complete answer. If one wishes to remove all contractual responsibility from the Engineer one must re-write the contract and appoint a separate contractual adjudicator.
- There may be possible abuse of the board.
- DAB are too rigid. More discussions with board required.
- Removes Engineer's interest.
- Even trivialities may be referred.
- Cavalier approach by the DAB, decisions on first impressions.
- Swayed by personalities.
- Akin to arbitration.
- Insufficient time for proper attention.
- The Engineer's authority is limited, his position watered down and his status drastically reduced.
- It is an opportunity to quickly get rid of a well informed Engineer's opinion and seek a binding decision from a DAB, who do not know the facts as well as the Engineer.
- A DAB is more open to manipulation by Contractors.

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- It would be necessary for a DAB to live very closely to the contract from the start and this may impose an additional administrative and cost burden on the contract.

9.6.2 Principle of Dispute Review Board

The question posed was:

'*What is your opinion on the principle of a Dispute Review Board with a non-binding recommendation?*'

Some of the opinions offered by the respondents are presented ANNEXURE B.

Reasons given in support of the concept include:

- The parties are more likely to agree after they have heard the view of the independent DRB.
- The non-binding recommendation gives the parties a tool for settlement negotiations without the fear of the 'immediately binding' status.
- A good quality recommendation would result in neither party seeing any merit in proceeding further.
- Earlier and less expensive resolution of disputes before the formal arbitration process.
- It is convenient for a client, who handles public money, to have a DRB recommendation which can be used as justification to settle a dispute without costly arbitration.
- If necessary the Employer and/or Contractor have the opportunity to not accept the recommendation.

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Concerns expressed include:

- The DRB recommendation is often toothless if the Employer chooses to ignore it.
- Not very helpful other than allowing 'hard headed' opinions to soften.
- When a DRB reference follows the amicable settlement period the dispute proceedings are unduly prolonged.
- If some of the board members are not legally trained individuals, one will always have a greater chance of a non-contractual decision by the board.
- If very formal it tends to an arbitral process, probably at a higher cost.
- The DRB tends to mediate and not rule on the facts in keeping with the provisions of the contract and law.

- The DRB does not always keep up to date with the latest thinking of the parties.
- Non-binding recommendations cause frustration.
- Only in 50% of cases it worked. In the other cases it was a waste of money and time.

Some observations made by the respondents are:

- Success dependant on integrity and mix of expertise, nature.
- Success dependant on dedication, thoroughness, understanding of issues.
- Success dependant on frequency of visits and time allowance.
- The DRB must make a ruling on the facts before them and not try to quantify a possible solution or opt for the least controversial ruling.
- The Recommendation should be non-binding. The concept signed up to by the parties is that the DRB is part of the amicable settlement attempt process, with the Board to put forward recommendations based on principles which the Board feels should assist the parties to reach a settlement, and so avoid the drastic step of (binding) arbitration.

9.6.3 Impartiality of DB

The question posed was:

'*Do you consider Dispute Boards to be impartial? (Yes/No with reason)*'

The responses to the question are summarised in Table 20 hereunder.

Table 20 : Summary of Responses Regarding DB Impartiality

	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total	%
Yes	1	2	2	4	6	16	80%
No	3			1	1	4	20%

All groups generally considered DB to be impartial except the employer group which considered the DB not to be impartial.

Some of the motivations for their answers by the respondents are presented in ANNEXURE B.

Reasons given in support of impartial DB include:

- Personal experience points to impartiality.

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- The process of appointment of Board members prevents potentially partial members from being appointed.
- Because of professionalism.
- Because fees/remuneration do not relate to decisions.
- Board members are usually selected from individuals who have no affiliation or interest in the parties to the contract, and are required to be impartial.
- Anyone with a reputation of having been biased is unlikely to be asked to join a Board

Concerns expressed include:

- Parties try to select members to act as their advocate.
- There is either a conscious or unconscious proclivity towards mediation, automatically resulting in a built in bias towards the claimant, who is usually the Contractor.
- Partiality is a breach only of the DB personal contracts and not the construction contract.
- The preferred choice of a claims conscious party would be a person who has a history of 'mediation' recommendations rather than a history of impartial adjudications.
- The potentially biggest employers of DB members are contractors.
- The recommendations of DRB tend to favour the contractors.
- A board member's future appointment is more likely to be by a contractor.
- Since the Employer and Contractor each choose their candidate the degree of impartiality is in question.
- Some DRB members may have a leniency to be more sympathetic to contractors.

9.6.4 Value for Money

The question posed was:

'*Do you consider Dispute Boards to provide value for money? (Yes/No with reason)*'

The responses to the question are summarised in Table 21 hereunder.

Table 21 : Summary of Responses Regarding DB Value for Money

	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total	%
Yes	2	2	2	3	6	15	71%
No	3			2	1	6	29%

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The general opinion was that DB provide value for money. The employer and engineering consultants groups were split on this issue with 50% saying they do provide value for money and 50% saying they do not.

Some of the motivations for their answers by the respondents are presented in ANNEXURE B.

Reasons given in support of DB being value for money include:

- A fraction of the cost of even one medium arbitration.
- Clear-cut reduction in claims.
- Disputes are settled soon after they occur thereby precluding expensive litigation procedures.
- Long term tender prices would reduce as contractors do not have to price for the risk of unfair engineers/employers.
- When a DRB is involved it does put additional pressure on both the Contractor and Engineer to evaluate and present claims and evaluations more accurately.
- Results in fair overall settlements without going to court.

Concerns expressed include:

- The driving force of DRB is that an agreement is reached rather than an unequivocal decision on contractual right or wrong given.
- Too much 'mediation', 'split the difference' or 'the contractor has failed to substantiate his case so we will make a cartload of assumptions to make it for him' approach.
- The lack of clear reasoning and the presence of personal views of 'equity'.
- Must be operated under controlled procedures.
- Recent trends to adopt high fee structures in Southern Africa (based on $ allowances) is eroding the concept and turning it into only a business rather than encouraging a professional approach.
- International DRB members are more influenced by their previous experiences with similar contractors and situations than the facts of the particular dispute.

Some observations made by the respondents are:

- If the client is an informed client with the necessary technical and contractual backup a DRB is not necessary.

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- The parties must maintain the good faith shown in accepting a Disputes Board, and use the recommendations to settle.
- It is critical to appoint the right members who are able to make contractually justified impartial recommendations.

9.6.5 Essential Part of Amicable Settlement/Adjudication Process

The question posed was:

'Do you consider Dispute Boards to be an essential part of the amicable settlement/adjudication process? (Yes/No with reason)'

The responses to the question are summarised in Table 22 hereunder.

Table 22 : Summary of Responses on Essentiality of DB

	Employers	Contractors	Legal Consultants	Engineering Consultants	DB Members	Total	%
Yes	1		1	1	3	7	35
No	4	2		4	3	13	65

Some of the motivations for their answers by the respondents are presented in ANNEXURE B.

The table reveals that the respondents were of the opinion that DB are not an essential part of the dispute resolution process. It is instructive to note that the DB member group is split on this issue.

Some opinions of the respondents regarding the essentiality of the DB in the dispute resolution process are:

- Any forum that gets the parties around the table is to be encouraged.
- The Board's recommendation points the direction in which the correct solution lies, and hence the parties tend to abandon insecure positions with the result that settlement becomes more achievable.
- The very existence of Dispute Boards encourage the Parties to the contract to settle amicably their disputes without recourse to expensive options such as arbitration or litigation.
- It is reality that disputes would arise on large value contracts and in such situations the DB would contribute positively to the resolution of these disputes.

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- DB are only required in the case of unreasonable parties or an unsophisticated Employer or weak Engineer.
- A government/public body would feel more comfortable to settle with the support of a DRB recommendation.
- With proper attitudes of the parties and effective leadership, amicable settlement is achievable.
- Many engineers do an effective job of adjudicating impartially and strive to achieve proper contractual settlements. A good DB will / should enhance the process once this falls apart.
- If the client is an informed client with the necessary technical and contractual backup a DRB is not necessary.
- A fatal flaw common to many DRB, mediators and arbitrators is that they are loath to reject nonsensical claims of the Contractor. A DRB (etc) should not give the impression that it pays the Contractor to take disputes further because he is always likely to get something. Some claims deserve to be thrown out completely.

9.7 Section Summary and Conclusion

The response ratio for the questionnaire was 56% with the DB members being the most responsive.

From the responses the following was concluded:

- The respondents have experience of a number of large projects.
- The majority of respondents were of the opinion that the DAB is the closest to an adjudicatory process (arbitration/adjudication – 70%). Those in the industry with knowledge of DB are clear on where the DAB fits as an ADR process.
- Those in the industry with knowledge of DB have divergent opinions as to where the DRB fits as an ADR process. This was prevalent even among experienced DRB members.
- The most prominent reasons for using a DB are dissatisfaction with the existing (at the time) standard form contract dispute resolution mechanisms and funding agent requirements.
- The major reason put forward for not using a DB is that a standard form of contract, which does not have a DB provision, is simply followed.

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- All groups generally considered DB to be impartial except the employer group which considered the DB not to be impartial.
- The general opinion was that DB provide value for money. The employer and engineering consultants groups were split on this issue with 50% saying they do and 50% saying they do not.
- Respondents were of the opinion that DB are not an essential part of the dispute resolution process.

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10. RESULTS OF INTERVIEWS

10.1 Section Introduction

The author was fortunate to be able to interview persons that have been and are intimately involved with DB. The salient views that surfaced during the interviews are summarised hereunder:

Interviews were conducted in Johannesburg, Pretoria and Lesotho. The persons interviewed were:

- A consulting civil engineer
- A legal consultant and DRB member
- DRB members

Informal ad hoc discussions were also held with persons from employer organisations.

Some questions were prepared before the interviews, with some being specific to the affiliation of the person that was being interviewed. However, the interviews did not rigidly follow the questions and the discussions developed around the responses. The questions are summarised in ANNEXURE A.

The detailed notes of the interviews are not contained in this report.

10.2 Summary of Opinions

Salient opinions from the interview are presented hereunder.

10.2.1 Role and Authority of the DB

- A DRB has a dual role to play
  - Pre-dispute as 'sounding board' for the Engineer, it would
    - Reinforce the independence of the Engineer
    - Bring a broader experience to the process
    - Result in the DRB being well informed of the matter potentially in dispute, in the event that the matter is referred to the DRB.
  - Post-dispute as adjudicatory body
- The DRB is ultimately a consultative process, but it depends on the structure of the project and the personalities involved if a DRB in such a position would work satisfactory.

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- The role of the DRB in the first instance is that of an adjudicator on the allegations of fact and contentions of law/contract placed before it. Secondary it could make recommendations for settlement of the dispute, which would mostly rely on judgement, not necessarily based on any legal/contractual principles.
- The DB is there to adjudicate, the amicable settlement process comes thereafter.
- The DRB differs from Expert Determination (or NEFF) in that it considers the case put before it and does not use its expertise to the same level as the Expert.
- On non-absolute issues the DRB must take a robust approach, and without offending the contract, it must look for a solution.
- If the DRB recognises that a claim exists under a different clause to that being submitted as entitlement, it could enquire, with care, as to whether the parties have considered that avenue. It would obviously have to be done in advance of a statement of case being submitted. In a DAB situation this would not be advisable as it has a binding decision which must be put into effect, immediately.
- Relief in excess of that sought would generally not be recommended. The principles of calculation of the amount would be recommended by the DRB, leaving the parties to do the detailed calculations and arrive at an agreed amount. The parties are in a far better position to do the detailed calculations, having access to detailed information. In the case of a DAB where the board is obliged to decide on the amount, such a decision could generally not result in an amount exceeding the amount claimed.
- Where the DRB makes a robust recommendation on non-absolute issues, claims well in excess of their real value could be counterproductive in determining the amount of any recommendation.
- The DB could only become involved in a mediatory role at the end of the project where some issues remain to be resolved. Then only one of the members should become involved, as mediation by committee is not successful.
- Another approach could be to put the recommendation into Escrow, to be opened when the DB fails to establish an agreement between the parties.
- DRB set the stage for amicable settlement whereas DAB are less amicable.

10.2.2 Industry Sentiment

- Generally Southern-African project participants do not think seriously about disputes before project commencement and consequently do not provide adequately for it.

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- Generally Southern-African project participants do not appreciate the value of a DB and do not see it as an insurance in the event of disputes. DB costs are not budgeted for and the participants are reluctant to commit funds.
- Major international employers and contractors are familiar with the DB concept and supports it.
- Although there is some awareness of DB in the civil engineering construction industry in Southern Africa, this does not exist in the building industry and DB are not used in the building industry. The level of disputes in the building industry are high and the industry would benefit from the introduction of DB.
- There is some disillusionment with the concept given the sensitivity of its success to member choice and the high proportion of recommendations in the favour of the Contractor.

10.2.3 General Observations

- The Engineer is in a more invidious position when it comes to impartiality than a DB member. He may be looking for future work form the Employer, he may be protecting his design, he may be under pressure to support the decisions of his site staff, etc. The DB does not operate under the same constraints.
- The enquiries into DRB have increased substantially in the past year and a half. The enquiries are not so much those under obligation from funding agents or because it is included in the latest FIDIC standard form CoC. It is from those under no obligation, seeking an alternative way of dispute resolution.
- A major advantage of the DB is its regular presence on site where it brings claims into discussion, focussing the parties on the issues and claims management.
- On many projects an early reluctance by the parties towards the DB is experienced, which changes to much improved relations and trust as the project progresses and the DB becomes involved.
- With DAB one would find that legal representation would increase as the parties only have one bite at the cherry before the decision becomes binding and enforceable. With legal representation comes procedural wrangling. The DAB may develop into a pre-arbitral process leaning towards arbitration with a concomitant loss in the DB advantages of cost, time and engineering involvement.
- It does happen that DB refrain from giving a recommendation on the issue put to them.

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- One instance would be that the matter put to them is of such complexity that an expert in the field would have to be appointed, eg. taxation. An interim recommendation would then be for the appointment of the expert and the recommendation of the DB would then be based on the expert's report. The DB would manage the process, including requests for clarification, hearings, etc.
- Another situation which often arises is where the one party does not agree on the basis for the entitlement, makes a case for it and refrains from dealing with the principles of the quantum calculations. In the event that the DB then recognises the basis for the entitlement, there is no argument against the quantum and the DB is left with the argument for quantum calculations from one party only.

- The DRB objective is amicable settlement but with DAB the legal aspect becomes more prominent.
- Personal experience indicates that the presence of a DRB on site leads to a reduction or even elimination of disputes.
- Personal experience indicates that disputes are settled sooner.
- It is human nature to want to 'split the difference' in negotiation.
- There is some reluctance to receive documents in advance of a dispute as the case changes and memory fades.
- The parties start to predict how the DRB would react and settle disputes before it reaches the DRB level. Also then certain claims are withdrawn by the claimant.

10.2.4 Recommendations

- A clear terms of reference for the DB (adjudication or recommendation for settlement) is of primary importance.
- The DB specifications, procedures and rules should form part of the tender documents and contract.
- The DB must be in operation from day one.
- Precedence cases would be quoted in DB recommendation/decision if considered necessary by the members.
- It is recommended the DRB consists of two engineers and one lawyer to bring the legal perspective of interpretation (and procedure if required).
- A DRB is of little use, a DAB which replaces the Engineer post-dispute, is required.

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- Non-binding recommendations cause frustration. Recommendations should be binding based on a strong legal approach.
- It is important to have a good mix of knowledge and background (including legal).
- An alternate member that can step in if a member is lost to the board (resignation, illness, etc.) should be agreed by the parties.

10.3 Section Summary and Conclusion

The following pertinent conclusions are drawn:

- There is general consensus that the DRB, although adjudicating in the first instance, has more discretion in recommending solutions as the recommendation is non-binding and may set the stage for a settlement. A DAB is bound to the letter of the contract and law as their decision is immediately binding and enforceable. The DRB is a 'softer' approach whereas the DAB is a 'harder' approach.
- The DAB approach is in danger of becoming legalistic due to the immediately binding decision. The objectives of reduced cost and time and a solution by engineers would then not be met.
- Clear terms of reference for the DB and early involvement are important.
- In Southern Africa the DB process is not well known and project participants do not budget and consider the probability of disputes in advance.
- There is some disillusionment with the concept given the sensitivity of its success to member choice and the high proportion of recommendations in the favour of the Contractor.

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11. DISPUTE BOARD FUTURE

11.1 Section Introduction

In this section the future of DB in Southern Africa is assessed by considering:

- Developments in the world and in Southern Africa in connection with DB
- Advantages of DB
- Disadvantages of DB
- Success of DB

11.2 Developments

Chapman (2000) contends that DB are set to grow in popularity. He put forward the following reasons:

- Since 1995 the World Bank requires the establishment of DB for projects financially supported by the Bank.
- All three of the new (1999) FIDIC major standard forms contain DB provisions
- The new UK 'Adjudication' Act requires almost all UK construction contracts to contain adjudication clauses. The UK industry considers that, for the larger projects, a DB is preferable to individual adjudicators being required to determine isolated disputes.
- The cost of arbitration and litigation remains high and economic pressures would encourage more economical dispute resolution options.

In Southern Africa a number of large and smaller projects have employed DB. Recently on two projects a DB replaced the mediation provision in the contract during the currency of the contract when the mediation provision proved to be unsatisfactory.

In an interview a DB member stated that enquiries received by him into DB has increased substantially in the past year and a half. The enquiries are not so much from those under obligation from funding agents or because DAB are provided for in the latest FIDIC standard form CoC. The enquiries are from those under no obligation, seeking an alternative way of dispute resolution.

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11.3 Advantages

The advantages of DB listed in Section 5.6 are summarised hereunder.

- Reduction in disputes
- Reduction in cost
- Reduction in time for dispute resolution
- Improved dispute resolution process
- Improved relationships
- Improved chance for acceptance and settlement
- Wide application

11.4 Disadvantages of DB

Arguments against DB are presented in Table 23 hereunder with associated available counter arguments.

Table 23 : Arguments Against DB and Counter Arguments

Arguments Against DB	Counter Arguments
The cost of maintaining a three person tribunal is high.	Lodigiani (1986:502) points out that this cost needs to be offset against savings of not proceeding to arbitration and can be viewed as an 'insurance premium' against the risk of arbitration.
The non-binding recommendation lacks finality.	Even a binding decision lacks finality if there is further recourse to arbitration or litigation. It is an advantage in that the process would retain its non-litigious nature if recommendations remained non-binding.
The DB may loose credibility in the eyes of a party(ies) if the situation arises where the DB makes recommendations which appear to favour the one party at the expense of the other, or which neither party finds acceptable.	By choosing the correct members this situation can be avoided.
The authority of the Engineer to manage the project is diluted.	This is a misconception as the Engineer does not have to have adjudicatory powers to manage the project.
The introduction of a further step between the Engineer's decision and arbitration increases the time for resolving the dispute.	The number of disputes is reduced substantially and the additional time (up to six months) is not excessive given the time that the arbitration process is likely to take. Alternatively time can

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Arguments Against DB	Counter Arguments
	be saved by dispensing with the Engineer's decision.
The hearing and recommendations are private and there is no record of case law being built up.	This is also true for arbitration and ADR and is not unique to DB.
The DRB also has to contend with the same criticism which has long plagued the impartial Engineer. Where the Engineer has been criticised that he naturally takes the side of the Employer as he cannot afford to and does not have the courage to stand up to his Employer, so can the DRB. The DRB members' potentially largest employer is the contracting fraternity, with less Contractors going around than owners.	The Engineer is in a more invidious position when it comes to impartiality than a DB member. He may be looking for future work from the Employer, he may be protecting his design, he may be under pressure to support the decisions of his site staff, etc. The DB does not operate under the same constraints. However, the concern remains valid and can hopefully be addressed by the correct choice of members.
DB is a departure from traditional roles and practices.	Traditional roles and practices are not providing prompt, informal, neutral, non-binding dispute resolution at the job-site level.
DB do not add value.	DB has the advantages stated in Section 11.3 above, thus adding value.
DB will impose its own concepts of fairness and equity.	The research suggests that this is the single biggest criticism of DB resulting in a feeling of justice not being done. At least three things can be done to overcome this: ➢ Correct choice of DB members ➢ Clear terms of reference that the recommendation must be based on the provisions of the contract and law. If some leeway is allowed the recommendations must clearly state when it is departing from the provisions of the contract and law, and for what reason. ➢ By making the recommendation non-binding the injured party can still reject the recommendation
Low-threshold effort promotes claims.	Experience indicates the contrary.
The DB may not be well informed.	This should not happen if all the parties to the tri-partheid agreement properly discharge their duties.
DB procedures introduce acrimony or promote posturing.	A properly conducted DB results in the opposite.
DB lack legal procedures and standards.	Extensive records and availability of knowledgeable witnesses on most projects minimises disputes regarding facts.

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11.5 Success of DB

The DB concept has reportedly met with a substantial amount of success.

- The Dispute Review Forum (2000b) contends that '*the DRB process has proved itself beyond expectations*' and goes on to list some forty entities that use or promote the use of DRB on their construction projects.
- They submit that in terms of US dollar value the use of DRB around the world has had a growth compounded annually of 50 percent. The total value of completed, current, and planned projects involving a DRB is currently some $53 billion. In addition to the 221 completed projects involving a DRB, some 200 current projects make use of a DRB.
- Campbell (1994:18) says that experience has shown that non-binding DRB have had a dramatic success rate with respect to party acceptance.
- Shadbolt (1999:106) says that it is said that the DRB has a high success rate and that users are generally very satisfied with the system. He observes that where DRB had been in use disputes had been resolved by the time the project had been completed.
- Chapman (2000:2) expresses the view that almost one thousand disputes have been the subject of DRB decisions but there have been few occasions (under 20 cases reported to date) where a DRB's decision on a substantive dispute has been referred to arbitration or the courts.
- Wall (1992:331) observes that the DRB in America has been '*an outstanding success*'.

Analysis of the projects under consideration for this research shows that DB were reasonably successful with respect to party acceptance of recommendations and generally successful with respect to dispute settlement. Although the parties were not always in agreement or content with the recommendations, the majority of disputes were settled, some following the DB process.

11.6 Section Summary and Conclusion

Increased use and requirement for DB world wide and in Southern Africa were identified.

The principle advantages of DB were identified as:

- Reduction in disputes
- Reduction in cost

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- Reduction in time for dispute resolution
- Improved dispute resolution process
- Improved relationships
- Improved chance for acceptance and settlement
- Wide application

There is evidence and general acceptance that DB are successful in resolution/settlement of disputes.

It is concluded that the DB mechanism may well be the preferred system of dispute resolution as it provides:

- The opportunity to secure a rational, impartial review of disputes by mutually accepted experts
- Informality of procedure and reduction in cost and time of dispute resolution
- Credibility of the disputes resolution system among participants

The DB mechanism may meet the need in the construction industry for prompt, informal, cost-effective, consistent and impartial dispute resolution.

It is anticipated that the use of DB in Southern Africa would increase.

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12. DB ROLE AND APPROPRIATE PROCEDURE AND CHARACTERISTICS

12.1 Section Introduction

In this section two important aspects are considered, *viz*:

- The role of the DB and where it fits in the dispute resolution process
- Appropriate procedures and characteristics of a DB

Also the principles of adjudication are presented as it forms part of both the DRB and DAB processes.

12.2 Where Does the Dispute Board Fit?

DB are part of the structural approach (see Section 3.2) to intervention in disputes, which improves organisational effectiveness by changing the organisations' structural design characteristics.

12.2.1 DB and ADR

On their website the Dispute Review Forum (2000) state '*Owners and contractors around the world are using the process* [DRB] *for alternative dispute resolution...*'.

To consider whether DB indeed forms part of the ADR process, the DB process is compared with the definitions of ADR in Table 24 hereunder.

Table 24 : Comparison of DB Processes with ADR Definitions

ADR Definitions	DB Processes
Lieberman and Henry (cited by Freeman (1994:xv)	
'*a set of practices and techniques that aim*	Consistent
> *to permit legal disputes to be resolved outside the courts for the benefit of all disputants;*	Consistent
> *to reduce cost of conventional litigation and the delays to which it is ordinarily subject;*	Consistent
> *or, to prevent legal disputes that would otherwise likely be brought to the courts.*'	Consistent

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ADR Definitions	DB Processes
Brown and Marriott's (1993:9)	
'a range of procedures	Consistent
> *which serve as alternatives to the adjudicatory procedures of litigation and arbitration*	Although the DRB may be an adjudicatory process it is dissimilar to litigation and arbitration in that the DRB recommendation is generally non-binding. DAB is an adjudicatory process with a binding decision thus akin to litigation and arbitration. However, see discussion in Section 4.2 above.
> *for the resolution of disputes, generally but not necessarily involving the intercession and assistance of a neutral third party who helps to facilitate such resolution.'*	Consistent

The common factor in ADR in construction is the introduction of a third party who intervenes actively to a more or lesser degree. The DB is such a third party.

On the basis of the above analysis, DB are considered to be part of the ADR process.

To a certain extent a DRB can be likened to non-binding arbitration as described by Stipanowich and Henderson (1992:316). They describe it as a process that '*usually involves condensed case presentations before one or more third persons who draw non-binding conclusions regarding issues in dispute. Typically a court-annexed procedure, it is also a process aimed at facilitating settlement of disputes*'.

It generally fits this definition as:

- it involves condensed case presentations
- the presentations are before one or more third persons
- they make non-binding recommendations
- it is aimed at facilitating settlement of disputes

12.2.2 Adjudication

In considering the role and mandate of DB it is important to understand the principles of adjudication as it forms part of both the DRB and DAB processes.

Adjudication is a form of social ordering institutionally committed to 'rational' decision.

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Fuller (1978:36) considers its distinguishing characteristic to lay in the fact that it confers on the affected party a specific mode of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour. The mode of participation is considered to be the 'essence' of adjudication. He argues that whatever destroys that participation destroys the integrity of adjudication. Thus, participation through reasoned argument loses its meaning if the adjudicator is not open to reasoned argument due to prejudice, insanity, being bribed, etc.

From the office of the adjudicator certain requirements are deduced:

- Impartiality
- Must be willing to hear both sides

Fuller (1978) defines adjudication as '*a device which gives formal and institutional expression to the influence of reasoned argument in human affairs*'. A decision from a reasoned argument must meet the test of reason and rationality is expected. Reasoning requires some shared context of principle. In the courts it would be the 'rule of law' (derived from statute, custom, precedence, treatises embodying principles of fairness and equity). To demand of an adjudicator to resolve issues 'fairly' is to ask the adjudicator to decide on something about which the parties could not agree themselves and for the determination of which no standard exists.

The two areas for human reason are empirical fact and logical implication.

Fuller (1978) further argues that the following elements of adjudication are required and needs to be preserved:

a) Partisan advocacy is essential as only when the adjudicator had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision (p 34)

b) An adjudicator cannot initiate the adjudicative process as (p 37):
   - It is generally impossible to keep the initiation of proceedings untainted by preconceptions about events and consequences.
   - The bulk of claims are from reciprocal relationships which by its nature requires that the claimant must invoke the process.

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c) The decision must be accompanied by reasons for it as (p 38):
   - The fairness and effectiveness of adjudication are promoted by reasoned opinions.
   - If no reason is given the parties to a continuing relationship would guess at reasons and act accordingly. Thus the results intended may not be achieved and practices based on misinterpretation of decisions may curtail his (the adjudicator's) freedom of decision in future cases.

d) The adjudicator's decision must be based on the argument put before him (40). If not the bond of the party's participation would be destroyed and while being given an appearance of a hearing, the grounds for the decision are largely unrelated to what was presented at the hearing.

e) The adjudicator must have a 'feel' for the problems involved otherwise he may not be able to grasp the point of the argument (p 41).

f) The process by its nature would be retrospective (p 42).

g) The adjudicator is affected by the source of his power (p 43). Being unbacked by state power (as a judge would), arbitrators and DB members must concern them directly with getting the decision right. They are also relatively free from technical rules and can shape procedures to intrinsic demands.

12.2.3 Dispute Review Board

a) Prevention

Altough Ury *et al* (1988:xii) opines that many disputes cannot be prevented (normally stemming from deep rooted conflict) construction disputes generally do not stem from differences in ideology which results in deep rooted conflict, and can be prevented. Now if construction disputes can be prevented a process with suitable characteristics, which could be a DB, could contribute to the prevention of disputes.

Burke and Chinkin (1989:403) have the view that an expert (such as a DB) can prevent a dispute from arising.

Molineaux (1995:263) says that a great attraction of DB are that the experts are involved early to prevent as well as resolve disputes.

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The TCCP of UTRC (1991:10) says that making a DRB part of the project emphasises dispute prevention.

In considering when the DRB should become involved, Loots and Fraser (1999) say that it can be argued that the role of the DRB is more preventative than resolutive.

Wall (1992:331) considers that the goal of the DRB is not only to resolve disputes but also to prevent them.

On Project A the DRB was exposed to potential disputes in that the Engineer had the option to solicit the DRB's view on a particular issue at an early stage. In this role a DRB could contribute to dispute prevention. DRB involvement only when a dispute has arisen, would negate any preventative role that may have been intended for the DRB.

Another view is that one of the duties of the impartial Engineer would be dispute prevention and the DB should deal with disputes that cannot be prevented by the normal FIDIC (e.g.) machinery.

Relevant observations from the interviews (Section 10) are:

- Personal experience indicates that the presence of a DRB on site leads to a reduction or even elimination of disputes.
- The parties start to predict how the DRB would react and settle disputes before it reaches the DRB level. Also then certain claims are withdrawn by the claimant.

From a review of DB agreements proposed and in general use (e.g. World Bank, FIDIC, DRB Manual, Projects A to E) it is apparent that DB only become formally involved when there is a dispute in existence and such a dispute ahs been referred to the DB.

However, some agreements (e.g. FIDIC) allow for an earlier involvement of the DB to '*be available to give advice and opinions in conjunction with other members of the Board on any matter relevant to the Project not being a dispute when requested so to do by the Parties*'.

It is concluded that the general way in which DB are appointed (formal involvement only when dispute arises) results in them not being in a position to actively prevent disputes unless requested by the parties to do so. However, their existence and the message their

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inclusion conveys, may contribute to dispute prevention. Although this role of a DB is postulated in the literature and was mooted in the interviews, no evidence supporting this view was found.

b) Resolution

The most vexed question that arose during the research, which is also the issue that appeared to result in the most criticism of DB, is that of the role and mandate of DB in the dispute resolution process.

MacGregor (1994:14) suggests that dispute resolution can be made more effective and productive by the introduction of an adept neutral third party who does not make a binding award but adds overall value to the process. A DRB is a neutral third party that generally makes an award, which only becomes binding if accepted by the parties. However, reference to '*adept*' would indicate that he possibly had mediation in mind, where the communication and interpersonal skills of the mediator plays a major role in the success of the process.

So the question would arise, as to just how '*adept*' a DRB is expected to be and with respect to what. Is it a body;

- that must seek to achieve a settlement between the parties above all else, or
- considers the arguments placed before it and then makes a recommendation as to entitlement of the parties, thus a sort of front-runner of arbitration, so the parties is presented with a view as to the likely award by an arbitrator?

In the first bullet the process would lean towards being part of an amicable settlement process, whereas in the second it would be more a part of an adjudicatory process, but with lesser finality. In the FIDIC 4th procedures the Engineer's determination and decision and the arbitration are adjudicatory, whereas only one step in the process is that of amicable settlement. Having a DRB with an adjudicatory role, would weigh the FIDIC 4th process further to that of an adjudicatory one.

Chapman (2000:1) describes a DRB as a 'job-site' dispute adjudication (see Section 4.7.1 above) device.

Lodigiani (1986:502) views a DRB as an attempt of the kind of an amicable settlement.

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Wall (1992:331) describes the DRB process as an expedited non-binding ADR procedure whereby an independent board is established to evaluate disputes and make settlement recommendations to the parties.

Genton (2000:10) says that the success of the DRB '*depends on the willingness of the parties to compromise*'. This may imply that that the DRB is some form of a mediator or conciliator facilitating settlement through compromise.

Loots and Fraser (1999:7) considers the DRB to be '*principally a process of conciliation*' and say that it is part of the amicable settlement requirement of FIDIC. Further, that the purpose of the DRB is to offer the parties a practical route to amicable settlement. They say that '*A prevalent view is that the role of the Board is quasi-mediotorial in attempting to find settlement acceptable to both parties*'. They also state that '*...the World Bank favours the Dispute Review Board, in which the Board acts as mediator...*'. On the other hand they say '*It should strive for a recommendation consistent with applicable laws and contract provisions.*

Note Shadbolt's (1999:105) view presented in Section 5.4.1 above, that the DRB does not have to choose between different viewpoints and can make up its own mind and exercise its own skill and judgement. He says that this would tend to avoid the kind of compromise which result from mediation and arbitration.

In considering the question of the role and mandate of DB it would be instructive to note how the industry defines the DBs' role and mandate.

In the Construction DRB Manual (1996):

- The purpose of the DRB is given as:
  - *The Board, as an independent third party, will assist in and facilitate the timely and equitable resolution of disputes between the Owner and the Contractor in an effort to avoid acrimony, construction delay, and more formal means of dispute resolution.*
  - '*The objective of the Board is to consider, fairly and impartially, the Disputes referred to it, and to provide written recommendations to the Owner and*

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Contractor for resolution of these Disputes.' (note Fuller's comment in Section 12.2.2 above regarding the use of '*fair*' in adjudication).

- In connection with the recommendation, it is stated: '*The recommendation shall be based on the pertinent provisions of the Contract, applicable laws and regulations, and the facts and circumstances involved in the dispute. It is important for the Board to express, clearly and completely, the logic and reasoning leading to the recommendation so that both parties fully understand it.*'

Although the purpose refers to '*equitable resolution*', an express requirement for the recommendation is for it to '*be based on the pertinent provisions of the Contract, applicable laws and regulations*'. However, the requirement is not that the recommendation must be solely based or must be in terms of the *pertinent provisions of the Contract, applicable laws and regulations.* Use of the word '*based*' is ambiguous and some leeway to depart from the strict provisions of the contract could be inferred.

In the DRB agreement for Projects B, C and D it is stated that '*whereas, by virtue of Clause 67.2 of the Conditions of Contract the parties are obliged to attempt to settle disputes amicably*' and '*the parties hereto have considered the establishment of a DISPUTES REVIEW BOARD...as a means of achieving that objective*' and '*the objective of the Board is to make recommendations in respect of disputes ...*'.

There appears to be no restriction on the DRB's mandate other than that it is a means of achieving an amicable settlement. Presumably the DRB would be entitled to depart from the strict provisions of the contract in order to achieve this objective.

In the DRB agreement for Project E, it is provided that '*the Board shall make non-binding recommendations to the Parties for the resolution thereof for which purpose they shall call upon their own expertise and experience on technical and contractual matters and matters of disputed fact as well as taking account of the contentions of the Parties*'. The words leave the impression that the DRB should develop its own opinion as to the resolution of the dispute and not rely solely on the contentions placed before them. However, a restriction is placed by a later rule which states '*The Board (using its combined expertise and experience) shall base its findings and recommendations on the provisions of the Contract and established principles of law found by the Board to be applicable to the facts and circumstances as found by the Board from the information provided by the parties.*'

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In the World Bank DRB/DRE Rules and Procedures it is stated that '*The Recommendations shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.*'

Again, in both cases the use of the word '*based*' is ambiguous and some leeway to depart from the strict provisions of the contract could be inferred.

In considering the responses to the questionnaire (see Section 9.4) regarding this aspect, despite the divergent opinions, it is concluded that the respondents are generally of the opinion (some 56%) that the DRB process is the closest to a mediatory/conciliatory process.

From the literature study, the responses to the questionnaire and the author's own analysis, it is submitted that a DRB is part of the amicable settlement process, as long as its recommendation remains non-binding. It is further submitted that it can act in one of three ways, *viz*:

i) As a 'test case' to give an indication of how a judge or arbitrator[18] would be likely to rule. This would be an adjudicatory approach, but remaining part of the amicable settlement process, as the result is a recommendation (which is non-binding). In this application the DRB must decide solely in accordance with the contract and substantive rules of law.
ii) In the sense of amiable compositeur (see Section 4.7.9). The DRB would not be required to decide solely in accordance with the substantive rules of law. Without offending the provisions of contract and law, they would have some leeway. The DRB would then be authorised by the parties to 'adjudicate' disputes *ex aequo et bono* as amiable compositeur.
iii) A combination of the above two. In the first instance the recommendation is in accordance with the provisions of the contract and decided in accordance with the substantive rules of law. The second part of the recommendation contains recommendations developed not only from the provisions of the contract and rules of

[18] The use of 'arbitrator' in this context is in the jurisdictions where the arbitrator is bound by the substantive rules of law (see Section 4.9.3).

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law but also by applying various criteria of interpretation and judgement, especially equity, commercial usages and the conscience of the DRB members.

It is submitted that option (iii) above is the preferred option. Even if the results of the adjudication points in one direction, it remains only a probability (although it may be high) that the judge or arbitrator would rule the same and there remains a road of substantial cost and time to such ruling. The parties could then undertake their own analyses and make a business decision with regards to the settlement of the dispute.

In this case the DRB would initially make a recommendation on the facts and merits of the case, according to the strict provisions of the contract and rules of law. This recommendation would carry the weight of an expert panel chosen by the parties to render a reasoned, rational, impartial and objective recommendation on the facts and merits of the case put before it. It is thus not a case of compromise but a case of being convinced by the recommendation.

If the board operates as a mediator/conciliator it undermines the authority of its recommendation. The parties would know that the recommendation is aimed at settlement and that an arbitrator or judge may view the situation differently, thus increasing the impetus for proceeding. Thus to encourage acceptance, it is imperative that the first part of the recommendation be as close as possible to that what an arbitrator would award. This argument is also particularly valid in the case where the DRB's recommendation is admissible in further proceedings (arbitration or litigation). Compare this with a mediator's proceedings which would be without prejudice and inadmissible, except that the mediator can be called as a witness in subsequent proceedings (a known negative characteristic of mediation)

Not to lose the value that a body of expert persons, well versed in the details of the dispute, can bring to the process from a dispute settlement point of view, if a party finds himself unable to agree with the DRB recommendations (for reasons other than not being convinced by the DRB's argument – such as company political reasons) it should be considered whether the DRB should not act as a mediator during an ensuing defined amicable settlement period. Such an arrangement would have the major drawback of making the preceding process lack finality and a losing party would almost inevitably proceed to this next stage as, by the nature of compromise, he can but only improve his

University of Cape Town

position, at little extra cost. In connection with a DAB, it is of interest to note that the 1996 supplement to FIDIC 4th edition 'Red Book' Section A *Guide to Amended Clause 67* suggests that the DAB members should not involve themselves in amicable settlement procedures until their appointment to the DAB has terminated.

12.2.4 Dispute Adjudication Board

The 1996 supplement to the FIDIC 4th edition 'Red Book' Section A *Guide to Amended Clause 67* it is stated that the DAB provides a procedure for the settlement of disputes where direct discussions between the parties have failed.

In the foreword to the 1996 FIDIC 4th edition 'Red Book' supplement it is stated: '*FIDIC agrees that this* [appointment of an expert(s) at the beginning of the contract] *is an acceptable alternative to the Engineer's former role in dispute adjudication*'. This indicates an adjudicatory role, as it replaces the adjudicatory role of the Engineer.

In sc 20.2 of the 1999 edition of the FIDIC 'Red Book' it is stated that '*disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4*'. In sc 20.4 reference is made to the '*decision*' of the DAB. In the Particular Conditions reference is made to '*the adjudication procedure*'.

On Project F, which uses a DAB, it was stated that the '*DAB is a decision making body, which decisions must be in terms of the contract*' and '*Amicable settlement is not looked for in the first instance*'.

In considering the responses to the questionnaire (see Section 9.4) regarding this aspect, it is concluded that the respondents are generally of the opinion (some 70%) that the DAB process is the closest to an adjudicatory process.

There can be no doubt that the DAB has a fully adjudicatory role. However, if the FIDIC 1996 model is followed, there may be little difference between a DRB and DAB other than the status and implementation of the recommendation and decision. The DRB gives a non-binding recommendation and the DAB gives a decision (which may be disputed and taken to arbitration). The FIDIC 1996 and 1999 model allows immediate effect to the decision, until the decision is revised. This is not so for DRB recommendations and effect must only be given when the recommendation becomes final and binding (if at all). Generally thus,

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the DAB decision is final and binding until it is reviewed following a notice of dissatisfaction. The DRB recommendation only becomes final and binding when accepted by the parties.

12.3 Characteristics of a Successful DB

Ury *et al* (1988:20) say that dispute resolution systems are unlikely to work unless it satisfies the needs that lead the parties to use existing systems. Thus is would be prudent to consider the parties' needs for a dispute resolution system in construction and consider what characteristics a DB must have to satisfy these needs. Sander (cited by Brown and Marriot, 1993:44) considers certain criteria important for determining the effectiveness of a dispute resolution system, namely:

- Cost
- Speed
- Accuracy
- Credibility
- Workability
- In some cases predictability
- Disputant acceptance of the dispute resolution system (*inter alia*, through involvement with the design)

Pryles (1998:107) give criteria for dispute resolution processes as:

- Fairness
- Appropriateness
- Flexibility

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12.3.1 Cost

The cost can be kept low by:

- Not relying on legal pleadings and court style recordings at the hearings
- Ensuring early and continuous involvement of the DB, thus requiring little 'lead' time for rendering recommendations
- As cost is proportional to time, the recommendations regarding speed hereunder should be adhered to

It is recommended that costs of the DB are shared equally by the parties.

12.3.2 Speed

One of the important features of the DB concept is the timely resolution of disputes. Later or delayed organisation of the DB can be detrimental to the concept.

Time-consuming selection and engagement procedures utilised by the owner or simple procrastination by either party is a frequent cause of delay and must be resisted.

Through its regular visits and review of reports and documentation the DRB is up to date on the subject of the dispute at the time that it arises. Shadbolt (1999:105) says that this is a vital ingredient in the success of the DRB.

Some owners have impaired the speed of the DB by requiring time-consuming internal reviews or the preparation of elaborately documented submittals before the dispute can be referred to the DB. Procedural requirements must be developed with circumspection.

12.3.3 Accuracy

Chapman (1999:1) is of the view that the significant difference between DB and most other ADR processes is that the DB is appointed at the commencement of the project and, through regular visits to site, is actively involved throughout the project. This involvement increases the chances for accurate decisions/recommendations.

Further the DB members must be experienced in the type of work undertaken and also experienced in the interpretation of contracts.

12.3.4 Credibility

In the Particular Conditions for the 1999 FIDIC 'Red Book' in connection with sc 20.2 it is stated: '*The adjudication procedure depends for its success on, amongst other things, the Parties' confidence in the agreed individual(s) who will serve on the DAB. Therefore, it is essential that candidates for this position are not imposed by either Party on the other Party; and that, if the individual is selected under Sub-Clause 20.3, the selection is made by a wholly impartial entity.*'

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As the success of the DB process is highly dependent on the stature of the board; criteria for membership must be exacting. The author considers this aspect to be the most crucial to the success of a DB.

Pryles (1998:107) gives the criteria for dispute resolution tribunal personnel as:

- Impartiality and integrity
- Appropriateness
- Expertise

It is of specific importance where the DRB acts as amiable compositeur and/or where the recommendation is non-binding and the acceptance of the recommendation would depend largely on the stature of the DB and the perceived accuracy of the recommendation.

Also any members that may have a conflict of interest, such as former employees of any party involved in the construction contract or members with financial or personal interests in the outcome of DB recommendations, must be disqualified or must disclose any such potential conflict of interest prior to appointment.

Also a DB member shall in no circumstances:

- be appointed as an arbitrator in any arbitration between the parties in connection with the contract unless the parties agree otherwise in writing;
- be called as a witness to give evidence concerning any dispute before an arbitrator unless he accepts such assignment (from the parties) in writing addressed to both Parties

All members of the DB must be neutral and subject to the approval of both parties. All members must sign an agreement obligating them to serve both parties equally and fairly.

The DB process, which includes the hearings, must provide a sense of procedural justice.

It would also be beneficial if the DB members subscribe to a code of ethical conduct. The author is not aware of such a generally accepted code being in existence. A code used by the American Consulting Engineers Council of New England (DRB Foundation Forum, 1999:13) contain the following:

- Financial separation – The DB members should perform their duties while maintaining financial separation from both parties (except for their remuneration).

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- Impartiality, fairness and independence – A DB member should be impartial, fair and independent.
- Confidentiality/Communications – The DB members should not at any time use confidential information acquired during DB proceedings for personal gain or to adversely affect the interest of another, or to damage the reputational interest of the parties.
- Adherence to the contract – DB members should act within the confines of their jurisdiction and qualifications and issue recommendations based upon and consistent with the technical requirements of the contract.
- Diligence/Conduct of a hearing – DB members should attend to the diligence/conduct of a hearing as expeditiously as possible.
- Recommendation - DB recommendations should be expressed in writing and in a manner which respects and acknowledges the respective positions of the parties and demonstrate fair and impartial consideration of the pertinent evidence.

12.3.5 Workability

Procedures must be straight forward, flexible and easily understood by all.

There should be no limitation on the issues which can be referred to the board.

The DB must keep abreast of developments through regular site visits and review of routine reports.

It is also recommended that the agreement specify that the DRB members act as independent experts.

12.3.6 Predictability

This can be achieved by the DRB in the first instance adjudicating solely in accordance with the contract and substantive rules of law.

12.3.7 Disputant Acceptance of the Dispute Resolution System

For purposes of certainty and immediate implementation it is generally recommended that the DB specification must be included in the tender documents and the DB constituted immediately on commencement of the contract. A DB organised after the onset of a dispute has reduced effectiveness.

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This would of course reduce the level of acceptance of the dispute resolution system by the party not having an input into the choice of system. However, if all stakeholders are involved with the development of systems to be used in standard form contracts, this problem may be reduced.

A further increase in acceptance may be by including the principles of a system in the tender documentation and leaving the details for the contract negotiations. However, the author is of the opinion that this approach has more disadvantages than advantages, mainly due to the lack of time for review and consideration during contract negotiations.

12.3.8 DB Recommendations

DB recommendations should not be binding as:

- The weight of a unanimous recommendation by DRB experts chosen by the parties after due process, especially if the recommendation may be adduced as evidence in subsequent proceedings, would deter any challenge to a DRB finding.
- Also a binding decision is more likely to result in a win-lose situation. Attitudes may be formalised, counsel engaged and adversarial approaches developed, aimed solely at winning.
- It can produce useful information or observations, covering both equity and the law, and thereby assist the parties in negotiating a fair and just settlement.
- It is stated in the literature that experience indicates that almost all non-binding recommendations are adopted by both parties. The results of the research into actual DRB recommendations indicate that not all, but a large proportion of DRB recommendations are accepted by the parties.
- The DB is not an arbitration tribunal and should not become one as, *inter alia*, the advantages of flexibility, speed and cost would be lost.

If a DB decision is to be binding it is important to indicate in the contract whether the decision/recommendation of the DB would be immediately binding, even if a reference to arbitration has been served (Chapman, 2000:9).

It is recommended that for a recommendation to become final and binding it should be expressly accepted rather than by default with the passing of a fixed period during which no objections are raised.

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There may be a fear that the non-binding recommendation of a DRB may result in a party taking less notice of the recommendation and rejecting it. As in concilio-arbitration and court-annexed arbitration cost disincentives can be used in order to discourage such behaviour. If the party who refuses to accept the recommendation does not achieve a significantly better result at the arbitration there is a cost penalty. For example if he does not better by an excess of one third, he must pay all costs.

The DRB recommendation should not be admissible as evidence should the dispute not be resolved by the DRB and proceed to arbitration or litigation, for the following reasons:

- The DRB should have the necessary flexibility to come to a sound engineering/contractual solution without fear of transgressing legal minutiae and processes.
- If the DRB recommendation should be admissible as evidence it would result in the process becoming legalistic and treated as a pre-arbitration, possibly with legal counsel present. This would remove the process from the amicable settlement arena.
- It is accepted by most that the DRB is part of the amicable settlement process. In its recommended secondary role of amiable compositeur the process by necessity involves some form of compromise by the parties. If the recommendation is admissible as evidence the parties are unlikely to make any compromises for the fear of being compromised in further adjudication proceedings. The role of the DRB in this respect would thus largely be lost.

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An amicable settlement process must follow the DRB recommendation to allow the parties an opportunity to consider the DRB recommendation with the view to settlement, especially if the second part of the recommendation (amiable composition) is contrary to the part which is solely based on the provisions of the contract and law.

12.3.9 Role of the Engineer

Currently the role of the impartial Engineer is under legitimate attack and he is no longer seen to be impartial in the dispute resolution process. It would thus be prudent to proceed to a perceived independent entity in the dispute resolution process as soon as possible and dispense with the traditional role of the impartial Engineer in the context of dispute resolution (traditional c 67 in FIDIC).

12.4 DB Selection

The characteristics and recommendations for a DB contained in this report have been put forward from a particular point of view. Although certain projects are more suited to the concept of dispute resolution by DB, the DB details are also flexible to be adjusted to suit the needs of the project and the project participants.

Bartholomew (1998:1) says in this connection that '*one size does not fit all*' and is of the opinion that '*DRB conduct is highly sensitive to the circumstances of a particular situation, which vary widely.*' He considers that it is impossible for one set of guidelines to cover all potential situations as is manifested by a number of DB specifications and three-party agreement provisions.

12.5 Section Summary and Conclusion

In this section two important aspects were considered, *viz*:

- The role of the DB and where it fits in the dispute resolution process
- Appropriate procedures and characteristics of a DB

Also, the principles of adjudication were presented as it forms part of both the DRB and DAB processes.

It was concluded that:

- DB are part of the ADR process.
- The general way in which DB are appointed (formal involvement only when dispute arises) results in them not actively preventing disputes. However, their existence and the message their inclusion conveys, may contribute to passive dispute prevention. Although this role of a DB is postulated in the literature and was mooted in the interviews, no evidence supporting this view was found.
- A DRB is part of the amicable settlement process.
- The DAB has a fully adjudicatory role.

It was further concluded that a DRB can operate in three ways, *viz*:

- Adjudication solely in accordance with the contract and substantive rules of law
- In the sense of amiables compositeurs
- A combination of the above

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Further the characteristics of a DB to satisfy the needs for a dispute resolution system to work were considered under the aspects of:

- Cost
- Speed
- Accuracy
- Credibility
- Workability
- In some cases predictability
- Disputant acceptance of the dispute resolution system
- DB recommendations
- Role of the Engineer

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13. CONCLUSIONS

As the DB concept is reasonably new in Southern Africa, those that have consciously elected not to follow the DB route may be following the advise of William Shakespear, who in Hamlet, has Polonius advise: '*Be not the first by which the new is tried, nor yet the last to lay the old aside*'

Many apparent flaws and unanswered questions exist. However, many influential institutions (World Bank, FIDIC) have fully embraced the DB concept, ensuring that it is here to stay (for the foreseeable future at least) warts and all. Also perceptions are very strong that the traditional Engineer is not impartial, due to *inter alia*, a higher level of Employer involvement and pressure, economic realities for repeat work, loss of professionalism, etc.

But if the ethics of the professional Engineer is in question, so should that of DB members be. It is only the structure and process that would be the saving grace, in that it may be more tamper proof than that of the impartial (single) Engineer.

The author is of the opinion that the correct approach is the replacement of the Engineer adjudicating on disputes by a DRB giving a non-binding recommendation, for the following reasons:

- It is an accepted principle in adjudication that one cannot be a judge in one's own case (contrary to the rules of natural justice).
- With the increased competition for appointments, the impartiality of the Engineer rightfully becomes questionable, especially in certain cultures and environments where little attention is paid to ethics.
- Contractors generally do not believe that the Engineer is, and can be, impartial. This does not add value to the dispute resolution process and the Engineer's decision is viewed by many as a mere time consuming formality in the process.
- The removal of the adjudicatory role from the Engineer does not undermine the authority of the Engineer.
- There is evidence that DRB have been very successful with resolution of disputes.
- It is an opportunity to secure perceived objective and impartial experts.
- It brings informality of procedure and reduction in cost and time of dispute resolution.

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- It brings early finality to the dispute resolution process as:
  - The DRB is perceived to be impartial and its decision would carry more weight than the Engineer's.
  - Elimination of the Engineer's decision from the process reduces the time period.

The author does not favour the use of a DAB with a binding decision as it has great potential to develop into an arbitration type procedure with concomitant loss of flexibility, economy and speed.

The DB principle has been criticised and many discouraging remarks made. However, with a correctly structured and briefed DB the criticisms and discouraging remarks can be set aside, because, as stated by Christie (1992:264) in connection with amiables compositeurs, DB have a clear and commendable aim, and the achievement of that aim is attended by no more uncertainty than is to be expected in a vigorous branch of law.

Further conclusions are:

a) From the literature survey it is concluded that the DRB concept is intended to be part of the amicable settlement process. The fact that certain DRB can make binding 'recommendations' complicates the issue. Those in the industry with knowledge of DB have divergent opinions as to where the DRB fits as an ADR process. This was prevalent even among experienced DRB members.

b) It is clear from its application by FIDIC and even its name, that the DAB is an adjudication process, resulting in a binding decision. Also the majority of respondents were of the opinion that the DAB is the closest to an adjudicatory process (arbitration/adjudication – 70%). Those in the industry with knowledge of DB are clear on where the DAB fits as an ADR process.

c) Generally DB agreements are not clear on the authority of the DB as to whether recommendations must be in strict accordance with the provisions of the contract and be decided in accordance with the substantive rules of law or whether the DB has some leeway. Also how far a DRB operating on the principles of equity can depart from the law is not clearly stated.

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d) In the event of using a DRB to provide a recommendation on the basis of equity rather than law, the manner in which an equitable solution, which may not coincide with the strictly legal principle, is sought, is not immediately clear.

e) The standard of DB recommendations in Southern Africa could be improved.

f) The proximity of the amounts decided/recommended by DB in Southern Africa and a 50/50 compromise position could be pure coincidence or it could be proof of a propensity for a DB to 'split the difference'.

g) In Southern Africa the DB process is not well known and generally project participants do not budget and consider the probability of disputes in advance. DB are only in use on civil engineering construction projects and then also mainly on large projects.

h) There is some disillusionment with the DB concept given the sensitivity of its success to member choice and the high proportion of recommendations in the favour of the Contractor.

i) The most prominent reasons for using a DB are dissatisfaction with the existing (at the time) standard form contract dispute resolution mechanisms and funding agent requirements. The major reason put forward for not using a DB is that the standard form of contract which do not have a DB provision is simply followed.

j) Generally DB are considered to be impartial, however some doubt exists in this regard from the side of employers and engineering consultants. Also the general opinion is that DB provide value for money but that DB are not an essential part of the dispute resolution process.

k) DRB and DAB are alternative dispute resolution processes mainly designed for the construction industry.

l) DB do not actively preventing disputes. However, their existence and the message their inclusion conveys, may contribute to dispute prevention. Under the majority of DB agreements the parties have the option to use DB in a preventative role. However, DB are generally used as dispute resolution processes.

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m) A DRB can operate in three ways, *viz*:

- Adjudication solely in accordance with the contract and substantive rules of law
- In the sense of an amiable compositeur
- A combination of the above two

n) A dispute resolution process must satisfy certain needs for it to be accepted by the parties.

o) The timeframe allowed for the research project places limits on the scope. In this particular instance it was not possible to identify and contact all users of DB in Southern Africa and solicit information and opinions from them.

p) The DB mechanism can meet the need in the construction industry for prompt, informal, cost-effective, consistent and impartial dispute resolution. It is anticipated that the use of DB in Southern Africa would increase.

q) In connection with DB recommendations/decisions it is concluded that in Southern Africa:

- The Contractors initiates the references to the DB.
- The DB decisions are generally in the favour of the Contractors.
- The majority of recommendations are either accepted or the dispute is settled after the recommendation is made.
- Contractors reject more recommendations than Employers.
- The 79% success rate of DB is lower than expected from the literature survey.

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14. RECOMMENDATIONS

The following recommendations are made:

a) DRB recommendations should be non-binding, leaving the binding decisions to a DAB operating in a purely adjudicatory role.

b) The use of a DAB with a binding decision is not recommended as it has great potential to develop into an arbitration type procedure with concomitant loss of flexibility, economy and speed.

c) It must be clearly stated whether the DB recommendations must be strictly in accordance with the provisions of the contract and be decided in accordance with the substantive rules of law or whether the DB has some leeway.

d) In the event of using a DRB to provide a recommendation on the basis of equity rather than law, guidance on the manner in which an equitable solution, which may not coincide with the strictly legal principle, is arrived at, can be sought from the French system of *amiable composition*. How far a DRB operating on the principles of equity can depart from the law must be clearly stated.

e) Requirements (format, content, etc.) for DB recommendations should be detailed and clearly set out in the DB agreement.

f) It is recommended that a larger database be used to assess whether there is a propensity for DB to 'split the difference'.

g) It would be prudent to conduct DB workshops for employers, contractors and engineers who are involved with large projects and in particular, those that operate internationally.

h) DB recommendations must clearly set out the reasons for the recommendations and show that the recommendations are in keeping with the DB authority and terms of reference.

i) See g) above. The building industry should also be specifically involved.

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j) Criteria for membership must be exacting and the choice of correct DB members must be a high priority with the parties.

k) The alternative dispute resolution process status of DRB and DAB must be maintained.

l) DB agreements must make it clear whether the DB would be acting in a preventative or resolutive role, or both.

m) A DRB should operate as a combination of:

- In the first instance adjudication solely in accordance with the contract and substantive rules of law and
- Secondary as amiable compositeur

The role of the DRB in the first instance is that of an adjudicator on the allegations of fact and contentions of law/contract placed before it in keeping with the rules of law. Secondary it could make recommendations for settlement of the dispute, which would mostly rely on judgement, not necessarily based solely on legal/contractual principles.

n) In designing the DB agreement cognisance must be taken of the needs of the industry for a dispute resolution process.

o) The author considers it of importance to the base of knowledge regarding DB in Southern Africa to obtain and analyse information also from all other projects employing DB in Southern Africa. More contractors and employers with DB experience should be identified and their opinions solicited.

Although the characteristics and recommendations for DB contained in this report have been put forward from a particular point of view, the author recognises that the DB details are also flexible to be adjusted to suit the needs of the project and the project participants.

University of Cape Town

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University of Cape Town

16. ANNEXURES

ANNEXURE A : Questionnaire and Summary of Interview Questions 227
ANNEXURE B : Questionnaire Qualitative Responses 231
ANNEXURE C : Comparative Tables of DB Specifications and Rules and Procedures . 238
ANNEXURE D : TCCP of UTRC DRB Specification 266
ANNEXURE E : TCCP of UTRC DRB Three Party Agreement 272
ANNEXURE F : World Bank DRB/DRE FIDIC Part II Clauses (Specification) 279
ANNEXURE G : World Bank DRB/DRE Rules and Procedures 284
ANNEXURE H : Construction DRB Manual (1996) Guide Specification 296
ANNEXURE I : Construction DRB Manual (1996) Rules and Procedures 305
ANNEXURE J : FIDIC 1996 – Clause 67 – Particular Conditions of Contract amendments for the DAB 311
ANNEXURE K : FIDIC 1996 – Model Terms of Appointment for a Dispute Adjudication Board 316
ANNEXURE L : FIDIC 1999 – Sub-Clause 20.2 to 20.4 - Concerning the DAB 323
ANNEXURE M : FIDIC 1999 – Alternative Sub-Clause 20.2 326
ANNEXURE N : FIDIC 1999 – Appendix; General Conditions of Dispute Adjudication Agreement 328
ANNEXURE O : FIDIC 1999 – Dispute Adjudication Agreement 334
ANNEXURE P : Guidelines for DRB Recommendations 336

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ANNEXURE A : Questionnaire and Summary of Interview Questions

DB QUESTIONNAIRE

Please note: All information provided would be treated in the strictest confidence.

1. Personal Experience with DB

No	Type (1)	Year (2)	Project Name (3)	Project Value (4)				Involvement (6)			
				V<50 U$	50<V< 100 U$	V>100 U$	Other (5)	Counsel	DB Member	Drafting of Clauses	Other (7)
A. Large projects with DB											
A1											
A2											
A3											
B. Large projects without DB											
B1											
B2											
B3											

1. Insert – e.g civil, mechanical, petrochemical
2. Insert
3. Not necessary if to be kept anonymous. I will not use in dissertation in any event, but useful for further research.
4. Mark box with x (V=value in year stated in 2, Contract Price plus contingencies and escalation)
5. Mark box with x
6. Mark box with x
7. Insert

2. What is a Dispute Board?

To which ADR process do you consider the indicated type of DB to be the closest (mark box with x)

ADR Process	Dispute Adjudication Board	Dispute Review Board
Mediation		
Arbitration		
Med-arb		
Neutral expert fact finding		
Conciliation		
Adjudication		
Other (state)		

3. History

3.1 Please list past, present and future projects (not in 1 above) with Disputes Boards in Southern Africa and their owners, which you may be aware of.

Name of Project	Name of Owner	Year of Construction

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4. Reason for using/not using a Dispute Board

4.1 Projects where DB used

For the projects listed in 1. above note the client/owner reasons for using a Dispute Board.

Reason	Project No. (from 1. above)								
	*								
Simply followed the standard form of contract **which had** DB provision	+								
Funding agent requirement to use ++									
Not satisfied with standard form of contract dispute resolution mechanism									
Want to be in forefront of new developments									

* Insert project no. from section 1. above
+ mark relevant boxes under each project with x
++ State name of funding agents here:
Project No____Agent Name_____

4.2 Projects where DB not used

For the projects listed in 1. above note the client/owner reasons for not using a Dispute Board.

Reason	Project No. (from 1. above)								
	*								
Simply followed the standard form of contract which **did not have** DB provision	+								
Funding agent requirement **not** to use ++									
Satisfied with standard form of contract dispute resolution mechanism									
Do not want to be in forefront of new developments – 'wait and see'									
Habit and custom									

* Insert project no. from section 1. above
+ mark relevant boxes under each project with x
++ State name of funding agents here:
Project No____Agent Name_____

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5. Opinion on Dispute Board Principle

5.1 What is your opinion on the principle of a Dispute Adjudication Board as contained in the latest version of the FIDIC standard form of contract?

5.2 What is your opinion on the principle of a Dispute Review Board with a non-binding recommendation?

5.3 Do you consider Dispute Boards to be impartial? (Yes/No with reason)

5.4 Do you consider Dispute Boards to provide value for money? (Yes/No with reason)

5.5 Do you consider Dispute Boards to be an essential part of the amicable settlement/adjudication process? (Yes/No with reason)

Thank You!

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A2 SUMMARY OF INTERVIEW QUESTIONS

1. Is a DRB adjudication or is it settlement above all else?
2. Can the DRB recommend in excess of the relief sought?
3. Must the DRB recommendation be based on the allegation of fact and contentions of law put by the parties?
4. Can relief in excess of that has been requested be granted?
5. DRB - Must the recommendation be based on the contract/law?
6. DRB – What leeway should the DRB have?
7. Does a DB result in a clear-cut reduction in claims (also less spurious claims)?
8. Are disputes settled sooner?
9. Are there too much "mediation" and "split the difference" in DRB.
10. One of the reasons for DB is perceived lack of Engineer impartiality (lack of integrity) – why would DB members be any different?
11. The driving force of DRB is that an agreement is reached rather than an unequivocal decision on contractual right or wrong given.
12. Can a DRB decline to give a recommendation on the basis of a lack of information/argument?
13. What are the pertinent differences between a DRB and DAB (with and without the c 67 Engineer)?
14. What is your view on a two step process; a) recommendation is adjudication on the rights of the parties, b) in the event of non-acceptance the DRB becomes part of the amicable settlement process. (No Engineer)

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ANNEXURE B : Questionnaire Qualitative Responses

5. Opinion on Dispute Board Principle

5.1 What is your opinion on the principle of a Dispute Adjudication Board as contained in the latest version of the FIDIC standard form of contract?

Some of the opinions offered by the respondents are as follows:

a) *It replaces the Engineer with people who are paid by both the Contractor and the Employer. There is nothing wrong in such an approach. It matters not who people are paid by. However, the reason it has been adopted which is the acceptance that engineers lack the integrity to be independent and impartial, will in my view be ultimately damaging to the administration of contracts.*

b) *The current ADR are simply a wave of fashion. It will pass but not in our lifetimes. Indeed in our lifetime the crest will get higher. Our job is to make the DRBs work.*

c) *While the provision which gives the DAB decision more weight is to be welcomed as possibly producing more finalities, there is concern that the DAB tends to encroach on the role and effectiveness of the Engineer. The Engineer has a role under the contract and the removal of Clause 67 decision function is not a complete answer. If you wish to remove all contractual responsibility from the Engineer you must re-write the contract and appoint a separate contractual adjudicator.*

d) *It is an excellent method to settle disputes and more importantly the presence of a DAB does encourage the Parties to settle their disputes amicably. It has been said that if no disputes have been referred to a DAB the Board has in fact been a success.*

e) *Favourable – removes onus of adjudication of disputes from 'Engineer' and hence is probably more transparent and fair.*

f) *The principle is excellent. Dispute Boards do work (Chinese project at 1 above had 40 disputes all settled by DRB recommendations - no arbitration). New FIDIC form takes things forward and introduces a number of improvements on the earlier forms (WB, FIDIC).*

g) *In accordance with Clauses 20.4 & 20.5, a DAB's decision is intended to be binding, but either party to the contract can still refuse to accept it! However, in view of the DAB's composition, it would be unwise for one party to take his dispute beyond the amicable settlement stage, because of the costs involved. The principles are good.*

h) *It is a good option if good board members can be appointed and both parties are reasonably confident that the other will not abuse the board.*

i) *Not familiar with the latest FIDIC, nor are international conditions best suited to our local and very different contracting philosophies.*

j) *Generally good.*

k) *May be greatly improved in several directions, for instance in a less rigid way allowing more discussions with the Board*

l) *Advantages include*

- *Impartiality*
- *Formality*

Disadvantages / Dangers include

- *Relief to Engineer (but removes Engineer's interest)*

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- *Even trivialities may be referred*
- *Cavalier approach, decisions on first impressions*
- *Swayed by personalities.*
- *Akin to Arbitration*
- *Insufficient time for proper attention.*

m) *The DAB replaces the Engineer to accelerate the claims resolution process. The Engineer's authority is thereby limited and his status drastically reduced. The contractor now have a convenient opportunity to quickly get rid of a well informed engineer's opinion and seek a binding decision from a DAB, who do not know the facts as well as the Engineer and is more open to manipulation by contractors.*

n) *The position of the Engineer seems to be watered down. A DAB will have to live very closely to the contract from the start and may impose an additional administrative and cost burden on the contract.*

5.2 What is your opinion on the principle of a Dispute Review Board with a non-binding recommendation?

Some of the opinions offered by the respondents are as follows:

a) *The above comments (as for question 5.1) apply here. I do not believe that, in practice, there will be much difference, I prefer the amicable settlement process to come after the DB's recommendation (DRB) or decision (DAB) as set out in the DAB procedure, as the parties are more likely to agree after they have heard the view of the independent DB.*

b) *Can also work well. The non-binding recommendation gives the parties a tool for settlement negotiations without the fear of the 'immediately binding' status. However, the DRB recommendation is often toothless if the employer chooses to ignore it.*

c) *The objective of the DAB & DRB is to provide a within-the-contract resolution in order to minimise the chances of disputes proceeding to arbitration / litigation. Either body must give a recommendation / decision which is such that neither parties see merit in proceeding further. Provided this is achieved, the DRB non-binding recommendation is not a drawback if it is contractually sound it will achieve the same result.*

d) *The principles of a Review Board and an Adjudication Board are very similar and the use of either has my support. Although the DRB only makes a recommendation the Parties place great significance on the recommendations of the impartial Board and do usually accept the findings of the Board. It must also be stressed that the recommendations of the Board are admissible as evidence if the dispute goes to arbitration/litigation.*

e) *Might help "hard headed" opinions to soften – otherwise not very helpful*

f) *The key issue is does the DRB "rule" or "recommend"? The best way of dealing with this is to have a ruling that is binding and immediately enforceable and which stays binding unless disputed (back on the road to arbitration) within a stipulated time*

g) *Performs a useful function, very similar to that of a mediator sitting with two assessors, but when a DRB reference follows the amicable settlement period the dispute proceedings are unduly prolonged.*

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h) *Unless some of the board members are legally trained individuals, one will always have a greater chance of a non-contractual decision by the board – therefore, an arbitration for the aggrieved party must remain.*

i) *It depends on the type of parties. Usually I would favour the DRB, as it is a more amicable settlement procedure (parties accepting and take finally the decision). However I can understand that in some circumstances the decision of the DAB is useful (such ordering down payments, decision on technical/safety issues).*

j) *May be more acceptable to owner than DAB binding decision.*

o) *My opinion is that the principle of such a body is a vital ingredient in a major project contract*

p) *The Recommendation should be non-binding. The concept signed up to by the parties is that the DRB/DAB is part of amicable settlement attempt process, with the Board to put forward recommendations based on principles which the Board feels should assist the parties to reach a settlement, and so avoid the drastic step of (binding) arbitration.*

k) *In principle, favourable but success depends on*

- *integrity and mix of expertise, nature*
- *dedication, thoroughness, understanding of issues*
- *frequency of visits and time allowance*
- *high formality → tends to arbitral process, at least mediation, probably at higher cost.*

l) *The board acts as independent experts (legal or technical) to facilitate the amicable settlement process to enable an earlier and less expensive resolution of disputes before the formal arbitration process. It is sometimes convenient for a client, who handles public money, to have a recommendation from experts, which is contrary to the Engineers decision, and which can be used as justification to settle a dispute without costly arbitration. Similarly it enables a contractor to obtain some payment at an earlier time without the costs and delay due to arbitration.*

m) *Experience to date have shown that on large projects where issues may change at short notice, especially where large amounts of money is involved, the DRB does not always keep up to date with the latest thinking of the parties. The selection of DRB members is of he utmost importance. Should the DRB tend to rather act in a mediating role, contrary to their brief, the client and or Contractor will have the opportunity to dispute their decision. The DRB must make a ruling on the facts before them and not try to quantify a possible solution or opt for the least controversial ruling.*

n) *Non-binding recommendations cause frustration. A DRB with a strong legal approach and binding recommendation is preferable.*

5.3 Do you consider Dispute Boards to be impartial? (Yes/No with reason)

Some of the motivations for their answers presented by the respondents are as follows:

a) *Generally yes. In some jurisdictions the parties try to select members to act as their advocate. This should not be encouraged. I have served on 14 DB and never yet found impartiality (or lack of it) to be a problem.*

b) *In my experience, absolutely. There is sometimes a concept that because each party puts forward a nomination, that nomination has "to bat for" that party. For this reason it may be better for the parties to agree a chairman and the chairman to*

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co-opt two members approved by the parties. However in spite of the above concept, I have never experienced bias by a member.

c) *Yes – the process of appointment of Board members prevents potentially partial members from being appointed. All Parties must agree to the person nominated by either Party and must also agree to the appointment of the third member nominated by the two members appointed by the Parties.*

d) Yes !! because of professionalism and because fees / remuneration do nor relate to decisions

e) No. The limited number of decisions I have seen to date suggest that there is either a conscious or unconscious proclivity towards mediation. That is the DRB sees its role as helping the parties to reach a settlement. This automatically means that there is a built in bias towards the claimant. As the claimant is more often than not the contractor this means there is in general and natural bias towards the contractor. The argument that DRB impartiality is ensured as a result of it being paid by both Contractor and the Employer is of course nonsense. One of the primary arguments propounded by advocates of DRB is that the Engineer's impartiality is somehow compromised by the fact that he is paid by the Employer. If as it is implied it is accepted that professional engineers are willing to compromise their integrity and cause a breach of contract to gain some financial benefit then consider how this applies to DRB members. The very nature of the industry - large contractors serving the occasional needs of employers means that the bulk of the "repeat " business for DRB members must come from contractors. Who do you think would be the preferred choice of a contractor - a person who has a history of "mediation" recommendations or as person who has a history of impartial adjudications. In addition they have the advantage that partiality is a breach only of their own contract not the construction contract.

f) *Yes - Board members are usually selected or individuals who have no affiliation or interest in the parties to the contract, and are required to be impartial. Anyone with a reputation of having been biased is unlikely to be asked to join a Board.*

g) *Yes, provided that the members are qualified and experienced, and that the employer and the contractor each nominate one member, and the nominated members choose their chairman.*

h) Yes: The process of selecting the members ensures impartiality.

i) Obviously the panel has to be impartial. How to measure that ...? Like in an arbitration you should make the difference between neutrality (no by reason of the initial sympathy to the party appointing the member and to the representative dealing with the case), impartiality (yes) and independence (yes).

j) *Yes, panel members are truly impartial/independent.*

k) Yes. Persons serving in these roles are internationally reputable professionals and it is a small world. They would not continue to get on Boards if they were not impartial.

l) In principle they should be, in practice

- *Generally clients / engineers are milder personalities and contractors (1) are more forceful, not skilled in understanding engineer viewpoints*
- *Contractors have found ways of influencing DB's probably through (1). This is the only explanation for the infrequent rejection of Contractor's claims in favour of Engineer's decisions.*

m) The board, even though members are appointed by the parties, should be impartial but unfortunately in the real world of construction it does not seem to be the case. My experience seems to indicate the recommendations of DRB's tend to favour the

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contractors. The simple reason for this is that a board member's future appointment is more likely to be by a contractor, especially a major international one who are engaged in many major projects across the world. A client usually has only one project over a discrete period and is unlikely to require the services of a member after completion of the first projects in the future.

n) *Usually but: As mentioned previously the calibre of person is very important. The impression may be that since the client and contractor each choose their candidate the degree of impartiality is in question. Some DRB members may have a leniency to be more sympathetic to construction activities.*

o) *Yes, the DRB was impartial. It is important to have a good mix of knowledge and background (including strong legal) in the DRB.*

5.4 Do you consider Dispute Boards to provide value for money? (Yes/No with reason)

Some of the motivations for their answers presented by the respondents are as follows:

a) *Yes. An insurance policy for both parties and one that will usually save the parties starting on arbitration.*

b) *Definitely, but more particularly on large projects where the Board costs probably less than 0.5% of the project cost. The main value is the clear-cut reduction in claims – Contractors do not submit spurious claims and Engineers hesitate before complete rejection. On smaller contracts, three members may be expensive and may be a one man Board or Adjudicator may be more appropriate.*

c) *Yes – experience has shown that disputes are settled soon after they occur thereby precluding expensive litigation procedures long after the event and some times after completion of the contract.*

d) *Yes – because a fair approach to Contractor's disputes will in the long term reduce tender prices Contractor does not have to price for unfair Engineer / Client*

e) *For the Employer – On previous experience, far too much "mediation", "split the difference" or "the contractor has failed to substantiate his case so we will make a cartload of assumptions to make it for him" approach. The lack of clear reasoning and the presence of personal views of 'equity" on some of he DRB recommendations on a particular project was disturbing.*

f) *For the Contractor – Yes, very much so. For a relatively modest sum (and the Employer pays half anyway) you not only build up a class of people beholden to your for their regular income but you also benefit from human nature in that the driving force of DRB is that an agreement is reached rather than an unequivocal decision on contractual right or wrong given.*

g) *Mostly Yes - If the parties to the contract cannot reach amicable settlement by themselves, then a DB will always be cheaper than alternatives such as arbitration on litigation in a court of law. Can be No, if expensive DB members are chosen, or if the parties are likely to be reasonable and can sort things out by themselves.*

h) *Yes: Compared to the costs of legal council in presentation (build-up) of any claim and overall cost of arbitration cases.*

i) *If used correctly by the Employer and Contractor, no doubt.*

j) *Yes, prevention is far less expensive than cure.*

k) *Yes, if managed properly, i.e. operated under controlled procedures, and the parties maintain the good faith shown in accepting a Disputes Board, and use the recommendations to settle, so avoiding the consequences of going to arbitration.*

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l) Still do if not too formally constrained. Recent trends to adopt high fee structures (based on $ allowances) is eroding the concept and turning it into a business rather than encouraging a professional approach.

m) In principle it should provide value if it results in the early resolution of disputes and the avoidance of arbitration. It is therefore critical to appoint the right members who are able to make contractual justified impartial recommendations. International DRB members tend to be more influenced by their previous experiences with similar contractors and situations than the facts of the particular dispute. When a DRB is involved it does put additional pressure on both the Contractor and Engineer to evaluate and present claims and evaluations more accurately and that in itself adds value.

n) If the client is an informed client with the necessary technical and contractual backup a DRB is not necessary. Deal with claims as they appear and do not postpone it to later dates.

o) Yes. Cost v value of claims was good value for money. Resulted in fair overall settlement without going to court.

5.5 Do you consider Dispute Boards to be an essential part of the amicable settlement/adjudication process? (Yes/No with reason)

Some of the motivations for their answers presented by the respondents are as follows:

a) Yes, any forum that gets the parties around the table is to be encouraged. Whether a DB is essential is arguable but it is certainly most helpful.

b) Not essential, but helpful and valuable. The Board's recommendation points the direction in which the correct solution lies, and hence the parties tend to abandon insecure positions with the result that settlement becomes more achievable. Again the Board recommendation must be such that the parties decide (with legal advice) that further action is fruitless. It is suggested that the value of the DRB being appointed early and becoming familiar with all aspects and the people involved are stressed. This greatly increases the capacity to make a better recommendation.

c) Yes – the very existence of Dispute Boards encourage the Parties to the contract to settle amicably their disputes without recourse to expensive options such as arbitration or litigation.

d) It depends where you are. In a country where there is still a strong professional ethic and a general appreciation or climate of moral independence the DRB would, if it were used, be simply a convenient rather than essential tool. Off hand I can't think of such a country. Some of the northern European countries still outside the EU might still make it. However, in those places where cultural development has resulted in a general population that think "ethics" is a county south east of London then DBs may well be considered essential – although even there they are likely to be by passed by the brown envelope brigade.

e) Not essential - the first prize is to have reasonable parties to the contract, but in large projects entered into after a competitive tendering process, this may be wishful thinking! In this case, a DB is preferable to a process that is likely to lend to the involvement of lawyers and protracted arguments. If the project is large, say more than R 100 million, I (reluctantly) feel that the answer would be yes.

f) No. In fact I consider the amicable settlement process to be a complete waste of time. After the Engineer's decision has been rejected a dispute should proceed straight to the DRB, or preferably, to a mediator working with two assessors in

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accordance with the provisions of the SA GCC '90, neither the DRB recommendation nor the mediator's opinion being binding.

g) *Only in the case of an unreasonable Client/Employer/Engineer/Contractor and especially unsophisticated Employer and weak Engineer.*

h) *The success may depend partly on the skills and personality of the members, but mainly it is up to the parties to contribute to achieve amicable negotiations.*

i) *Yes, because they can provide (at a reasonable cost) a realistic point of encounter.*

j) *They are not essential. However it is always preferable to have the DRB/DAB approach included in contracts. This provides the very important possibility to avoid arbitration. Apart from purely this, I believe a Government/Public Body client will feel much more able to settle (generally public funds/taxation revenue is being spent) with the comfort of the support of a Board recommendation.*

k) *From the Contractor's viewpoint, a DRB/DAB recommendation may change the Contractor's position on a matter he would otherwise have been ready to go the full arbitration route with; only to possibly have lost in the end. We have to remember that one only goes to arbitration when one feels one really cannot lose. The reality can be completely unexpected and disastrous!*

l) *No, as with proper attitudes of the parties and effective leadership, amicable settlement is achievable. Many Engineers do an effective job of adjudicating impartially and strive to achieve proper contractual settlements. But a good DB will / should enhance the process once this falls apart.*

m) *Definitely not essential but more a convenient part.*

n) *Yes, I am of opinion that it is good practice to include a DRB in the contract document (large projects). Parties to agree on panel of members (3+1) as part of contract agreement.*

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ANNEXURE C : Comparative Tables of DB Specifications and Rules and Procedures

	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
Purpose of DB	➢ Timely and equitable resolution of disputes to avoid delay and litigation ➢ To encourage parties to resolve potential disputes without resorting to the DRB	1	III	
Commencement of agreement	➢ Each party shall negotiate a working agreement with their respective member within 6 weeks of award of contract ➢ Three party agreement shall be entered into four weeks after selection of third member ➢ The DRB shall commence operations on the written authorisation of the employer to do so	3	VI	
Termination of agreement	➢ On completion of construction contract, after final payment has been made. ➢ On mutual agreement of the parties on 4 weeks written notice to the members.		VI IX	
Status of agreement				
Composition	Three members, two plus chairman			
Appointment, time for	➢ First two within 6 weeks of contract award ➢ Chairman within four weeks of the members notified to proceed to select	3		
Appointment	Parties one each, DRB members choose third (also chairman)	3		
Renewal of appointment				
Terms of appointment				
Termination of appointment	➢ Resignation – 4 weeks notice ➢ Only by the original appointer (employer its member, contractor its member and the first two members the third)		IX	
Replacement	➢ *Appointed in same manner as original member*		II.D	

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	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
	➢ Replacement effected within 4 weeks (28 days)			
Disagreement on appointment	If two members have an impasse to select the third, such member shall be selected by agreement between the parties	3		
Member status	➢ Show no partiality to either party or have any conflict of interest ➢ Not have an interest or ownership in any party to the contract or financial interest in the contracts (other than fees for DB member services) ➢ Except for fee-based consulting services on other projects, may not previously have been employed by or have any financial ties to any party to the contracts ➢ Not have a recent, close personal or professional relationship with a key member of party to the contract ➢ Not have had substantial prior involvement with the project which could compromise his impartiality ➢ During his tenure not be employed by any party to the contract. ➢ Not enter into discussions or make an agreement with either of the parties regarding employment by either of them after the contract is completed ➢ Submit disclosure statements: > Resume of experience > Past present and planned future relationships to the project and parties involved in the construction contract, recent, close personal or professional relationships with key members of all parties. ➢ Act impartially and independently	3	II.C	
Breach by member				
Liability	DRB members absolved of any personal or professional liability		X	
Member qualifications	➢ Desirable that experienced in the type of construction involved in the project and ➢ in the interpretation of contract documents	3		
DB duties				

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	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
Advice	➢ Seeking of advice from the DRB by the parties is prohibited ➢ DRB may not give advice regarding the conduct of the work or the resolution of problems, except for the services in the agreement	4	III IV	
Assignment, etc.	DRB members shall not assign any of the work of this agreement		VIII	
Co-ordination	The employer will, in co-operation with the contractor co-ordinate the operations of the DRB		IV.B	
Power of DB	➢ Formulate own rules of operation ➢ Procedure to be kept flexible	4		
Capacity of DB	Independent agents and not as employee of either employer or contractor		X	
Visits				
➢ Frequency	➢ At regular intervals and ➢ At times of critical construction events ➢ Agreed between parties and the DRB	4		
➢ Arrangements	Co-ordinated by employer with co-operation of contractor		V.B	
➢ Purpose	➢ To keep abreast of construction activities and become familiar with the work in progress ➢ At its first visit it would establish procedures for conduct of the routine site visits and hearing of disputes		II.A	
➢ Attendance	➢ Selected personal from parties shall attend the informal discussion	4		
➢ Report				
➢ Meeting Procedure	➢ Informal round table discussion, agenda: > Chairman convened meeting > Opening remarks by employer > Description by contractor of: - Work since last meeting - Status of work schedule - Potential disputes, claims - Proposed solutions > Discussion by employer - Works schedule as he views it	4		

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	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
	- Potential disputes, claims - Status of past disputes - Claims and other controversies > Tentative date for next meeting > If considered necessary by the parties the employer would prepare minutes			
➢ Field visit procedure	➢ Field inspection follows the meeting, consists of: ➢ Visit active segments of work ➢ DRB accompanied by parties	4		
Reference	➢ If contractor objects to decision, action or order of the employer, file a written protest with the employer within 1 week of the event. ➢ Employer considers protest and notifies his decision within two weeks of receipt of the protest ➢ Final and conclusive unless written appeal served within 1 week of receipt of the decision ➢ If apparent no settlement possible, reference to the DRB ➢ Also, either party may appeal any dispute, claim or controversy to the DRB by a Notice of Appeal	5		➢ Disputes referred to engineer who must render a decision within 56 days ➢ If engineer's decision disputed or not rendered within 56 days, either party may give notice to refer to DRB. ➢ If no such notice given within 70 days, of the engineer' decision it becomes final and binding ➢ If notice is given, there is a 56 day period for amicable settlement, which failing reference to the DRB may be made
Reference no DB in place				
Evidence and arguments to DB in a dispute	Notice of Appeal must state clearly and in full detail the issues of the dispute			
Provision of documents by the parties	➢ Members promptly informed of construction activity by means of regular written progress reports, etc. ➢ The contractor shall furnish each DRB member with one copy of all documents he has, other than those furnished by the employer, which are pertinent to the performance of the DRB ➢ Employer to furnish one copy to each DRB member (via	4	IV.A	Disputes are referred to the DRB by one party giving notice to the other and the engineer, with a copy of the engineer's decision, a statement of claim, and supporting documentation and information

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	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
	chairman): > Contract documents > Progress schedules and reports > Change orders > Other pertinent documents			
Rules and procedures bound by				
Hearings	➢ After reference the DRB shall fix a date for the hearing	5		
➢ Procedure	➢ Each party given ample opportunity to be heard and offer evidence ➢ DRB may request documentation and arguments from parties before hearing begins ➢ DRB chairman would chair hearings ➢ Each member keeps notes only unless either party requests, DRB may allow Court Reporter ➢ Audio and video recordings should not be permitted ➢ Employer and contractor present ➢ First contractor discusses dispute, followed by employer ➢ Then rebuttals by parties until all aspects fully covered ➢ DRB may ask questions, clarification and additional data	5 6		➢ Written representations then follow at 21 day intervals: > Respondent's defence and/or counterclaim > Claimant's reply and/or defence to counterclaim > Respondent's reply to defence to counterclaim ➢ No provision for discovery or inspection of documents ➢ No provision for extensions of time for service of written representations ➢ DRB hears the parties. ➢ Parties may be represented by lawyers, or other advisors or agents.
➢ DB function				
➢ Power				
➢ Opinions	None to be expressed during the hearings by the DRB	6		
➢ Failure to attend				
Recommendations/				

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	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
Decision				
➢ Formulation	➢ In private after conclusion of the hearing ➢ Individual views are kept confidential	6		
➢ Requirements	➢ In writing ➢ To both parties ➢ Based on pertinent contract provisions, applicable laws and regulations, and facts and circumstances involved in the dispute	1 5	II.C	
➢ Reasoned?	➢ If requested by either party the DRB shall meet with parties to provide additional clarification of its recommendation ➢ Explanation of reasoning submitted with recommendation as a report	5 6		The DRB issues its decision and reasons, if so requested.
➢ Unanimous decisions	➢ Make every effort to reach ➢ If impossible, dissenting member may prepare minority report	6		Decisions are taken by majority. The chairman effectively has a second or casting vote.
➢ Dissension	A minority report may accompany recommendation	5		
➢ Use of expertise and experience				
➢ Time within which to render	2 weeks (14 days) of completion of hearing	5		The DRB has 140 days to render its decision (includes period for hearing)
➢ Time within which to express satisfaction/ dissatisfaction	Within 2 weeks (14 days) of recommendation, signify acceptance or rejection Failure to respond in the time constitutes acceptance	5		Within 70 days of the DRB's decision or the expiry of the 140 day period if no decision is rendered, either party may give notice of intention to refer to arbitration. In the absence of such notice within 70 days the DRB's decision becomes final and binding
➢ Binding/non-binding	➢ Must carry great weight but not be binding ➢ If unresolved, appeal to DRB or other method of dispute settlement ➢ Recommendations are advisory	1 5	II.B	A recommendation, thus non-binding.
➢ Implementation	On acceptance, promptly	5		Engineer's decisions, and decisions of the DRB, must be complied with until

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	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
				subsequently revised by agreement or arbitration
➢ Admissible as evidence in further proceedings	Yes, recommendation and minority report	5		
Failure to comply with binding decision				
Outside assistance or advice	➢ Specialist services such as legal consultation, accounting, data research, and the like, to the agreement of the parties. ➢ Cost to be shared as agreed.	7		
Communications				
Compensation				
➢ Security				
➢ Amount	➢ As agreed between the parties and their respectively appointed members ➢ Third member as agreed between him and the parties.		VII.A	
➢ Cost liability	Shared equally between the parties	6		The DRB awards costs, just as a court or arbitrator would do. The DRB could punish a party attempting obstruction in the award of costs.
➢ Retainer				
➢ Fee	➢ The first two members would be reimbursed for time and expenses devoted to choosing a third member. ➢ Calculated from hours expended		VII.A	
➢ Expenses	Reasonable expenses - cost of long distance telephone calls, faxes, courier, travel and subsistence, paid in the currency of the fees		VII.A	
➢ Taxes				
➢ Escalation				
➢ Payment	➢ Made by the Contractor and 50% billed to employer	7	VII	

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	TCCP of UTRC (1991)	Spec	Agr.	Pike (1993a) Broad Recommendations
	➢ To be paid 30 days after receipt of invoices			
Failure to make payment				
Governing law				
Not a dispute				
Dispute arising from agreement				
Amicable settlement				
Arbitration				
Court	If DRB recommendation not accepted and further effort at settlement fails, referred to court of which jurisdiction specified		XI	
Funding agents	The funding agents for the project have the right to review recommendations and attend DRB meetings and hearings (but not the private DRB deliberations).			

	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
Purpose of DB						
Commencement of agreement	Latest of: ➢ Commencement Date ➢ DAB agreement has been executed ➢ Parties to give notice to DAB member ➢ If no notice in six months, agreement void		1	When the parties and each of the DAB members have executed the terms		
Termination of agreement	➢ Parties jointly with 42 day notice to member ➢ Resignation ➢ Member non-compliance, termination by notice from <u>both</u> parties ➢ Party non-compliance, termination by notice, effective when received by both.		7 2			
Status of agreement						

University of Cape Town

	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
Composition	One or three members as stated in the Appendix to Tender. If not stated, then three	20.2		Three members, two plus chairman	67.1	
Appointment, time for	By a date stated in the Appendix to Tender	20.2		28 days of Commencement Date	67.1	
Appointment	➢ Jointly by the parties ➢ Parties one each, DAB members consulted for choice of third and chairman. All approved by parties ➢ If list included in contract, select from list	20.2		Parties one each, DRB members choose third and chairman. All approved by parties	67.1	
Renewal of appointment						
Terms of appointment	Shall include by reference the General Conditions of Dispute Adjudication Agreement	20.2		➢ Model terms from FIDIC ➢ Remain independent from parties ➢ Act impartially ➢ Parties to indemnify members	67.1	
Termination of appointment	➢ Resignation – 70 days notice ➢ Discharge ito sc 14.12 ➢ Mutual agreement of parties	20.2	2	➢ Resignation – 'reasonable notice' ➢ Discharge ito sc 60.7 ➢ Mutual agreement of parties, reasonable period notice	67.1	1.b) 7.
Replacement	➢ Agreement of the parties ➢ May appoint to be available to replace ➢ If member declines to act or is unable to act ➢ Mechanism described	20.2		➢ Agreement of the parties ➢ May appoint to be available to replace ➢ If member declines to act or is unable to act ➢ Mechanism described	67.1	
Disagreement on appointment	Appointing authority if, by date stated in the Appendix to Tender: ➢ Failure to agree appointment ➢ Failure to nominate members ➢ Failure to agree chairman ➢ Within 42 days of event requiring replacement, fail to agree. Cost of appointing authority shall be half/half	20.3		Appointing authority if: Within 28 days of Commencement Date, ➢ Failure to nominate members ➢ Failure to agree chairman Within 28 days of event requiring replacement, fail to agree	67.1	

University of Cape Town

	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
Member status	➢ Personal appointment ➢ Be and remain impartial and independent of the parties ➢ Not have an interest (financial or otherwise) in any party to the contracts, the engineer or financial interest in the contracts (other than fees for DAB member services) ➢ Not have been or be employed as a consultant by the either of the parties or engineer, except as disclosed in writing ➢ Not have personal or professional relationships with members of parties or engineer, except as disclosed in writing ➢ Not be employed as a consultant or otherwise by either of the parties or the engineer without prior written consent of the parties and other DAB members ➢ Not give advice to either of the parties or the engineer concerning the conduct of the project, other than as provided for in the agreement ➢ Not enter into discussions or make an agreement with either of the parties regarding employment by either of them after ceasing to be a board member.		3 4	➢ Personal appointment ➢ Be and remain impartial and independent of the parties ➢ Not have an interest (financial or otherwise) in any party to the contracts, the engineer or financial interest in the contracts (other than fees for DRB member services) ➢ Not have been or be employed as a consultant by the either of the parties or engineer, except as disclosed in writing ➢ Not have personal or professional relationships with members of parties or engineer, except as disclosed in writing ➢ Not be employed as a consultant or otherwise by either of the parties or the engineer without prior written consent of the parties and other DAB members ➢ Not give advice to either of the parties or the engineer concerning the conduct of the project, other than as provided for in the agreement ➢ Not enter into discussions or make an agreement with either of the parties regarding employment by either of them after ceasing to be a board member.		1 a) 3
Breach by member	Of general obligations, c 4: The DAB member shall not be entitled to fees and expenses and reimburse fees and expenses if DAB decisions rendered void or ineffective.		8	On breach of c 3 the DAB member shall not be entitled to fees and expenses and reimburse fees and expenses if DAB decisions rendered void or ineffective.		9.
Liability	A DAB member shall not: ➢ Be appointed as an arbitrator in an		5	A DAB member shall not: ➢ Be appointed as an arbitrator in an		8.

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	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
	arbitration between the parties in connection with the contract ➢ Be called as a witness to give evidence before an arbitrator in connection with the contract ➢ Be liable for any claims unless acting in bad faith. Parties to indemnify DAB members jointly and severally.			arbitration between the parties in connection with the contract ➢ Be called as a witness to give evidence before an arbitrator in connection with the contract ➢ Be liable for any claims unless acting in bad faith. Parties to indemnify DAB members jointly and severally.		
Member qualifications	➢ Experienced in the type of work involved in the project ➢ Fluent in the language of the contracts ➢ Experienced in the interpretation of contract documents		3	➢ Experienced in the type of work involved in the project ➢ Fluent in the language of the contracts ➢ Experienced in the interpretation of contract documents		4
DB duties	➢ Comply with the annexed procedural rules. ➢ Ensure availability for site visits and hearings ➢ Acquaint themselves with the contract and the progress of the project by documents made available and keep a current working file. ➢ Treat details of contract and all DAB activities and hearings as private, only publish with consent ➢ Be available to give advice and opinions on matters not in dispute at request of parties		4	➢ Ensure availability for site visits and hearings ➢ Acquaint themselves with the contract and the progress of the project by documents made available and keep a current working file ➢ Treat all DAB activities and hearings as private, only publish with consent ➢ Be available to give advice and opinions on matters not in dispute at request of parties		4
Advice	➢ The parties or engineer may not seek advice from the DAB members other than provided for and agreed. ➢ Employer to ensure engineer's compliance.		5	➢ The parties or engineer may not seek advice from the DAB members other than provided for and agreed. ➢ Employer to ensure engineer's compliance.		5
Assignment, etc.	No assignment, subcontracting without written		2	No assignment, subcontracting or delegate any		4. d)

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	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
	agreement			tasks under the agreement		
Co-ordination						
Power of DB	➢ Establish procedure to be applied in deciding a dispute ➢ Decide on DB's jurisdiction ➢ Conduct any hearing ➢ Ascertain facts and matters required for a decision ➢ Make use of specialist knowledge ➢ Decide on payment of financing charges ito the contract ➢ Decide on provisional relief ➢ Open up, review and revise any opinion, instruction, determination, certificate, decision or valuation of the engineer related to the dispute.		A8	➢ Establish procedure to be applied in deciding a dispute ➢ Decide on DB's jurisdiction ➢ Ascertain facts and matters required for a decision ➢ Make use of specialist knowledge ➢ Decide on payment of interest ➢ Decide on provisional relief ➢ Open up, review and revise any opinion, instruction, determination, certificate or valuation of the engineer related to the dispute.	67.2	
Capacity of DB	Deemed not to act as arbitrators	20.4		Panel of experts, not arbitrators.	67.2	A5
Visits						
➢ Frequency	➢ Not more than 140 day intervals unless requested otherwise by the parties, ➢ But not less than 70 days, except to convene a hearing or if agreed by the parties and DAB		A1	As requested by the parties, but not less than three times in any twelve month period		A1
➢ Arrangements	Agreed jointly, in absence of agreement by the DAB		A2	Agreed jointly, in absence of agreement by the DAB		A2
➢ Purpose	Enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims.		A2	Enable the DAB to become and remain acquainted with the progress of the project and of any actual or potential problems or claims.		A3
➢ Attendance	Employer, contractor and engineer. Co-ordination by employer with co-operation of contractor.		A3	Employer, contractor and engineer. Co-ordination by employer with co-operation of contractor.		A3

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	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
➢ Report	DAB to prepare a report prior to departure from site and copy to parties		A3	DAB to prepare a report prior to departure from site and copy to attendees		A3
➢ Meeting Procedure						
➢ Field visit procedure						
Reference	If a dispute arises	20.4		If a dispute arises	67.1	
Reference no DB in place	Reference to arbitration, not subject to amicable settlement and notice of dissatisfaction restrictions	20.8		Reference to arbitration, not subject to amicable settlement and notice of dissatisfaction restrictions	67.6	
Evidence and arguments to DB in a dispute	Documents promptly by the parties additional information, access to site, appropriate facilities	20.4		Attested copies required of : ➢ Written opinion, instruction, determination, certificate or valuation of the engineer. ➢ The party's written objection to such opinion, instruction, determination, certificate or valuation of the engineer. ➢ The engineer's written response to such objection. ➢ Written definition by the party of the dispute	67.2	
Provision of documents by the parties	➢ One copy of all documents which the DAB may request to each member ➢ All communications shall be copied to the other party		A4	One copy of all documents which the DAB may request to each member		A4
Rules and procedures bound by	Only those in the agreement and contract		A8	Only those in the agreement		A5
Hearings	➢ After reference, DAB <u>may</u> conduct hearing ➢ DAB decides date and place, and ➢ May request written arguments and documents to be presented to DAB prior to		A6	➢ After reference, at <u>discretion</u> of DAB ➢ DAB decides date and place, and ➢ May request written arguments and documents to be presented to DAB prior to		A5

University of Cape Town

	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
	hearing			hearing		
➢ Procedure	➢ May adopt procedures suitable to the dispute, avoiding unnecessary delay or expense ➢ Act fair and impartial, giving each of the parties reasonable opportunity to present case		A5	➢ Afford each of the parties reasonable opportunity to present case		A5
➢ DB function						
➢ Power	➢ May adopt inquisitorial procedure ➢ May refuse admission at hearings or audience at hearings, other than parties and engineer ➢ May proceed in the absence of any party who has been duly notified ➢ Has discretion to decide whether and to what extent this power may be exercised.		A7	➢ May adopt inquisitorial procedure ➢ May refuse admission at hearings or audience at hearings, other than parties and engineer ➢ May proceed in the absence of any party who has been duly notified		A5
➢ Opinions	None to be expressed during the hearings by the DAB		A9	None to be expressed during the hearings by the DAB		A5
➢ Failure to attend	If a DAB member fails to attend the remaining two may proceed, unless ➢ It is the chairman and he instructs not to make a decision, or ➢ If either parties otherwise does not agree to proceed			➢ If a DAB member fails to attend the remaining two may proceed, unless it is the chairman and he instructs not to proceed, or ➢ If parties otherwise agree not to		A5
Recommendations/ Decision				Give notice to the parties		A6
➢ Formulation	In private after conclusion of the hearing		A9	In private after conclusion of the hearing		
➢ Requirements						
➢ Reasoned?	Yes			No provision		
➢ Unanimous	➢ Endeavour		A9	➢ Endeavour to reach		6

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	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
decisions	➢ If impossible, majority decision			➢ If impossible, majority decision		
➢ Dissension	Majority may require minority to prepare a written report			Minority may prepare a written report		6
➢ Use of expertise and experience	Specialist knowledge		A8	Specialist knowledge	67.2	
➢ Time within which to render	84 days of receipt of reference	20.4		84 days of receipt of reference	67.2	
➢ Time within which to express satisfaction/ dissatisfaction	28 days from receipt of decision, including Reasons for dissatisfaction	20.4		28 days from receipt of decision	67.2	
➢ Binding/non-binding	Final and binding if notice of dissatisfaction is not given within 28 days from receipt of decision	20.4		Final and binding if notice of dissatisfaction is not given within 28 days from receipt of decision	67.2	
➢ Implementation	Promptly by the employer, contractor and the engineer.	20.4		Forthwith by the employer, contractor and the engineer.	67.2	
➢ Admissible as evidence in further proceedings	Yes					
Failure to comply with binding decision	Reference to arbitration, not subject to amicable settlement and notice of dissatisfaction restrictions			Reference to arbitration, not subject to amicable settlement and notice of dissatisfaction restrictions	67.5	
Outside assistance or advice	Allowed, payment to be agreed	**20.2**		Allowed, payment to be agreed	67.1	
Communications				➢ In English ➢ All communications shall be copied to the other party and other members of the DAB		A7
Compensation						

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	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
➢ Security	On reference of dispute requiring site visit and hearing, security to be provided for sum of expenses.		5			
➢ Amount	To be agreed (CoC), stated in agreement.	20.2		To be agreed (CoC), stated in agreement. ISCID arbitrator fees on disagreement.	67.1	6.
➢ Cost liability	Shared equally between the parties	20.2		Shared equally between the parties	67.1	6.
➢ Retainer	➢ Available at 28 day notice ➢ Becoming and remaining conversant with the project and keeping of files ➢ Office and overhead expenses ➢ Other services not listed Reduced to half at issue of Taking Over Certificate. Half paid up to resignation or end of agreement.		6	➢ Available at 28 day notice ➢ Becoming and remaining conversant with the project and keeping of files ➢ Office and overhead expenses ➢ Other services not listed Paid up to end of Defects Liability Period		6.a)
➢ Fee	Daily fee for: ➢ Maximum of 2 days travel time each way to site and back ➢ Each day spent on site visits and hearings ➢ Each day spent in reading submissions for a hearing Fee terminates in month after expiry of Defects Liability Period		6	Hourly fee for: ➢ Maximum of 2 days travel time each way to site and back ➢ Time spent on site visits and hearings ➢ Time spent in reading submissions for a hearing Fee terminates in month after expiry of Defects Liability Period		6.b)
➢ Expenses	Reasonable expenses - cost of telephone calls, faxes, courier, travel and subsistence, paid in the currency of the fees		6	Reasonable expenses - cost of telephone calls, faxes, courier, travel and subsistence, paid in the currency of the fees		6.c)
➢ Taxes	Those levied in country of the site, reimbursed in the currency of the fees		6	Those levied in country of the site, reimbursed in the currency of the fees		6.d)
➢ Escalation	Retainer and fees fixed for first 24 months, thereafter adjusted by agreement on anniversary of the agreement.		6	Retainer and fees fixed for first 12 months, thereafter adjusted by agreement on anniversary of the agreement.		6.
➢ Payment	➢ Made by the Contractor and employer's		6	Made by the Contractor and employer's share		6.

University of Cape Town

	FIDIC 1999	Spec	Agr.	FIDIC 96/Project F	Spec	Agr.
	share recovered as stayed in the contract ➢ To be paid 56 days after receipt of invoices			recovered through the certificate To be paid 56 days after receipt of invoices		
Failure to make payment	➢ Employer shall make payment and recover from defaulting party with interest. ➢ If payment not received within 70 days of invoice, DAB member may suspend services (without notice) and/or resign his appointment.		6	➢ Default to be dealt with in terms of c 63 and c 69 ➢ Other party may make payment and recover from defaulting party with interest ➢ DAB member may suspend services and/or resign his appointment.		
Governing law				Stated		
Not a dispute						
Dispute arising from agreement	To be settled by arbitration under the ICC rules and sole arbitrator.		9	To be settled by arbitration under the ICC rules and sole arbitrator.		11.
Amicable settlement	56 days period from notice of dissatisfaction	20.5		56 days period from notice of dissatisfaction	67.3	
Arbitration	➢ Not without a notice of dissatisfaction ➢ ICC rules ➢ Three arbitrators ➢ Language for communications as defined in sc 1.4 ➢ Power to open up, review and revise any certificate, determination, instruction, opinion or valuation and any decision of the DAB ➢ Engineer may be called as a witness ➢ Not limited to arguments and evidence previous put before the DAB	20.6		Arguments and evidence limited to those previous put before the DAB	67.4	

University of Cape Town

	Projects B - D	**Spec**	**Agr.**	**Project E**	**Spec**	**Agr.**
Purpose of DB	The DRB is a means of achieving the objectives of: ➢ Amicable resolution of disputes ➢ Minimising time, effort and costs necessary to resolve disputes					
Commencement of agreement	From date of signing 1 August 1994		5.4 A2.1	On date on which parties and last of DRB members execute agreement		
Termination of agreement	➢ The DRB has made recommendations in respect of all disputes, or ➢ Final certificate has been issued or payment pursuant to sc 60.8 made, or ➢ Return by contractor of performance security (sc 10.2), or ➢ The expiration of the time set for a replacement member [and he has not been selected] ➢ On same date as employer/contractor DRB agreement Whichever is the earlier, or as agreed Validity suspended if member resigned or appointment terminated until replaced		5.4 A2.3			
Status of agreement	In the event of discrepancies and ambiguities between agreement and c 67, c 67 shall prevail		A2.2			
Composition	Three members, two plus chairman		3.1			
Appointment, time for	➢ Approve the two selected members within 63 days after date of agreement (and obtained their consent) ➢ Third member selected within 56 days of their appointment		3.3 3.4 A1.3			
Appointment	➢ Parties one each, DRB members choose third. One chosen as chairman by members. All approved by parties		3.1 3.6 A1.3	Not specified		

University of Cape Town

	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
	➢ Initially for 2 year term		A2.5			
Renewal of appointment	➢ Upon written agreement of the parties		3.6			
Terms of appointment				Agreement, sc 67.2 of the CoC and MOU		
Termination of appointment	➢ Resignation – 70 days notice ➢ Not renewed after initial term ➢ Mutual agreement of parties		3.6 A2.4 A2.5	➢ Mutual agreement of parties, 8 weeks (56 days) notice ➢ Resignation – 8 weeks (56 days) days notice		18. 9.
Replacement	➢ Appointed in same manner as original member ➢ Replacement effected within 70 days		3.6	Not provided for		
Disagreement on appointment	➢ If two members have an impasse to select the third, such member shall be selected by agreement between the parties		3.3 A1.3			
Member status	➢ No conflict of interest between his appointment and personal interests ➢ Not have an interest (financial or otherwise) in any party to the contracts, the engineer or financial interest in the contracts (other than fees for DRB member services) ➢ Except for fee-based consulting services on other projects, may not previously or during course of tenure as member, have been or be employed by or have any financial ties to any party to the contracts ➢ Not have had <u>substantial</u> prior involvement with the project which could compromise his impartiality ➢ Members act in independent capacity and not as employee or agent of either		3.2 A4.1	➢ Personal appointment ➢ Be and remain impartial and independent of the parties ➢ Disclosed in writing that he does not have personal or professional relationships with members of parties or engineer ➢ Disclosed in writing that he has not had prior involvement with the project which is not known to the parties ➢ May be appointed as an arbitrator, adjudicator or mediator in other projects in which the employer and/or contractor (also JV members) are involved ➢ Not have an interest (financial or otherwise) in any party to the contracts, the engineer or financial interest in the		7. 11. 12.

University of Cape Town

	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
				contracts (other than fees for DRB member services) ➢ Not have been or be employed as a consultant by the either of the parties or engineer, except as disclosed in writing ➢ Not be employed as a consultant or otherwise by either of the parties or the engineer without prior written consent of the parties and other DRB members ➢ Not give advice to either of the parties or the engineer concerning the conduct of the project, other than as provided for in the agreement ➢ Not enter into discussions or make an agreement with either of the parties regarding employment by either of them after ceasing to be a board member.		
Breach by member				The DRB member shall not be entitled to fees and expenses and reimburse fees and expenses if DRB decisions rendered void or ineffective.		
Liability	DRB members indemnified against personal or professional liability		A4.2	A DRB member shall not: ➢ Be appointed as an arbitrator in an arbitration between the parties in connection with the contract ➢ Be called as a witness to give evidence before an arbitrator in connection with the contract ➢ Be liable for any claims unless acting in bad faith. ➢ Parties to indemnify DRB members		19.

University of Cape Town

	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
				jointly and severally.		
Member qualifications	➢ Experienced in the type of construction involved in the contracts ➢ Experienced in the interpretation of contract documents		3.2	➢ Experienced in the type of construction involved in the contracts ➢ Fluent in the language of the contracts ➢ Experienced and skilled in the interpretation of contract documents and the weighing up of evidence on fact and its credibility		13.
DB duties	➢ Ensure availability for site visits and hearings ➢ Each member to keep a current working file ➢ Be conversant with the development of the contracts by studying all documents received ➢ Treat all details of the contracts and all activities of the DRB as private and confidential, only publish with consent		3.2 A8.2	➢ Acquaint themselves with the progress of the works and commercial, contractual issues by site visits and by documents made available ➢ Ensure availability for site visits and hearings ➢ Observe the DRB rules ➢ Each member to keep a current working file ➢ Treat all details of the contracts and all activities of the DRB as private and confidential, only publish with consent		15.
Advice				DRB may not give advice or have consultations with the parties or engineer regarding the contract other than in accordance with the agreement.		16.
Assignment, etc.	No assignment of DRB duties and responsibilities		A3	No assignment, subcontracting or delegation of DRB tasks		15.
Co-ordination						
Power of DB						
Capacity of DB				Board of impartial experts, not arbitrators		A1.3
Visits						
➢ Frequency	➢ Regular intervals, agreed between parties after		…	Visit the site once every six months or as		4.

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	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
	consultation with the DRB - ➢ Every 6 months or as requested by the parties ➢ Requests shall give 49 days notice		A1.3	requested by the parties		
➢ Arrangements	Request to include a proposed agenda agreed to by the parties					
➢ Purpose	To acquaint the DRB with the progress of the Works and any contractual issues and matters the DRB may eventually be involved.		A1.3	To acquaint the DRB with the progress of the Works and any commercial and contractual issues.		4. A1.1
➢ Attendance	Employer, contractor and if appropriate the engineer.		A1.3	Employer, contractor and engineer. Co-ordination by employer with co-operation of contractor.		A1.1
➢ Report	At the discretion of the DRB to prepare a report prior to departure from site and copy to parties and engineer		A1.3	DRB to prepare a report prior to departure from site and copy to parties and engineer		A1.1
➢ Meeting Procedure						
➢ Field visit procedure						
Reference	Where notice of intention to commence arbitration is given		2.1	Where notice of intention to commence arbitration is given	67.2	
Reference no DB in place						
Evidence and arguments to DB in a dispute	➢ Evidence and arguments placed before the engineer for his decision ➢ DRB may request further explanation or clarification ➢ If new evidence or arguments are brought by either party, these shall be referred to the Engineer for comment, to be presented to the DRB		A1.2	➢ Confined to what is stated in the party's request for an engineer's decision ➢ Applies to the ambit of the dispute but not the arguments presented in position papers or at hearings, no fresh point may be raised, except the clarification as noted next. ➢ The DRB may on its own or on the request of either party seek clarification		7. A1.8 A1.9

University of Cape Town

	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
				on items in the SOC and response ➢ The SOC and response shall set out in reasonable detail the nature and factual contractual and legal bases of the case and be accompanied by a bundle of copies of the documents upon which the party relies as evidence		
Provision of documents by the parties	➢ Employer to furnish one copy to each DRB member (via chairman): > Contract documents > Progress schedules and reports > Other pertinent documents > All documents also copied to contractor		A5.1	➢ Parties shall through the employer furnish each member with a copy of contract ➢ Either party may copy documents to members ➢ All documents sent to the DRB shall simultaneously be sent to the other party.		4. A1.2
Rules and procedures bound by				Only those in the agreement		A1.3
Hearings	➢ To be convened (by employer or contractor) within 49 days of day of notice of intent to commence arbitration.		2.2	➢ To be convened (by employer or contractor) within 49 days of day of notice of intent to commence arbitration. ➢ Shall conduct a hearing into the dispute, no later than 49 days of day of notice ➢ May conduct any hearing it deems fit	67.2	5. A1.3
➢ Procedure	➢ DRB determines procedures ➢ Conducted in presence of parties and engineer ➢ Chairman shall reside over the hearings ➢ DRB shall keep formal record of hearings if requested to do so by either party		A1.2	As set out in the rules in Schedule A Part 1 – DRB rules ➢ Within 14 days of notice of intention to commence arbitration, the claimant must serve a statement of case (SOC) on the defendant (copied to each	A1.8	

University of Cape Town

	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
				established principles of law ➢ Fully reasoned ➢ Citing findings of fact and conclusions derived ➢ State provisions of contract and precedent		
➢ Reasoned?	Documented reasons		2.3 A1.2	Documented reasons	67.2	A2
➢ Unanimous decisions	➢ Make a concerted effort to reach ➢ If impossible, majority recommendation		A1.2	➢ Endeavour to reach ➢ If impossible, majority recommendation		A1.4
➢ Dissension	Minority member shall submit a separate report			To be indicated with reason		A2.V
➢ Use of expertise and experience				Use own expertise and experience on technical and contractual matters Use combined expertise and experience		7. A1.10
➢ Time within which to render	56 days of commencement of hearing		2.3 A1.2	56 days of commencement of hearing	67.2	
➢ Time within which to express satisfaction/ dissatisfaction				56 days of issue of recommendation, party notifying to confirm intention to commence arbitration	67.2	
➢ Binding/non-binding	➢ Not final or binding. ➢ No period stated within which reconfirmation of notice of intention to commence arbitration must be given. ➢ Acceptance on valid if written agreement is effected setting out the terms of the settlement		2.4 5.3	Non-binding unless accepted satisfaction notified within 56 days of receipt of DRB recommendations		7.
➢ Implementation						
➢ Admissible as evidence in further	Deliberations of the DRB without prejudice to the strict and legal rights of the parties as may be determined in accordance with the contracts		5.2	Without prejudice: ➢ DRB findings as to facts ➢ Recommendations		8

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	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
proceedings				➢ Reasoning for the recommendations ➢ The fact that the dispute was referred to the DRB		
Failure to comply with binding decision						
Outside assistance or advice				Allowed, on opinion of either both parties, or DRB. ➢ Nominated by DRB or requesting party or both and approved by both parties and DRB. ➢ Additional cost to be advised before appointment. ➢ Cost shared met equally by parties.		14.
Communications	➢ Documents provided to the DRB through the employer ➢ No communications by parties with DRB without indicating intentions to other party		A6 A8.1	➢ In English ➢ All communications shall be copied to the other party and other members of the DRB		A1.5
Compensation						
➢ Security						
➢ Amount				Stated		X
➢ Cost liability	Shared equally by the parties Employer responsible for expenses at the site – administrative service, conference facilities, secretarial services		4.1 A5.3	Shared equally by the parties		17
➢ Retainer	➢ Being available ➢ Remaining conversant with the project and keeping of files ➢ Office and overhead expenses		A7	➢ Available at 49 day notice ➢ Becoming and remaining conversant with the project and keeping of files ➢ Office and overhead expenses ➢ Other services not listed Reduced to half at issue of Taking Over		17

University of Cape Town

	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
				Certificate. Half paid up to end of Defects Liability Period.		
➢ Fee	Daily fee for: ➢ Maximum of 2 days travel time between site and home base in each direction ➢ Each day (8 hours or more) spent on site visits, hearings ➢ Each day spent in home office after referral on preparation for hearings		A7	Daily fee for: ➢ Maximum of 3 days travel time between site and home base (does not state both ways) ➢ Each day spent on site visits, hearings and preparations of recommendations ➢ Each day spent in reading submissions for a hearing Fee terminates in month after expiry of Defects Liability Period		17
➢ Expenses	Reasonable expenses - cost of telephone calls, faxes, courier, travel and subsistence, paid in the currency of the fees		A7	Reasonable expenses - cost of telephone calls, faxes, courier, travel and subsistence, paid in the currency of the fees		17
➢ Taxes	No provision			No provision		
➢ Escalation	Retainer and fees fixed for first 2 years, thereafter adjusted by agreement on anniversary of the agreement.		A7	Retainer and fees fixed for first 12 months, thereafter adjusted by agreement on anniversary of the agreement. Basis for adjustment would be CPI of country of currency of payment.		17
➢ Payment	➢ By each parties ➢ Within 60 days after receipt of invoices		4.3 A7	➢ Made by the Contractor and employer's share recovered through the certificate ➢ To be paid within 56 days of receipt of invoices		17
Failure to make payment				➢ Default to be dealt with in terms of c 63 and c 69 ➢ Other party may make payment and recover from defaulting party with interest ➢ DRB member may suspend services		17

University of Cape Town

	Projects B - D	Spec	Agr.	Project E	Spec	Agr.
				and/or resign his appointment.		
Governing law				Stated		21
Not a dispute				The DRB may recommend on whether a matter is a dispute or not.		A1.6
Dispute arising from agreement	Dispute regarding validity, interpretation, or performance of the agreement shall be finally settled by arbitration pursuant to sc 67.4			To be settled by arbitration under the ICC rules and sole arbitrator.		
Amicable settlement				56 days period of confirmation of intention to commence arbitration	67.3	
Arbitration	➢ If notice of intention to commence arbitration has been reconfirmed ➢ May commence 28 days after reconfirmation		2.4 5.1	➢ If engineer's decision not final and binding ➢ If dissatisfied with DRB recommendation ➢ Amicable settlement not reached ➢ UNCITRAL rules and IBA rules of evidence ➢ One or more arbitrators ➢ Power to open up, review and revise any certificate, determination, instruction, opinion or valuation and any decision of the engineer ➢ Not limited to arguments and evidence previous put before the engineer or DRB ➢ Engineer may be called as a witness	67.4	7.

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ANNEXURE D : TCCP of UTRC DRB Specification

Disputes Review Board Specification

(This specification should be included in the Special Provisions and noted in the Instruction to Bidders.)

1. Introduction

A Disputes Review Board will be established to assist in the resolution of disputes, claims and other controversies arising out of the work of this project.

This specification describes the purpose, procedure, function and key features of the Disputes Review Board. Appended to this specification is a Three Party Agreement formalizing the creation of the Board.

The Board will assist in and facilitate the timely and equitable resolution of disputes between the Owner and the Contractor, in an effort to avoid construction delay and litigation.

It is not intended for the Owner or the Contractor to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning them to the Board. It is intended that the Board encourage the Owner and Contractor to resolve potential disputes without resorting to this appeal procedure.

Either the Owner or the Contractor may appeal a dispute to the Board. Appeal to the Board should be initiated as soon as it appears that the normal Owner-Contractor dispute resolution effort is not succeeding, and prior to enacting other dispute resolution procedures or filing of litigation by either party.

The Board shall fairly and impartially consider disputes referred to it, and shall provide written recommendations, to the Owner and the Contractor, to assist in the resolution of these disputes.

Although the recommendations of the Disputes Review Board should carry great weight for both the Owner and the Contractor, they are not binding on either party.

2. Continuance of Work During Dispute

At all times during the course of the dispute resolution process, the Contractor shall continue with the work as directed, in a diligent manner and without delay, or shall conform to the Owner's decision or order, and shall be governed by all applicable provisions of the Contract. Records of the work shall be kept in sufficient detail to enable payment in accordance with applicable provisions in the Contract, if this should become necessary.

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3. Membership

The Disputes Review Board will consist of one member selected by the Owner and approved by the Contractor, one member selected by the Contractor and approved by the Owner, and a third member selected by the first two members and approved by both the Owner and the Contractor. Normally, the third members will act as Chairman for all Board activities.

It is desirable that all Disputes Review Board members be experienced with the type of construction involved in this project, and interpretation of contract documents. The goal in selecting the third member is to complement the construction experience of the first two and to provide leadership for the Board's activities.

It is imperative that Board members show no partiality to either the Contractor or the Owner, or have any conflict of interest.

The criteria and limitations for membership are:

a) No member shall have an ownership interest in any party to the contract, or a financial interest in the contract, except for payment for services on the Disputes Review Board.
b) Except for fee-based consulting services on other projects, no member shall have ever been previously employed by, or have had financial ties to, any party to the contract.
c) No member shall have had a recent, close, professional or personal, relationship with any key member of any party to the contract.
d) No member shall have had substantial prior involvement in the project, of a nature which could compromise his ability to impartially participate in the Board's activities.
e) During his tenure as a Disputes Review Board member, no member shall be employed by any party to the contract.
f) During this tenure as a Disputes Review Board member, no member shall engage in a discussion or make an agreement, with any party to the contract, regarding employment after the contract is completed.

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Before their appointments are final, the first two prospective members shall submit complete disclosure statements for the approval of both the Owner and Contractor. Each statement shall include a resume of experience, together with a declaration describing all past, present and anticipated or planned future relationships to this project and with all parties involved in the construction contract. Disclosure of recent, close, professional or personal, relationships with all key members of all parties to the contract shall be included. The third Board member shall supply such a statement to the first two Board members and to the Owner and Contractor before his appointment is final.

The Owner and the Contractor shall each select and negotiate a working agreement with their respective member within six weeks after award of the contract. Immediately after approval, the Owner and Contractor will notify their members to begin selection of the third member. The first two members shall ensure that the third member meets all of the criteria listed above. The third member shall be selected within four weeks after the first two members are notified to proceed with his selection. In the event of an impasse in selection of the third member, that member shall be selected by mutual agreement of the

Owner and the Contractor. In so doing, they may, but are not required to, consider the nominees offered by the first two members.

The Owner, the Contractor, and all three members of the Disputes Review Board shall executed the Disputes Review Board Three Party Agreement within four weeks after the selection of the third member.

4. Operation

The Disputes Review Board shall formulate its own rules of operation. It is not desirable to adopt hard and fast rules for the functioning of the Board. The entire procedure shall be kept flexible to adapt to changing situations. The Board shall initiate, with the Owner's and Contractor's concurrence, new rules or modifications to old ones, whenever this is deemed appropriate.

In order to keep abreast of construction developments and progress, the members will be promptly informed of construction activity by means of regular written progress reports and other relevant data from the Owner. The Board shall visit the project and meet with representatives of the Owner and the Contractor at regular intervals and at times of critical construction events. The frequency of these visits shall be as agreed among the Owner, the Contractor and the Board, depending on the progress of the work.

The regular meetings shall be held at the job site. Each meeting shall consist of an informal round table discussion followed by a field inspection of the work. The round table discussion shall be attended by selected personnel from the Owner and the Contractor. The Agenda shall generally include the followings:

a) Meeting convened by the Chairman of the Disputes Review Board.
b) Opening Remarks by the Owner's representative.
c) A description by the Contractor of:
   - work accomplished since the last meeting,
   - current status of the work schedule,
   - schedule for future work,
   - potential disputes, claims and other controversies,
   - proposed solutions for these problems.
d) Discussion by the Owner's representative of:
   - the work schedule as he views it,
   - Potential disputes, claims and other controversies,
   - status of past disputes,
   - claims and other controversies.
e) Set tentative date for next meeting.

If it is considered necessary by the parties, the Owner will prepare minutes of regular meetings and circulate them for comments, revisions and/or approval of all concerned.

The field inspection shall cover all active segments of the work. The Board shall be accompanied by representatives of both the Owner and Contractor.

Seeking any Board member's advice or consultation during the meetings or at any other time is expressly prohibited.

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5. Procedure and Schedule for Dispute Resolution

Disputes shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps may be omitted as agreed to by both parties, and the time periods stated below may be shortened in order to hasten resolution.

a) If the Contractor objects to any decision, action or order of the Owner, the Contractor may file a written protest with the Owner, stating clearly, and in detail, the basis for the objection, within one week after the event.

b) The Owner will consider the written protest and make its decision on the basis of the pertinent contract provisions, together with the facts and circumstances involved in the dispute. The decision will be furnished in writing to the Contractor, within two weeks after receipt of the Contractor's written protest.

c) This decision shall be final and conclusive on the subject, unless a written appeal to the Owner is filed by the Contractor, within one week of receiving the decision. Both parties are encouraged to pursue the matter further to attempt to settle the dispute. When it appears that the dispute cannot be resolved on the job, either party may appeal to the Disputes Review Board.

d) In addition to the above procedure, by written Notice of Appeal, either the Owner or Contractor may appeal any dispute, claim or other controversy to the Board. Simultaneous with submittal to the Board, a copy of the Notice of Appeal shall be provided to the other party. The Notice of Appeal shall state clearly and in full detail the specific issues of the dispute to be considered by the Board.

e) When a dispute is appealed to the Board, it shall first be decided when to conduct the hearing. If the matter is not urgent, it may be heard at the next regular Board meeting. For an urgent matter, the Board shall meet at its earliest convenience.

f) During the hearing, the Contractor and the Owner shall each have ample opportunity to be heard and to offer evidence. Detailed procedures are given in Section 6. The Board's recommendations for resolution of the dispute will be given in writing, to both the Owner and the Contractor, within two weeks of completion of the hearings. In exceptionally difficult cases, this time may be extended by mutual agreement of all parties.

g) If requested by either party, the Board shall meet with the Owner and Contractor to provide additional clarification of its recommendation.

h) Within two weeks of receiving the Board's recommendations, or such other time specified by the Board, both the Owner and the Contractor shall respond to the other and to the Board in writing, signifying either acceptance or rejection of the Board's recommendations. The failure of either party to respond within the specified period shall be deemed an acceptance of the Board's recommendations. If, with the aid of the Board's recommendations, the Owner and the Contractor are

University of Cape Town

able to resolve their dispute the Owner will promptly process any required contract changes.

i) Should the dispute remain unresolved, either party may appeal the decision back to the Board, or may resort to other methods of settlement.

Although both the Owner and the Contractor should place great weight on the Disputes Review Board recommendations, they are not binding. If the Board's recommendations do not resolve the dispute, the written recommendations, including any minority report, will be admissible as evidence in any subsequent dispute resolution proceeding.

6. Conduct of Hearing

The Board may request that written documentation and arguments from both parties be submitted to each member before the hearing begins.

Normally the hearing will be conducted at the job site. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory. Private sessions of the Board may be held at any convenient location.

The third member of the Board will act as Chairman of the hearing, or he may appoint one of the other members. Normally each member keeps his own notes, and a formal transcript is not prepared. In special cases, when requested by either party, the Board may allow preparation of a transcript by a Court Reporter. Audio or video recordings should not be permitted.

The Owner and the Contractor shall have representatives at all hearings. The Contractor will first discuss the dispute, followed by the Owner. Each party will then be allowed successive rebuttals until all aspects are fully covered. The Board members may ask questions, request clarification, or ask for additional data. In large or complex cases, additional hearings may be necessary in order to consider and fully understand all the evidence presented by both parties. Both the Owner and Contractor shall be provided full and adequate opportunity to present all of their evidence, documentation and testimony regarding all issues before the Board.

During the hearings, no Board member shall express any opinion concerning the merit of any facet of the case.

After the hearings are concluded, the Board shall meet to formulate its recommendations. All Board deliberations shall be conducted in private, with all individual views kept strictly confidential. The Board's recommendations, together with an explanation of its reasonings, shall be submitted as a written report to both parties. The recommendations shall be based on the pertinent contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

The Board shall make every effort to reach a unanimous recommendation. If this proves impossible, the dissenting member may prepare a minority report.

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7. Compensation

Fees and expenses of all three members of the Board shall be shared equally by the Owner and the Contractor. The Owner will prepare and mail minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services, and will bear the cost of these services. If the Board desires special services, such as legal consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed.

The Contractor shall pay the invoices of all Board members after approval by both parties. The Contractor will then bill the Owner for 50% of such invoices.

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ANNEXURE E : TCCP of UTRC DRB Three Party Agreement

DISPUTES REVIEW BOARD THREE PARTY AGREEMENT

(to be executed after award of contract)

(project name)

DISPUTES REVIEW BOARD THREE PARTY AGREEMENT

THIS THREE PARTY AGREEMENT, made and entered into this _____ day of _____ 19 _____, between:

(Owner) _____,
hereinafter called the "OWNER", acting through the Construction Manager, and
(Contractor) _____,
hereinafter called the "CONTRACTOR", and the Disputes Review Board, hereinafter called the "BOARD", and consisting of three members, _____, _____, _____

WITNESSETH, that

WHEREAS, the OWNER is now engaged in the construction of the (Project name) _____; and

WHEREAS, the (Project name) _____ contract provides for the establishment and operation of a BOARD to assist in resolving disputes, claims and other controversies; and

WHEREAS, the BOARD is composed of three members, one selected by the OWNER, one selected by the CONTRACTOR, and the third member selected by these two;

NOW THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein, or attached and incorporated and made a part hereof, the parties hereto agree as follows:

I

DESCRIPTION OF WORK

In order to assist in the resolution of disputes, claims and other controversies between the OWNER and the CONTRACTOR, the OWNER has provided, in the (Project Name) _____ contract, for the establishment of a Disputes Review Board. The intent of the BOARD is to fairly and impartially consider the disputes placed before it, and to provide written recommendations, to both the OWNER and CONTRACTOR, for resolution of these disputes. The members of this BOARD shall

University of Cape Town

perform the services necessary to participate on this BOARD in accordance with the scope of work.

II

SCOPE OF WORK

The scope of work of the BOARD includes, but is not limited to, the following items of work.

A. Construction Site Visits

The BOARD members shall visit the project site to keep abreast of construction activities and to become familiar with the work in progress. The frequency, time, and duration of these visits shall be mutually agreed upon among the BOARD, the OWNER and the CONTRACTOR.

In the case of an alleged differing site condition, or specific construction problem, it will be advantageous, but not absolutely necessary for the BOARD to personally view any relevant conditions. If viewing by the BOARD would cause delay to the project, photographs and descriptions of these conditions, collected by either or both parties, will suffice.

B. Establish Procedures

During its first meeting at the job site, the BOARD shall, with agreement of all parties, establish procedures for the conduct of its routine site visits and its hearings of disputes. The conduct of its business shall, in general, be based on the specification provisions.

C. Recommend Settlement of Disputes

Upon receipt by the BOARD of a written appeal of a dispute, either from the OWNER or the CONTRACTOR, the BOARD shall convene a hearing to review and consider the dispute. Both the OWNER and the CONTRACTOR shall be given a full and adequate opportunity to present their evidence at these hearings. Both the OWNER and the CONTRACTOR are encouraged to provide, prior to the hearing, exhibits, calculations, and any other pertinent material to the BOARD for review. All such material shall be given at the same time and in the same form and content to all parties to this agreement.

It is expressly understood that all BOARD members are to act impartially and independently in the consideration of facts and conditions surrounding any dispute, and that the recommendations concerning any such dispute are advisory.

The BOARD recommendations shall be based on the pertinent contract provisions, and the facts and circumstances involved in the dispute. The recommendations shall be furnished in writing to the OWNER and the CONTRACTOR.

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D. Member Replacement

Should the need arise to appoint a replacement BOARD member, the replacement member shall be appointed in the same manner as the original member was appointed. The selection of a replacement BOARD member shall begin promptly upon notification of the necessity for a replacement and shall be completed within four weeks. This Agreement will be amended to indicate changes in BOARD membership.

III

BOARD RESPONSIBILITIES

The BOARD is organized to recommend settlements for disputes, claims and other controversies between the OWNER and the CONTRACTOR, arising from the construction contract. Primarily, the BOARD will consider matters involving interpretation of the contract documents, delays, acceleration of the work, scheduling, extra work, differing site conditions, design changes, and the like.

Prior to appeal, the BOARD will encourage the settlement of differences at the job level.

Except for providing the services required in the agreement, the BOARD and its individual members shall refrain from giving any advice to either party concerning conduct of the work or the resolution of problems.

IV

CONTRACTOR RESPONSIBILITIES

Except for its participation in the BOARD's activities as provided in the construction contract and in this agreement, the CONTRACTOR shall not solicit advice or consultation from the BOARD or its members on matters dealing with the conduct of the work or resolution of problems.

The CONTRACTOR shall furnish to each BOARD member one copy of all documents it has, other than those furnished by the OWNER, which are pertinent to the performance of the BOARD.

V

OWNER RESPONSIBILITIES

Except for its participation in the BOARD's activities as provided in the construction contract and in this agreement, the OWNER shall not solicit advice or consultation from the BOARD or its members on matters dealing with the conduct of the work or resolution of problems.

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The OWNER shall furnish the following:

A. Contract Related Documents

The OWNER shall furnish each BOARD member one copy of all contract documents, including, but not limited to, the specifications, plans, all addenda to the specifications and plans, geotechnical design summary report, progress schedule and updates, weekly progress reports, change orders, and other documents pertinent to the performance of the contract, and necessary to the BOARD'S work.

B. Coordination

The OWNER will, in cooperation with the CONTRACTOR, coordinate the operations of the BOARD.

C. Services

The OWNER will arrange for or provide conference facilities at or near the site, and provide secretarial and copying services.

VI

TIME FOR BEGINNING AND COMPLETION

The BOARD shall be active throughout the duration of the construction contract. It shall begin operation upon written authorization of the OWNER following execution of this Agreement, and shall terminate its activities on completion of the construction contract, after final payment has been made.

Except for choosing a third member by the first two members, the BOARD members shall not begin any work under the terms of this Agreement until authorized in writing by the Owner.

VII

PAYMENT

Invoices of the BOARD members shall be paid by the CONTRACTOR. Payments shall constitute full compensation for work performed and services rendered, and for all materials, supplies and incidentals necessary to serve on the BOARD.

A. Payment for Services and Expenses

Payment for services of the OWNER-appointed and CONTRACTOR-appointed members of the BOARD will be at the rates agreed to between the OWNER and the CONTRACTOR and their respective appointed BOARD members. Changes in the billing rates are subject to agreement between the OWNER and the CONTRACTOR and their respective appointed members.

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Payment for services rendered by the third member of the BOARD will be paid at the rate agreed to between the OWNER, the CONTRACTOR and the third member. Changes in the billing rate are subject to agreement between the OWNER, the CONTRACTOR and the third member.

The first two members will be reimbursed for their time and expenses devoted to choosing the third member.

Direct, non-salary expenses will be reimbursed at the actual cost to the BOARD member. These expenses may include, but are not limited to, automobile mileage (at the standard IRS rate in effect at the time the trip is taken), parking, travel expenses from he BOARD member's point-of-departure to the initial point-of-arrival, automobile rental, food and lodging, printing, long distance telephone, postage and courier delivery. Billing for these expenses shall include an itemized listing supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data.

B. Payments

Each BOARD member may submit invoices for payment for work completed not more often than once per month during the progress of work. Such invoices shall be in a format approved by the OWNER and CONTRACTOR, and accompanied by a general description of activities performed during that period. The value of work accomplished for payment shall be established from the billing rate and hours expended by the BOARD member together with direct, non-salary expenses. Satisfactorily submitted invoices shall be paid within 30 days.

The CONTRACTOR will pay the invoices of the Board members and back charge the OWNER for 50% thereof.

C. Inspection of Cost Records.

The BOARD members shall keep, available for inspection by representatives of the OWNER or CONTRACTOR for a period of three years after final payment, the cost records and accounts pertaining to this agreement.

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VIII

ASSIGNMENT

BOARD members shall not assign any of the work of this Agreement.

IX

TERMINATION OF AGREEMENT

This Agreement may be terminated by mutual agreement of the OWNER and the CONTRACTOR at any time upon not less than four weeks written notice to the other parties.

BOARD members may withdraw from the BOARD by providing four weeks written notice. BOARD members may be terminated for or without cause only by their original appointer; the OWNER may only terminate the OWNER-appointed member, the CONTRACTOR may only terminate the CONTRACTOR-appointed member, and the first two members must agree to terminate the third member.

X

LEGAL RELATIONS

The parties hereto mutually understand and agree that each BOARD member, in the performance of his duties on the BOARD, is acting in the capacity of an independent agent and not as an employee of either the OWNER or the CONTRACTOR.

The BOARD members are absolved of any personal or professional liability arising from the activities and recommendations of the BOARD.

XI

DISPUTES REGARDING THIS THREE PARTY AGREEMENT

Any dispute among the parties hereto, arising out of the work or other items of this Agreement, which cannot be resolved by negotiation and mutual concurrence between the parties, shall be referred to the _____ Court of the (Jurisdiction) _____, as provided in Section XII following.

XII

VENUE, APPLICABLE LAW, AND PERSONAL JURISDICTION

In the event that any party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the parties hereto agree that any such action shall be initiated in the _____ Court of the (jurisdiction) _____. The parties hereby agree that all questions shall be resolved by application of (jurisdiction) _____ law and that the parties to such action shall have the right to appeal from such decisions of the _____ Court in accordance with the laws of the (jurisdiction) _____. The BOARD member hereby consents to the personal jurisdiction of the _____ Court of the (jurisdiction) _____.

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XIII

FUNDING AGENCY REVIEW

The (Agencies funding the project) _____ have the right to review the recommendations and to attend BOARD meetings and hearings, but not to attend private BOARD deliberations.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

BOARD MEMBER

By: _____

BOARD MEMBER

By: _____

BOARD MEMBER

By: _____

CONTRACTOR

By: _____

Title: _____

OWNER

By: _____

Title: _____

University of Cape Town

ANNEXURE F : World Bank DRB/DRE FIDIC Part II Clauses (Specification)

Settlement of Disputes

Clause 67 Settlement of Disputes

(WB-M) Sub-Clauses 67.1 through 67.4 set forth the procedure for settlement of disputes.

[SUB-CLAUSE 67.1—VERSION 1]

Sub-Clause 67.1 Disputes Review Board

Delete Sub-Clause 67.1 and replace with the following:

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

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

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

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

University of Cape Town

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

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

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

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

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

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

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

[END OF VERSION 1]

[SUB-CLAUSE 67.1—VERSION 2]

Sub-Clause 67.1 Disputes Review Expert

Delete Sub-Clause 67.1 and replace with the following:

"If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of the Contract, including any

disagreement by either party with any action, inaction, opinion, instruction, determination, certificate, or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Expert ('DRE').

"The DRE shall take up his functions after having signed a DRE's Declaratio of Acceptance as required by the DRE's Rules and Procedures (which along with the Declaration of
Acceptance, are attached to these Conditions of Particular application).[16]

"The DRE shall be a person experienced with the type of construction involved in the Works and with the interpretation of contractual documents and shall be selected by agreement between the Employer and the Contractor. If the DRE is not selected within 28 days of the date of the Letter of Acceptance, then upon the request of either or both parties the DRE shall be selected as soon as practicable by the Appointing Authority specified in the Appendix to Bid.[17]

"In the event of death, disability, or resignation of the DRE, the latter shall be replaced by agreement between the Employer and the Contractor. Any replacement made by the parties shall be completed within 28 days after the event giving rise to the need for a replacement, failing which the replacement shall be made by the same international appointing authority as above.

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

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

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

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

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

University of Cape Town

having any relation to the dispute to which the Recommendation relates.

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

[END OF VERSION 2]

Sub-Clause 67.2 Sub-Clause 67.2 is deleted without a change in the numbering of the other sub-clauses of this Clause 67.

Sub-Clause 67.3 Arbitration[18] Sub-Clause 67.3 is deleted and replaced by the following Sub-Clauses 67.3.1 and 67.3.2:

"**67.3.1** Arbitration Proceedings

"Any dispute in respect of which the Recommendation, if any, of the _____ [**"Board"** or **"DRE"**][19] has not become final and binding shall be finally settled by arbitration in accordance with the rules of procedure designated in Sub-Clause 67.3.2 below. The arbitral tribunal shall have full power to open up, review, and revise any decision, opinion, instruction, determination, certificate, or valuation of the Engineer and any Recommendation(s) of the ____ [**"Board"** or **"DRE"**][20] related to the dispute.

"Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments put before the _____ [**"Board"** or **"DRE"**][21] for the purpose of obtaining his Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify the _____ [**"any Board Member"** or **"DRE"**][22] from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

"Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor, and the _____ [**"Board"** or **"DRE"**][23] shall not be altered by reason of the arbitration being conducted during the progress of the Works.

"**67.3.2** Rules of Procedure[24]

(a) Contracts with foreign contractors[25]

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules:

Sub-Clause 67.3.2 (a)—Any dispute, controversy, or claim arising out of or relating to this Contract, or breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.[26]

Rules of Conciliation and Arbitration of the International Chamber o Commerce (ICC):

Sub-Clause 67.3.2 (a)—All disputes arising in connection with the present Contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules.

University of Cape Town

Rules of Arbitration Institute of the Stockholm Chamber of Commerce:

Sub-Clause 67.3.2 (a)—Any dispute, controversy, or claim arising out of or in connection with this Contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Rules of the London court of International Arbitration:

Sub-Clause 67.3.2 (a)—Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity, or termination shall be referred to and finally resolved by arbitration under the Rules of th London Court of International Arbitration, which rules are deemed to be incorporated by reference to this clause.

(b) Contracts with domestic contractors:[27]

Sub-Clause 67.3.2 (b)—Any dispute between the Employer and a domestic Contractor arising in connection with the present Contract shall be referred t adjudication or arbitration in accordance with the laws of the Employer's country.

Sub-Clause 67.4 Failure to Comply with Recommendations

Delete Sub-Clause 67.4 and replace with the following:

"Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related Recommendation has become final and binding, either party may, if the other party fails to comply with such Recommendation and without prejudice to any other right it may have, refer the failure to arbitration i accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 shall not apply to any such reference."

University of Cape Town

ANNEXURE G : World Bank DRB/DRE Rules and Procedures

Section XIII. Disputes Settlement Procedure [89]

(VERSION 1)

Disputes Review Board's Rules and Procedures

(see Clause 67 of the Conditions of Particular Application)

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

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

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

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

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

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

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

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

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

University of Cape Town

3. The Contractor shall:

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

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

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

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

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

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

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

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

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

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

University of Cape Town

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

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

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

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

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

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

(iii) Expenses. In addition to the above, all reasonable and necessary travel expenses (including less than first-class air fare, subsistence, and other direct travel expenses) as well as the cost of telephone calls, faxes, and telexes incurred in connection with the duties as Board Member shall be reimbursed against invoices. Receipts for all expenses in excess of US$25.00 (U.S. Dollars Twenty Five) shall be provided.

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

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

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

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

University of Cape Town

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

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

8. Board Site Visits:

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

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

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

9. Procedure for Dispute Referral to the Board:

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

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

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

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

University of Cape Town

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

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

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

10. Conduct of Hearings:

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

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

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

(d) After the hearings are concluded, the Board shall meet privately to formulate its Recommendations. All Board deliberation shall be conducted in private, with all Members' individual views kept strictly confidential. The Board's Recommendations, together with an explanation of its reasoning, shall be submitted in writing to both parties and to the Engineer. The Recommendations shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

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

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

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

University of Cape Town

BOARD MEMBER'S DECLARATION OF ACCEPTANCE

WHEREAS

(a) a Construction Contract (the Contract) for the *[name of project]* project has been signed on *[fill in date]* between *[name of Employer]* (the Employer) and *[name of Contractor]* (the Contractor);

(b) Clause 67 of the Conditions of Particular Application of the Construction Contract provides for the establishment and operation of a Disputes Review Board (the Board);

(c) the undersigned has been selected (and where required, approved) to serve as a Board Member on said Board;

NOW THEREFORE, the undersigned Board Member hereby declares as follows:

1. I accept the selection as a Board Member and agree to serve on the Board and to be bound by the provisions of Clause 67 of the Conditions of Particular Application of the Contract and the Disputes Review Board's Rules and Procedures attached to the Conditions of Particular Application.

2. With respect to paragraph 1 of said Disputes Review Board's Rules and Procedures, I declare

(a) that I have no financial interest of the kind referred to in subparagraph (a);

(b) that I have had no previous employment nor financial ties of the kind referred to in subparagraph (b); and

(c) that I have made to both parties any disclosures that may be required by sub-paragraphs (b) and (c).

BOARD MEMBER

_____

_____ *[print name of Board Member]*

Date: _____

University of Cape Town

(VERSION 2)

Rules and Procedures for the Functions of the Disputes Review Expert (DRE)

(see Clause 67 of the Conditions of Particular Application)

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

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

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

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

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

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

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

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

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

3. The Contractor shall:

(a) Furnish to the DRE a copy of all documents that he may request including Contract documents, progress reports, variation orders, and other documents pertinent to the performance of the Contract.

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

University of Cape Town

4. The DRE shall begin his activities following the signing of a DRE's Declaration of Acceptance, and he shall terminate these activities as set forth below:

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

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

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

6. The DRE is an independent contractor and not an employee or agent of either the Employer or the Contractor.

7. Payments to the DRE for his services shall be governed by the following provisions:

(a) The DRE will receive payments as follows:

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

(A) Being available, on seven days' notice, for Site visits requested by either party.

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

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

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

University of Cape Town

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

(A) Each day up to a maximum of two days of travel time in each direction for the journey between the DRE's home and the Site.

(B) Each day on Site.

(iii) Expenses. In addition to the above, all reasonable and necessary travel expenses (including less than first-class air fare, subsistence, and other direct travel expenses) as well as the cost of telephone calls, faxes, and telexes incurred in connection with the duties as DRE shall be reimbursed against invoices. Receipts for all expenses in excess of US$25.00 (U.S. Dollars Twenty Five) shall be provided.

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

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

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

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

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

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

University of Cape Town

8. DRE Site Visits:

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

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

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

9. Procedure for Dispute Referral to the DRE:

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

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

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

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

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

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

(g) During the hearing, the Contractor, the Employer and the Engineer shall each have ample opportunity to be heard and to offer evidence. The DRE's Recommendations for resolution of the dispute will be given in writing to the Employer, the Contractor, and the

University of Cape Town

Engineer as soon as possible, and in any event not less than 56 days after receipt by the DRE of the written Request for Recommendation.

10. Conduct of Hearings:

(a) Normally hearings will be conducted at the Site, but any location that would be more convenient and still provide all required facilities and access to necessary documentation may be utilised by the DRE.

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

(c) During the hearings, the DRE shall not express any opinion concerning the merit of the respective arguments of the parties.

(d) After the hearings are concluded, the DRE shall formulate his Recommendations and shall submit them in writing, together with an explanation of his reasoning, to both parties and to the Engineer. The Recommendations shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

11. In all procedural matters, including the furnishing of written documents and arguments relating to disputes, Site visits, and conduct of hearings, the DRE shall have full and final authority.

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

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DISPUTES REVIEW EXPERT'S DECLARATION OF ACCEPTANCE

WHEREAS

(a) a Construction Contract (the Contract) for the *[name of Project]* project has been signed on *[fill in date]* between *[name of Employer]* (the Employer) and *[name of Contractor]* (the Contractor);

(b) Clause 67 of the Conditions of Particular Application of the Construction Contract provides for the selection of a Disputes Review Expert (DRE);

(c) the undersigned has been selected to serve as the DRE;

NOW THEREFORE, the undersigned DRE hereby declares as follows:

1. I accept the selection as a DRE and agree to serve in this capacity and to be bound by the provisions of Clause 67 of the Conditions of Particular Application of the Contract and the Disputes Review Expert's Rules and Procedures attached to the Conditions of Particular Application.

2. With respect to paragraph 1 of said Disputes Review Expert's Rules and Procedures, I declare

(a) that I have no financial interest of the kind referred to in subparagraph (a);

(b) that I have had no previous employment nor financial ties of the kind referred to in subparagraph (b); and

(c) that I have made to both parties any disclosures that may be required by sub-paragraphs (b) and (c).

DISPUTES REVIEW EXPERT

_____

_____ *[print name of DRE]*

Date: _____

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ANNEXURE H : Construction DRB Manual (1996) Guide Specification

This guide specification is a reformatted and revised version of the guide specification included in *Avoiding and Resolving Disputes During Construction* (ASCE, 1991).

GUIDE SPECIFICATION FOR DISPUTE REVIEW BOARD

Introduction

This guide specification and its three-party agreement is a reformatted and revised version of the guide specification included in *Avoiding and Resolving Disputes During Construction* (ASCE, 1991). Several of the revisions are designed to strengthen the DRB process.

In the past, some provisions of the guide specification have been altered or have not been completely followed. This is particularly true of the following sections.

Specification 1.01 general

In several instances, the scope of DRB activities has been limited to specific types of issues of minimum or maximum claim values. There should be no limitation on the issues which can be referred to the board. To impose such limits invites controversy over those subjects and calls into question the commitment of the owner and the DRB concept itself.

Specification 1.02B
Membership Criteria

The success of the DRB process is highly dependent on the stature of the board; criteria for membership must be exacting.

Neither party should hesitate to reject a proposed member if is has any concern regarding that individual's technical qualifications or neutrality. Parties sometimes hesitate to reject a potential board member because they do not wish to cause hard feelings at the start of the job. It is better to disagree on a board member than to accept a nominee who is not completely trusted.

The specification disqualifies most former employees of any party involved in the construction contract. This provision should be strictly observed. Consider the consequences of not following the provision. It will be very difficult for the other party to perceive the former employee as being completely neutral.

Specification 1.02D
Selection Process

Later or delayed organization of the DRB can be detrimental to the concept. Time-consuming selection and engagement procedures utilized by the owner or simple procrastination by either party is a frequent cause of delay.

A DRB organized after the onset of a dispute has reduced effectiveness.

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Specification 1.04 Review of Disputes

One of the important features of the DRB concept is the timely resolution of disputes. Some owners have impaired this feature by requiring time-consuming internal reviews or the preparation of completely documented submittals before the dispute can even be referred to the DRB. When legal policy requirements mandate a prior decision by an owner's designated representative, the process should be expedited.

DRB GUIDE SPECIFICATION

1.01 GENERAL

A. Definitions

1. **Board** - See Dispute Review Board.

2. **Contract** - The Construction Contract of which this Specification section is a part.

3. **Dispute** - A claim, change order request, or other controversy that remains unresolved

4. **Dispute Review Board** - Three neutral individuals mutually selected by the Owner and Contractor to consider and recommend resolution of Disputes referred to it.

B. Summary

1. A Dispute Review Board will be established to assist in the resolution of Disputes in connection with, or arising out of, performance of the work of this Contract.

2. Either the Owner or the Contractor may refer a Dispute to the Board. Such referral should be initiated as soon as it appears that the normal Owner – Contractor dispute resolution effort is not succeeding, and prior to initiating other dispute resolution procedures or filing of litigation by either party.

3. Promptly thereafter, the Board will impartially consider the Dispute(s) referred to it. The Board will provide a non-binding written recommendation for resolution of the Dispute to the Owner and the Contractor.

4. Although the recommendations of the Dispute Review Board should carry great weight for both the owner and the Contractor, they are not binding on either party.

C. Scope

1. This specification describes the purpose, procedure, function, and features of the Dispute Review Board. A Three-Party Agreement among the Owner, Contractor, and three members using the form and content of Attachment A will formalize creation of the Board and establish the scope of its service and rights and

University of Cape Town

responsibilities of the parties. In the event of a conflict between Specification and the Three-Party Agreement, the latter governs.

D. Purpose

1. The Board, as an independent third party, will assist in and facilitate the timely and equitable resolution of disputes between the Owner and the Contractor in an effort to avoid acrimony, construction delay, and more formal means of dispute resolution.

2. Creation of the Board is not intended to promote Owner or Contractor default on the responsibility of making a good-faith effort to settle amicably and fairly their differences by indiscriminate referral to the Board.

E. Continuance of Work

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

F. Tenure of Board

1. The Board will be deemed established after all parties execute the Three-Party Agreement.

2. The Board will be dissolved as of the date of final payment to the Contractor unless earlier terminated or dissolved by mutual agreement of the Owner and Contractor.

1.02 MEMBERSHIP

A. General

1. The Dispute Review Board will consist of one member nominated by the Owner and approved by the Contractor, one member nominated by the Contractor and approved by the Owner, and a third member nominated by the first two members and approved by both the Owner and the Contractor. The third member will serve as Chairman unless the parties otherwise agree.

B. Criteria

1. Experience

a) It is desirable that all Dispute Review Board members be experienced with the type of construction involved in the project, interpretation of contract documents, and resolution of construction disputes.

b) The goal in selecting the third member is to complement the experience of the first two and to provide leadership of the Board's activities.

University of Cape Town

2. Neutrality

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

b) For purposes of this subparagraph, the term "member" also includes the member's current primary or full-time employer, and "involved" means having a contractual relationship with either party to the Contract, such as a subcontractor, architect, engineer, or construction manager.

c) Prohibitions; disqualifying relationships for prospective members:

1) an ownership interest in any entity involved the construction contract, or a financial interest in the contract, except for payment for services on the Dispute Review Board;

2) previous employment by, or financial ties to, any party involved in the construction contract within a period of 30 years prior to award of the Contract, except for fee-based consulting services on other project;

3) a close professional or personal relationship with any key member of any entity involved in the construction contract which, in the judgement of either party, could suggest partiality; or

4) prior involvement in the project of a nature which could compromise that member's ability to participate impartially in the Board's activities.

d. Prohibitions; disqualifying relationships for members;

1) employment, including fee-based consulting services, by any entity involved in the construction contract except with the express approval of both parties;

2) discussion concerning, or the making of, an agreement with any entity involved in the Contract regarding employment after the Contract is completed.

C. Disclosure Statement

As a part of the selection process, the first two prospective members will be required to submit complete disclosure statements for the approval of both the Owner and the Contractor. Each statement shall include a résumé of experience, together with a declaration describing all past, present, and anticipated or planned future relationships, included indirect relationships through the prospective members' primary or full-time employer, to this project and with all parties involved in the Contract, including subcontractors, design professionals, and consultants. Disclosure of close professional or personal relationships with all key members of all parties to the Contract shall be included. The third Board member will be required to submit such a statement to the first two Board members and to the Owner and Contractor as a part of his selection and evaluation process.

University of Cape Town

D. Selection Process

1. Nomination and approval of first two members

a) The Owner and the Contractor shall each nominate a proposed Board member and convey the nominee's name and disclosure statement to the other party within 4 weeks after Contract award.

b) If the nominee is not rejected within 2 weeks after receipt of the name and disclosure statement, he shall be deemed approved.

c) No reasons for rejection need be stated. In the event of rejection, the nominating party shall submit another nomination within 2 weeks of receipt of the notice of rejection. This process will be repeated until two mutually acceptable members are named.

2. Nomination and approval of third member

a) Upon approval of both of the first two members, the Owner and the Contractor will notify them to begin selection of the third member. The first two members will endeavor to nominate a third member who meets all the criteria listed above. The third member shall be nominated within 4 weeks after the first two members are notified to proceed with his selection. The nominee's name and disclosure statement will be conveyed to the Owner and the Contractor, who will either accept or reject the nominee within four weeks. No reasons for rejection need be stated. In the event of rejection, the first two members will be requested to submit another nomination within two weeks of receipt of notice of rejection.

b) In the event of an impasse in selection of the third member from nominees of the first two members, the third member shall be selected by mutual agreement of the Owner and the Contractor. In so doing, they may, but are not required to, consider nominees offered by the first two members.

E. Three-Party Agreement

1. All three Dispute Review Board members and the authorized representatives of the Owner and the Contractor shall execute the Dispute Review Board Three-party Agreement (Attachment A) within 4 weeks after the selection of the third member.

1.03 OPERATION

A. General

1. Dispute Review Board operating procedures consistent with this specification will be formulated by the Board as a task under the Three-Party Agreement.

University of Cape Town

B. Contract Documents, Reports, and Information

1. The Owner will provide a conformed set of plans and specifications to each Board member.

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

C. Periodic Meetings and Visits

1. The Board will visit the project site and meet with representatives of the Owner and the Contractor at regular intervals and at times of significant construction events. The frequency and scheduling of these visits will be as agreed among the Owner, the Contractor, and the Board, depending on the progress of the work. In the case of failure to agree, the Board will schedule the visits.

2. Each meeting shall consist of an informal roundtable discussion followed by a field observation of the work. The roundtable discussion will be attended by personnel of the Owner and the Contractor. The agenda will generally include the following:

a) Meeting convened by the Chairman of the Dispute Review Board.

b) Contractor discussion items:
   1) work accomplished since the last meeting;
   2) current status of the work schedule and schedule for future work;
   3) anticipated or potential problems and proposed solutions;
   4) status of current and potential disputes, claims, and other controversies.

c) Owner discussion items:
   1) the work schedule;
   2) perspectives on potential disputes, claims, and other controversies;
   3) status of past disputes, claims, and other controversies.

d) Such other items as the parties may wish to discuss with the Board.

e) Set tentative date for next meeting(s).

3. The Owner shall prepare minutes of regular meetings and circulate them for comments, revisions, and / or approval of all concerned.

4. The field observations shall cover all active segments of the work. The Board shall be accompanied by representatives of both the Owner and Contractor.

University of Cape Town

1.04 REVIEW OF DISPUTES

A. General

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

2. Procedures and time periods may be modified by mutual agreement.

B. Prerequisites to Review

A Dispute is subject to referral to the Board when:

1. Either party believes that bilateral negotiations are not likely to succeed or have reached an impasse, and,

2. If the Contract provides for a prior decision by the [Architect] [Enginer] [Construction Manager], such a decision has been issued. (In this case parties shall cooperate to timely comply with this requirement and may waive it by mutual agreement.)

C. Requesting Review

1. Either party may refer a dispute to the Board. Requests for Board review shall be submitted in writing to the Chairman of the Dispute Review Board and shall state the Dispute in connection with, or arising out of, performance of the work of this Contract which the parties have considered but have been unable to resolve. The Request for Review shall state clearly and in full detail the specific issues of the Dispute to be considered by the Board and include a recommendation as to whether it may be heard at the next regular Board meeting or at a special meeting.

2. A copy of the Request for Review shall be simultaneously provided to the other party.

3. After conferring with both parties, the Board Chairman will establish a submittal schedule so that adequate time is allowed for the other party to respond to the requesting party's statement and for the Board members to review both statements and the supporting documentation before the hearing.

D. Scheduling Review

1. The Three-Party Agreement of Attachment A empowers the Board to schedule hearings.

2. Upon receipt of a Request for Review, the Chairman will schedule a hearing date.

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E. Pre-hearing Requirements

1. Concise written position statements shall be prepared by both parties, with page number references to any supporting documentation, and submitted to each Board member and to the other party.

2. A single and complete compilation of supporting documentation, with pages consecutively numbered for ease of reference, is most desirable. The parties shall co-operate in compiling this documentation and submitting it to each Board member for review before the hearing.

3. The party requesting the Board review shall submit its position statement first, followed by the other party.

F. Hearing

1. Normally the hearing will be conducted at the job site. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory. Private sessions of the Board may be held at any convenient location.

2. The third member of the Board will act as Chairman of the hearing, or he may appoint one of the other members.

3. The Owner and the Contractor shall have representatives at all hearings. The Party requesting Board review will first present its position, followed by the other party. Each party will be allowed successive rebuttals until all aspects are fully covered. The Board members and the parties may ask questions, request clarification, or ask for additional data. In difficult or complex cases, additional hearings may be necessary in order to facilitate full consideration and understanding of all the evidence presented by both parties. Both the Owner and the Contractor shall be provided full and adequate opportunity to present all their evidence, documentation, and testimony regarding all issues before the board.

4. Normally, a formal transcript will not be prepared. When requested by either party, the Board may allow recordation and transcription by a court reporter with the cost to be allocated as agreed by the parties. Audio or video recordings will not be permitted.

5. Attendance by, or participation of , lawyers will be at the discretion of the Board.

G. Deliberations

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

University of Cape Town

H. Recommendation

1. The Board's recommendation for resolution of the dispute will be provided in writing to both the Owner and the Contractor within 2 weeks of the completion of the hearings. In difficult or complex cases, and in consideration of the Board's schedule, this time may be extended by mutual agreement of all parties.

I. Acceptance or Rejection

1. Within 2 weeks of receiving the Board's recommendation, or such other time specified by the Board, both the Owner and the Contractor shall provide written notice to the other and to the Board of acceptance or rejection of the Board's recommendation. The failure of either party to respond within the specified period shall be deemed an acceptance of the Board's recommendation. If, with the aid of the Board's recommendation, the Owner and the Contractor are able to resolve their dispute, the Owner will promptly process any required Contract changes.

J. Clarification and Reconsideration

1. Should the dispute remain unresolved because of a bona fide lack of clear understanding of the recommendation, either party may request that the Board clarify specified portions of its recommendation.

2. If new evidence has become available, either party may request that the Board reconsider its recommendation.

K. Admissibility

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

1.05 PAYMENT

A. The fees and expenses of all three members of the Board shall be shared equally by the Owner and the Contractor. The Contractor shall pay the invoices of all Board members after approval by both parties. The Contractor will then bill the Owner for 50 percent of such invoices.

B. The Owner, at its expense, will prepare and mail minutes and progress reports, and provide administrative services such as conference facilities and secretarial services.

C. If the Board desires special services such as legal or other consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed.

University of Cape Town

ANNEXURE I : Construction DRB Manual (1996) Rules and Procedures

This three-party agreement is a reformatted and revised version of the one included in *Avoiding and Resolving Disputes During Construction* (ASCE, 1991).

Attachment A to DRB Guide Specification

Dispute Review Board Three-Party Agreement

(To be executed after award of the Contract)

I. Parties

A. Owner:_____

B. Contractor:_____

C. Dispute Review Board Members:

1. _____

2. _____

3. _____

II. Situation

A. The Owner and Contractor are now engaged in the construction of the _____ (project name).

B. The _____ (project name) Contract provides for the establishment and operation of a Dispute Review Board ("Board") to assist in resolving Disputes as defined therein.

III. Purpose

A. The objective of the Board is to consider, fairly and impartially, the Disputes referred to it, and to provide written recommendations to the Owner and Contractor for resolution of these Disputes.

III. Scope of Work

The scope of work of the Board includes, but is not limited to, the following:

A. Project Site Visits

1. The Board members shall visit the project site to keep abreast of construction activities and to become familiar with the work in progress. The frequency, time, and duration of these visits shall be mutually agreed upon among the Board, the

University of Cape Town

Owner, and the Contractor. In case of failure to agree, the Board shall schedule the visits.

2. In the case of an actual or potential dispute involving an alleged differing site condition or specific construction problem, it may be advantageous for the Board to view personally any relevant conditions. If viewing by the Board would cause delay to the project, videos, photographs, and descriptions of these conditions, collected by either or both parties, will be utilized.

B. Establish Procedures

1. During its first meeting at the project site, the Board shall, with the agreement of all parties, establish procedures for the conduct of its routine site visits and its hearings of disputes. The conduct of its business shall, in general, be based on the Specification provisions.

2. It is not desirable to adopt hard-and-fast rules for the functioning of the Board. The entire procedure shall be kept flexible to adapt to changing situations. The Board shall initiate, with the Owner's and Contractor's concurrence, new procedures or modifications to old ones whenever this is deemed appropriate.

C. Recommend Resolution of Disputes

1. Upon receipt by the Board of a written Request for Review of a Dispute, either from the Owner or the Contractor, the Board shall convene a hearing to review and consider the Dispute and thereafter issue a written recommendation to the Owner and the Contractor.

2. It is expressly understood that all Board members are to act impartially and independently in the consideration of facts and conditions surrounding any dispute. During the hearing, no Board member shall express any opinion concerning the merit of any facet of the case.

3. The Board shall make every effort to reach a unanimous recommendation. It this proves impossible, the dissenting member may prepare a minority report.

4. The Board's recommendation, together with explanations of its reasoning, shall be submitted as a written report to both parties. The recommendation shall be based on the pertinent provisions of the Contract, applicable laws and regulations, and the facts and circumstances involved in the dispute. It is important for the Board to express, clearly and completely, the logic and reasoning leading to the recommendation so that both parties fully understand it.

5. The recommendation concerning any dispute is not binding, unless agreed otherwise by the Owner and the Contractor.

D. Other

1. The Board members shall become familiar with the Contract Documents, review periodic reports, and maintain a current file.

University of Cape Town

2. Except for providing the services required in the Agreement, the Board and its individual members shall refrain from giving any advice to either party concerning conduct of the work or the resolution of problems which might compromise the Board's integrity.

3. The Board shall perform services not specifically listed herein to the extent necessary to achieve the purpose of this Agreement.

V. Contractor Responsibilities

A. Except for its participation in the Board's activities as provided in the Contract Documents and in this Agreement, the Contractor shall not solicit advice or consultation from the Board or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the Board's integrity.

B. The Contractor shall furnish each Board member with pertinent Contractor-prepared documents, such as progress schedules, to supplement the documents provided by the Owner.

VI. Owner Responsibilities

A. Except for its participation in the Board's activities as provided in the Contract Documents and in this Agreement, the Owner shall not solicit advice or consultation from the Board or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the Board's integrity.

B. The Owner shall:

1. Furnish each Board member with one copy of all Contract Documents, including but not limited to the specifications, plans, addenda, progress schedule and updates, weekly progress reports, minutes of progress meetings, change orders, and other documents pertinent to the performance of the contract and necessary to the Board's work.
2. In cooperation with the Contractor, coordinate the operations of the Board.
3. Furnish conference facilities at or near the site and provide secretarial and copying services.

VII. Time for Beginning and Completion

A. The Board shall be active throughout the duration of the Contract. It shall begin operation upon written authorization of the Owner following execution of this Agreement and shall terminate its activities on completion of the Construction Contract after final payment has been made.

B. Except for choosing a third member by the first two members, the Board members shall not begin any work under the terms of this Agreement until authorized in writing by the Owner.

University of Cape Town

VIII. Payment

A. Payment for services of the Owner-appointed and Contractor-appointed members of the Board shall be at the rates agreed to between the Owner and the Contractor and the respective appointed Board members. Changes in the billing rates are subject to agreement between the Owner and the Contractor and the respective appointed members.

B. Payment for services rendered by the third member of the Board will be made at the rate agreed to among the Owner, the Contractor, and the third member. Changes in the billing rate are subject to agreement among the Owner, the Contractor, and the third member.

C. The first two members will be reimbursed for the time and expense associated with choosing the third member.

D. Direct, nonsalary expenses will be reimbursed at the actual cost to the Board member. These expenses may include, but are not limited to, automobile mileage, parking, and travel expenses from the Board member's point of departure to the initial point of arrival, automobile rental, food and lodging, printing, long-distance telephone, postage, and courier delivery. Billing for these expenses shall include an itemized listing supported by copies of the original bills, invoices, and expense accounts.

E. Each Board member may submit invoices for payment for work completed not more often than once per month during the progress of work. Such invoices shall be in a format approved by the Owner and Contractor, and accompanied by a general description of activities performed during that period. The value of work accomplished for payment shall be established from the billing rate and hours expended by the Board member together with direct, nonsalary expenses. Satisfactorily submitted invoices shall be paid within 30 days.

F. Invoices of the Board members shall be paid by the Contractor unless otherwise agreed by both parties and the Board. Payments shall constitute full compensation for work performed and services rendered and for all materials, supplies, and incidentals necessary to serve on the Board.

G. The cost records and accounts pertaining to this Agreement shall be kept available for inspection by representatives of the Owner or Contractor for 3 years after final payment.

IX. Termination of Agreement

A. The Agreement may be terminated by mutual agreement of the Owner and the Contractor at any time upon not less than 4 weeks' written notice to the other parties.

B. Board members may withdraw from the Board by providing 4 weeks' written notice. Board members may be terminated for or without cause only by their original appointer. Only the Owner may terminate the Owner-appointed member;

University of Cape Town

only the Contractor may terminate the Contractor-appointed member; and the first two members or the Owner and Contractor must agree to terminate the third member.

C. Should the need arise to appoint a replacement Board member, the replacement member shall be appointed in the same manner as the original member was appointed. The selection of a replacement Board member shall begin promptly upon notification of the necessity and shall be completed within 4 weeks. This Agreement will be amended to indicate changes in Board membership.

X. Legal Relations

A. Each Board member, in the performance of his or her duties on the Board, is acting in the capacity of an independent agent and not as an employee of either the Owner or the Contractor.

B. The Owner and Contractor expressly acknowledge that each Board member is acting in a capacity intended to facilitate resolution of Disputes. Accordingly, it is agreed and acknowledged that to the fullest extent permitted by law, each Board member shall be accorded quasi-judicial immunity for any actions or decisions associated with the consideration, hearing, and recommendation of resolution for Disputes rightfully referred to the Board.

C. Each Board member shall be held harmless for any personal or professional liability arising from or related to Board Activities. To the fullest extent permitted by law, the Owner and Contractor shall indemnify all Board members for claims, losses, demands, costs, and damages (including reasonable attorney's fees) for bodily injury, property damage, or economic loss arising out of or related to Board members carrying out Board functions. The foregoing indemnity is a joint and several obligation.

D. Board members shall not assign any of the work of this Agreement.

XI. Disputes Regarding This Three-party Agreement

A. Disputes among the parties hereto arising out of this Agreement which cannot be resolved by negotiation and mutual concurrence between the parties and actions to enforce any right or obligation under this Agreement shall be initiated in the _____ Court of the _____ (jurisdiction).

B. All questions shall be resolved by application of _____ (jurisdiction) law.

C. The Board members hereby consent to the personal jurisdiction of the Court of the _____ (jurisdiction).

University of Cape Town

XII. Funding Agency Review

A. The _____ (Agencies funding the project) have the right to review the recommendations and to attend Board meetings and hearings, but not to attend private Board deliberations.

XIII. Effective date

A. This Agreement is effective as of _____

Board Member	Board Member	Board Member
_____	_____	_____

Contractor	Owner
By: _____	By: _____
Title: _____	Title: _____

University of Cape Town

ANNEXURE J : FIDIC 1996 – Clause 67 – Particular Conditions of Contract amendments for the DAB

SECTION A

DISPUTE ADJUDICATION BOARD

The following amendments to Clause 67 in Part I General Conditions of the Conditions of Contract for Works of Civil Engineering Construction and to the Appendix to Tender are to be made if it is decided to replace the Engineer as the decision maker by a Dispute Adjudication Board. The amendments to Clause 67 should be included in Part II Conditions of Particular Application.

Amendments to be made to Clause 67-Settlement of Disputes

Delete the text of Clause 67 and substitute:-

Settlement of Disputes and Arbitration

67.1 Dispute Adjudication Board

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any opinion, instruction, determination, certificate of valuation of the Engineer, the dispute shall initially be referred in writing to the Dispute Adjudication Board (the "Board") for its decision. Such reference shall state that it is made under this Sub-Clause.

Unless the member or members of the Board have been previously mutually agreed upon by the parties and named in the Contract, the parties shall, within 28 days of the Commencement Date, jointly ensure the appointment of the Board. The Board shall comprise suitably qualified persons as members, the number of members being either one or three, as stated in the Appendix to Tender. If the Board is to comprise three members, each party shall nominate one member for the approval of the other party, and the parties shall mutually agree upon and appoint the third member (who shall act as chairman).

The terms of appointment of the Board shall:

a) incorporate the model terms therefore published by the Fédération Internationale des Ingénieurs Conseils (FIDIC), as they may have been amended by the parties,
b) require each member of the Board to be, and to remain throughout his appointment, independent of the parties,
c) require the Board to act impartially and in accordance with the Contract, and
d) include undertakings by the parties (to each other and to the Board) that the members of the Board shall in no circumstances be liable for anything done or omitted in the discharge of their functions unless the act or omission is shown to have been in bad faith; the parties shall indemnify the members against such claims.

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The terms of the remuneration of each member of the Board, including the remuneration of any expert from whom the Board may seek advice, shall be mutually agreed upon by the Employer, the Contractor and each member of the Board when agreeing the terms of appointment. In the event of disagreement, the remuneration of each member shall include a daily fee in accordance with the daily fee established from time to time for arbitrators under the administrative and financial regulations of the International Centre for Settlement of Investment Disputes, a retainer fee per calendar month equivalent to three times such daily fee and reimbursement for reasonable expenses. The Employer and the Contractor shall each be responsible for paying one-half of the Board's remuneration.

The appointment of any member of the Board may be terminated (other than on a member's own initiative) only be mutual agreement of the Employer and the Contractor. The appointment of each member of the Board shall expire when the discharge referred to in Sub-Clause 60.7 shall have become effective, or at such other time as the parties may mutually agree.

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 or all members of the Board. Unless the parties agree otherwise, the appointment will come into effect if a member of the Board declines to act or is unable to act as a result of death, disability resignation or termination of appointment. If any of such circumstances should occur and no such replacement is available, the member shall replaced in the same manner as such member was nominated or agreed upon.

If any of the following conditions apply, namely:

a) the parties fail to agree upon the appointment of the sole member of a one-person Board within 28 days of the Commencement Date.
b) either party fails to nominate a member (acceptable to the other party), for a Board of three members, within 28 days of the Commencement date,
c) the parties fail to agree upon the appointment of the third member (to act as chairman) for a Board of three members within 28 days of the Commencement Date, or
d) the parties fail to agree upon the appointment of a replacement member of the Board within 28 days of the date on which a member of the Board declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing body or official named in the Appendix to Tender shall, after due consultation with the parties, appoint such member of the Board, and such appointment shall be final and conclusive.

67.2 Procedure for Obtaining the Board's Decision

When in accordance with Sub-Clause 67.1 a dispute is referred by one party to the Board, a copy of such reference shall be sent by that party to the other party and (for information) to the Engineer. The parties shall promptly make available to the Board all such additional information, further access to the Site, and appropriate facilities, as the Board may require for the purposes of rendering a decision.

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The Board shall have full power, among other things, to:

a) establish the procedure to be applied in deciding a dispute,
b) decide upon the Board's own jurisdiction, and as to the scope of any dispute referred to it,
c) take the initiative in ascertaining the facts and matters required for a decision,
d) make use of its own specialist knowledge, if any,
e) decide upon the payment of interest in accordance with the Contract,
f) decide to grant provisional relief such as interim or conservatory measures, and
g) open up, review and revise any opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

No later than the eighty-fourth day after the day on which it received such reference, the Board, acting as a panel of expert(s) and not as arbitrator(s), shall give notice of its decision, to the parties and (for information) to the Engineer. Such decision, which shall be reasoned, shall state that it is given under this Sub-Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence, and the Contractor and the Employer, as well as the Engineer, shall give effect forthwith to every decision of the Board, unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either party is dissatisfied with the Board's decision, then either party, on or before the twenty-eighth day after the day on which it received notice of such decision, may notify the other party and (for information) the Engineer of its dissatisfaction. If the Board fails to give notice of its decision on or before the eighty-fourth day after the day on which it received the reference, then either party, on or before the twenty-eighth day after the day on which the said period of 84 days has expired, may notify the other party and (for information) the Engineer of its dissatisfaction. In either event, such notice of dissatisfaction shall state that it is given under this Sub-Clause, and set out the matter in dispute and the reason(s) for dissatisfaction. Subject to Sub-Clauses 67.5 and 67.6, no arbitration in respect of such dispute may be commenced unless such notice is given.

If the Board has given notice of its decision as to a manner in dispute to the Employer, the Contractor and the Engineer, and no notice of dissatisfaction has been given by either party on or before the twenty-eighth day after the day on which the parties received the Board's decision, then the Boards decision shall become final and binding upon the Employer and the Contractor.

67.3 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 67.2, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that unless the parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

University of Cape Town

67.4 Arbitration

Any dispute in respect of which:

a) the decision, if any, of the Board has not become final and binding pursuant to Sub-Clause 67.2, and
b) amicable settlement has not been reached,

shall be settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The arbitrator(s) shall have full power to open up, review and revise any decision of the Board, as well as any opinion, instruction, determination, certificate or valuation of the Engineer, related to the dispute.

Neither party shall be limited, in the proceedings before such arbitrator(s), to the evidence or arguments previously put before the Board to obtain its decision.

Arbitration may be commenced prior to or after completion of the Works. Any decision of the Board shall be admissible in evidence in the arbitration. The obligations of the parties, the Engineer and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.

67.5 Failure to Comply with the Board's Decision

Where neither party has given notice of dissatisfaction within the period in Sub-Clause 67.2 and the Board's related decision, if any, has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 67.4. The provisions of Sub-Clauses 67.2 and 67.3 shall not apply to any such reference.

67.6 Expiry of the Board's Appointment

When the appointment of the members of the Board, including any replacements, has either been terminated or expired, any such dispute referred to in Sub-Clause 67.2 shall be finally settled by arbitration pursuant to Sub-Clause 67.4. The provisions of Sub-Clauses 67.2 and 67.3 shall not apply to any such reference.

University of Cape Town

Amendments to be made to Appendix to Tender

Add after line which read

"Rate of interest upon unpaid sums _____	60.10	_____ per cent per annum" the following:
Number of members of Dispute Adjudication Board (one or three)	67.1	_____
Member of Dispute Adjudication Board (if not agreed) to be appointed by _____	67.1	The President of FIDIC or a person appointed by such President
Number of arbitrators _____	67.4	_____
Place of arbitration _____	67.4	_____
Language(s) of arbitration _____	67.4	_____

If the Rules of Arbitration of the International Chamber of Commerce are not to apply, specify the alternative arbitration rules selected including any additional necessary information. For example, in the case of the UNCITRAL Arbitration Rules, the name of the appointing authority, the number of arbitrators, the place of arbitration and the language(s) to be used in the arbitral proceedings should be specified.

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ANNEXURE K : FIDIC 1996 – Model Terms of Appointment for a Dispute Adjudication Board

Conditions of Contract for Works of Civil Engineering Construction
FIDIC Model Terms of Appointment for a Dispute Adjudication Board

TERMS OF APPOINTMENT FOR A BOARD OF THREE MEMBERS[1]

THESE TERMS OF APPOINTMENT OF A BOARD MEMBER ARE MADE BETWEEN:

1. [name of Employer] of [address of Employer] (hereinafter called the "Employer").
2. [name of Contractor] of [address of Contractor] (hereinafter called the "Contractor").
3. [name of Board Member] of [address of Board Member] (hereinafter called the "Board Member")

W H E R E A S

A. The Employer and the Contractor (hereinafter jointly referred to as the "Parties") have on the [ ] day of 199 [ ] entered into a Contract (hereinafter called the "Contract") for the execution of [ ] (hereinafter called the "Project").
B. By Sub-Clause 67.1 of the Conditions of Contract (hereinafter called the "Conditions") provision is made for the constitution of a Dispute Adjudication Board (hereinafter called the "Board") which shall comprise three suitably qualified persons as stated in the Appendix to tender.
C. The Board Member has agreed to serve as [one of the members of] [chairman of] the Board on the terms set out herein.

NOW IT IS HEREBY AGREED as follows:

1. The Board Member:

   a) hereby accepts this appointment to the Board which is a personal appointment and agrees to be bound by these terms of Appointment and Sub-Clauses 67.1 and 67.2 of the Conditions as if they were set out herein; and
   b) shall be entitled notwithstanding such acceptance to resign this appointment on giving reasonable notice to the Parties.

2. These Terms of Appointment when executed by the Parties and the Board Member shall take effect when the Parties and the last of the three members of the Board have executed terms of appointment.

3. The Board Member shall be and remain impartial and independent of the Parties and shall be under a continuing duty to disclose in writing to each of them and to the other members of the Board any fact or circumstance which might be such as to call into question his impartiality or independence.

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Without prejudice to the generality of the foregoing, the Board Member:

a) shall have no interest financial or otherwise in either of the Parties or the Engineer as described in the Contract, or financial interest in the Contract except for payment for services on the Board;

b) shall not previously have been employed as a consultant or otherwise by either of the Parties or the Engineer except in those circumstances which have been disclosed in writing to the Parties prior to this appointment;

c) shall have disclosed in writing to the Parties and to the other members of the Board, prior to this appointment and to his best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Parties or the Engineer, and any prior involvement in the Project;

d) shall not while a Board Member be employed as a consultant or otherwise by either of the Parties or the Engineer without the prior written consent of the Parties and the other members of the Board;

e) shall not give advice to either of the Parties or to the Engineer concerning the conduct of the Project other than in accordance with the Procedural Rules annexed hereto as Appendix A (the "Rules"); and

f) shall not while a Board Member enter into discussions or make any agreement with either of the Parties or the Engineer regarding employment by any of them whether as a consultant or otherwise after ceasing to be a Board Member.

4. The Board Member warrants that he is experienced in the type of work involved in the Project and the interpretation of contract documents and is, as well, fluent in the language of the Contract. The Board Member shall:

a) ensure his availability for all site visits and hearings as are necessary and shall observe the provisions of the Rules;

b) become conversant with the Contract and the progress of the Project by studying all documents received which shall be maintained in a current working file;

c) treat the details of the Contract and all activities and hearings of the Board as private and confidential and shall not publish or disclose the same without the prior written consent of the Parties;

d) not assign, delegate or subcontract any of the tasks under these Terms of Appointment or the Rules[2];

e) be available to give advice and opinions in conjunction with other members of the Board on any matter relevant to the Project not being a dispute when requested so to do by the Parties.

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5. Neither the Employer, the Contractor nor the Engineer shall seek advice from or consultation with the Board Member regarding the Project otherwise than in the normal course of the Board's activities under the Contract and the Rules. The only exception to this prohibition shall be where the Parties jointly agree to do so and the other Board Members also agree. The Employer shall be responsible for ensuring the compliance by the Engineer with this Clause.

6. The Board Member will be paid as follows:

a) a retainer fee of [ ] per calendar month, which shall be considered as payment in full for:

i) being available on 28 days' notice for all site visits and hearings;
ii) becoming and remaining conversant with all Project developments and maintaining relevant files;
iii) all office and overhead expenses such as secretarial services, photocopying and office supplies incurred in connection with his duties; and
iv) all services performed hereunder except those referred to in Sub-Clauses (b) and (c) below.

Beginning with the month following that in which the Taking-Over Certificate referred to in Sub-Clause 48.1 of the Conditions (or if there is more than one, the one last issued) has been issued, the Board Member shall receive [only one half of the monthly retainer fee]. [Beginning with the next month after expiry of the Defects Liability Period as defined in the Conditions the Board Member shall no longer receive a monthly retainer fee];

b) a daily fee of [ ] which shall be considered as payment in full for:

i) each day or part of a day up to a maximum of two days travel time in each direction for the journey between the Board Member's home and the site or other location of a Board meeting;
ii) each working day on site visits, hearings or preparing decisions; and
iii) each day spent reading the Parties' submissions in preparation for a hearing.

c) Cost of telephone calls, courier charges, faxes and telexes incurred in connection with his duties; all reasonable and necessary travel expenses including [less than] first class air fare, subsistence and other direct travel expenses. These costs shall be reimbursed in the same currency as that in which fees are payable. Receipts shall be required for all expenses in excess of [ ] percent of the daily fee referred to in Sub-Clause (b) above;

d) any taxes properly levied in the country of the site on payments made to the Board Member (unless a national or permanent resident of the country of the site) pursuant to this Clause 6. Such reimbursement will be in the same currency as that in which the fees are payable.

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The retainer and daily fees shall remain fixed for the [initial] period of tenure of the Board Member [of twelve months]. [Thereafter they shall be adjusted by agreement between the Parties and the Board Member at each anniversary of the execution of these Terms of Appointment].

Payments to the Board Member shall be shared equally by the Employer and the Contractor. The Board Member shall submit invoices for payment of the monthly retainer quarterly in advance. Invoices for daily fees and expenses shall be submitted following the conclusion of a site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

The Contractor shall pay Board Members' invoices within 56 calendar days after receipt of such invoices and shall invoice the Employer (through the monthly statements to be submitted in accordance with Sub-Clause 60.1 of the Conditions) for one-half of the amounts of such invoices. The Employer shall pay such Contractor's invoices within the time period specified in the Contract for other payments to the Contractor by the Employer.

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

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

In the event of non-discharge of Board Members' invoices in accordance with the previous paragraphs the Board Member may either suspend his services until the invoices are discharged or resign his appointment.

7. The Parties may jointly terminate the Board Member's appointment hereunder by reasonable notice in writing. Such termination shall be without prejudice to any accrued rights of either of the Parties or the Board Member.

8. The Parties undertake to each other and to the Board Member that the Board Member shall in no circumstances:

   a) be appointed as an arbitrator in any arbitration between the Parties in connection with the Contract unless the Parties agree otherwise in writing;

University of Cape Town

b) be called as a witness to give evidence concerning any dispute before an arbitrator appointed under the Conditions unless he accepts such assignment in writing addressed to both Parties; or

c) be liable for any claims for anything done or omitted in the discharge of such Board Member's functions unless the act or omission is shown to have been in bad faith.

The Parties hereby jointly and severally indemnify the Board Member against all or any such claims.

9. If the Board Member shall breach any of the provisions of Clause 3 he shall not be entitled to any fees or expenses hereunder and shall reimburse each of the Employer and the Contractor for any fees and expenses properly paid to him and to any other Board Member if as a consequence of such breach any proceedings or decisions of the Board are rendered void or ineffective.

10. These Terms of Appointment shall be governed by the law of [ ].

11. Any dispute or claim arising out of or in connection with these terms of Appointment or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by a sole arbitrator appointed in accordance with said Rules.

SIGNED by _____ for and on behalf of the Employer in the presence of	SIGNED by _____ for and on behalf of the Employer in the presence of	SIGNED by _____ for and on behalf of the Employer in the presence of
Witness :_____	Witness :_____	Witness :_____
Name:_____	Name:_____	Name:_____
Address:_____	Address:_____	Address:_____
Date:_____	Date:_____	Date:_____

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APPENDIX A

PROCEDURAL RULES OF THE DISPUTE ADJUDICTION BOARD (of three members)

1. *The Board shall visit the site at regular intervals [and / or at times of critical construction events] at the request of either the Employer or the Contractor, and in any event not less than [three] times in any twelve month period.*

2. The timing of and agenda for each site visit shall be as agreed jointly by the Board, the Employer and the Contractor, or in the absence of agreement, shall be decided by the Board.

3. The purpose of site visits is to enable the Board to become and remain acquainted with the progress of the Project and of any actual or potential problems or claims.

   Site visits shall be attended by the Employer, the Contractor and the Engineer and shall be co-ordinated by the Employer in co-operation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services.

   At the conclusion of each site visit and before leaving the site the Board shall prepare a report on its activities during the visit and shall send copies to those parties who attended.

4. The Employer and the Contractor shall furnish to each Board Member one copy of all documents which the Board may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract.

5. If any dispute is referred to the Board in accordance with Sub-Clause 67.2 of the Conditions, the Board shall proceed as described therein. The Board may in its discretion, among other things, conduct a hearing on the dispute in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing. Subject to the time imparted to the Board to give notice of a decision and other relevant factors, the Board shall afford to each of the Employer and the Contractor reasonable opportunity to present its case in relation to a dispute referred to the Board for decision.

   The Board shall act as a Board of impartial experts, not arbitrator, and shall have full authority to conduct any hearing as it thinks fits, not being bound by any rules or procedures other than those set out herein. [Without limiting the foregoing, the Board shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than the Employer, the Contractor and the Engineer and to proceed in the absence of any party who the Board is satisfied received notice of the hearing].

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The Board shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. After a hearing is concluded the Board shall convene in private to formulate its decision.

[If a member fails to attend a meeting or hearing, or to fulfill any required function, the other two members may nevertheless proceed and make decisions unless the absent member is the chairman and instructs the other two members not to proceed, or the Parties otherwise agree].

6. The Board shall give notice of its decision in writing to the Employer and the Contractor in accordance with Sub-Clause 67.2 of the Conditions or as otherwise agreed by the Employer and the Contractor in writing.

The Board shall endeavour to reach decisions unanimously, but if this is impossible decisions shall be by a majority and the minority member may prepare a written report for submission to the Employer, the Engineer and the Contractor.

7. All communications between either of the Parties and a Board Member and all hearings shall be in the [ ] language. All such communications shall be copied to the other Party and to other members of the Board.

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[1]. Various clauses of these Terms and Rules contain words in brackets [ ], or require that appropriate wording be added. The signatories should consider whether or not these are appropriate in the circumstances of their Project or require amendment.

[2]. Circumstances may arise when the Board considers it needs advice from an outside expert in order to fulfil its duties to the Parties. These terms do not empower the Board to take such advice at the Parties' expense. It is recommended that in such a situation the Board invite the Parties to agree to secure such advice at their own expense if they accept it is necessary or desirable.

[3]. It is preferable to agree identical fees for the three Board Members, with the possible except of the Chairman.

ANNEXURE L : FIDIC 1999 – Sub-Clause 20.2 to 20.4 - Concerning the DAB

20.2 Appointment of the Dispute Adjudiction Board

Disputes shall be adjudicated by a DAB in accordance with sub-Clause 20.4 *[Obtaining Dispute Adjudication Board's Decision]*. The Parties shall jointly appoint a DAB by the date 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.

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

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

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

If at any time the Parties so agree, they may 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 described in this Sub-Clause.

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

20.3 Failure to Agree Dispute Adjudication

If any of the following conditions apply, namely:

a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,

University of Cape Town

Board

b) either patty fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date.
c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Particular Conditions shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.4 Obtaining Dispute Adjudication Board's Decisions

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 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.

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

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

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

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

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

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

University of Cape Town

binding upon both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

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

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

The arbitrator(s) shall have full power to open up review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and given evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

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

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

University of Cape Town

ANNEXURE M : FIDIC 1999 – Alternative Sub-Clause 20.2

Sub-Clause 20.2 - Appointment of the Dispute Adjudication Board

Unless the Engineer (although appointed by the Employer) is to make the pre-arbitral decisions under this Clause 20, in accordance with the alternative option described below, the Contract should include the provisions under Clause 20 which, whilst not discouraging the Parties from reaching agreement on disputes as the works proceed, allow them to refer contentious matters to an impartial dispute adjudication board ("DAB").

The adjudication procedure depends for its success on, amongst other things, the Parties' confidence in the agreed individual(s) who will serve on the DAB. Therefore, it is essential that candidates for this position are not imposed by either Party on the other Party; and that, if the individual is selected under Sub-Clause 20.3, the selection is made by a wholly impartial entity.

FIDIC is prepared to perform this role, if this authority has been delegated in accordance with the example wording in the Appendix to Tender.

It is preferable, but not essential, for the individual(s) to be agreed before the Letter of Acceptance is issued, and for the DAB to visit the Site on a regular basis. Under the example text in the Appendix to Tender, the Parties may either so agree before the Letter of Acceptance is issued or agree the appointment within the specified period thereafter. Alternatively, the Parties may prefer to defer the appointment until a dispute has arisen, in which case Sub-Clause 20.2 plus the Appendix - General Conditions of Dispute Adjudication Agreement with its Annex (Procedural Rules) and the Dispute Adjudication Agreement should be amended to comply with the wording contained in the corresponding sections of FIDIC's Conditions of Contract for Plant and Design -Build.

Sub-Clause 20.2 provides for two alternative arrangements for the DAB:

a) one person, who acts as the sole member of the DAB, having entered into a tripartite agreement with both Parties; or

b) a DAB of three persons, each of whom has entered into a tripartite agreement with both Parties.

The form of this tripartite agreement could be one of the two alternatives shown at the end of this publication, as appropriate to the arrangement adopted. Both of these forms incorporate (by reference) the General Conditions of Dispute Adjudication Agreement, which are included as the Appendix to the General Conditions because they are also referred to in Sub-Clause 20.2. Under either of these alternative forms of Dispute Adjudication Agreement, each individual person is referred to as a Member.

At an early stage, consideration should be given as to whether a one-person or three-person DAB is preferable for a particular project, taking account of its size, duration and the fields of expertise which will be involved. For some projects, it may be considered appropriate to appoint a one-person DAB for each major field of expertise relevant to the Works; however, this may give rise to problems if, when a dispute arises, the Parties cannot agree which field is applicable and, therefore, to whom the dispute should be referred.

For a one-person DAB to be mutually agreed, the Employer (or the tenderer) could propose the names and curriculum vitae of suitable persons, for the tenderer (or the Employer) to accept. It may be advisable to propose alternates in case some subsequently decline the appointment, assuming that they have not previously indicated their willingness to accept. Each Party may be reluctant to choose names from a list of people who have already been contacted by the other Party.

For a three-person DAB, the Employer and the tenderer may each propose one member, similar to the above procedure, for the tenderer and the Employer respectively to accept. For the chairman, the Employer (or the tenderer) could similarly propose suitable persons for the tenderer (or the Employer) to accept. It may be appropriate for the chairman's retainer fee to be more than that of

University of Cape Town

the other two members, reflecting the additional administrative tasks which a chairman will have to perform.

The appointment of the DAB may be facilitated, especially if the members are not to be appointed at the commencement of the Contract, by including an agreed list of potential members in the Contract: in a Schedule. Alternatively, the Engineer may make these pre-arbitral decisions. This alternative, which has been the Engineer's traditional role in common law countries, may be appropriate if the Engineer is an independent professional consulting engineer with the experience and resources required for the administration of all aspects of the contract. The Employer should recognise that, although the Engineer generally acts for the Employer as specified in Sub-Clause 3.1(a), the Engineer will make these pre-arbitral decisions impartially and the Employer must not prejudice this impartiality.

If this alternative is considered appropriate, the Sub-Clause may be varied:

EXAMPLE SUB-CLAUSE FOR PRE-ARBITRAL DECISIONS BY THE ENGINEER

Delete Sub-Clauses 20.2 and 20.3.

Delete the second paragraph of Sub-Clause 20.4 and substitute:

The Engineer shall act as the DAB in accordance with this Sub-Clause 20.4, acting fairly, impartially and at the cost of the Employer. In the event that the Employer intends to replace the Engineer, the Employer's notice under Sub-Clause 3.4 shall include detailed proposals for the appointment of a replacement DAB.

University of Cape Town

ANNEXURE N : FIDIC 1999 – Appendix; General Conditions of Dispute Adjudication Agreement

1 Definitions

Each "Dispute Adjudication Agreement" is a tripartite agreement by and between:

a) the "Employer";
b) the "Contractor"; and
c) the "Member" who is defined in the Dispute Adjudication Agreement as being:
   i) the sole member of the "DAB" (or "adjudicator") and, where this is the case, all references to the "Other Members" do not apply, or
   ii) one of the three persons who are jointly called the "DAB" (or "dispute adjudication board") and, where this is the case, the other two persons are called the "Other Members".

The Employer and the Contractor have entered (or intend to enter) into a contract, which is called the "Contract" and is defined in the Dispute Adjudication Agreement, which incorporates this Appendix. In the Dispute Adjudication Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

2 General Provisions

Unless otherwise stated in the Dispute Adjudication Agreement, it shall take effect on the latest of the following dates:

a) the Commencement Date defined in the Contract,
b) when the Employer, the Contractor and the Member have each signed the Dispute Adjudication Agreement, or
c) when the Employer, the Contractor and each of the Other Members (if any) have respectively each signed a dispute adjudication agreement.

When the Dispute Adjudication Agreement has taken effect, the Employer and the Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective.

This employment of the Member is a personal appointment. At any time, the Member may give not less than 70 days' notice of resignation to the Employer and to the Contractor, and the Dispute Adjudication Agreement shall terminate upon the expiry of this period.

No assignment or subcontracting of the Dispute Adjudication Agreement is permitted without the prior written agreement of all the parties to it and of the Other Members (if any).

3 Warranties

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement or impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is:

a) experienced in the work which the Contractor is to carry out under the Contract,
b) experienced in the interpretation of contract documentation, and fluent in the language for communications defined in the Contract.

University of Cape Town

4 General Obligations of the Member

The Member shall:

a) have no interest financial or otherwise in the Employer, the Contractor or the Engineer, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;

b) not previously have been employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;

c) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the Contract forms part;

d) not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except as may be agreed in writing by the Employer, the Contractor and the Other Members (if any);

e) comply with the annexed procedural rules and with Sub-Clause 20.4 of the Conditions of Contract;

f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;

g) not while a Member enter into discussions or make any agreement with the Employer, the Contractor or the Engineer regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication Agreement;

h) ensure his/her availability for all site visits and hearings as are necessary;

i) become conversant with the Contract and with the progress of the Works (and of any other parts of the project of which the Contract forms part) by studying all documents received which shall be maintained in a current working file;

j) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any); and

k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any).

5 General Obligations of the Employer and the Contractor

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, other-wise than in the normal course of the DAB's activities under the Contract and the Dispute Adjudication Agreement, and except to the extent that prior agreement is given by the Employer, the Contractor and the Other Members (if any).

The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member and the Other Members (if any):

a) be appointed as an arbitrator in any arbitration under the Contract;

b) be called as a witness to give evidence concerning any dispute before

University of Cape Town

arbitrator(s) appointed for any arbitration under the Contract; or

c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and hold the Member harmless against and from claims from which he/she is relieved from liability under the preceding paragraph.

Whenever the Employer or the Contractor refers a dispute to the DAB under Sub-Clause 20.4 of the Conditions of Contract, which will require the Member to make a site visit and attend a hearing, the Employer or the Contractor shall provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the Member. No account shall be taken of any other payments due or paid to the member.

6 Payment

The Member shall be paid as follows, in the currency named in the Dispute Adjudication Agreement:

a) a retainer fee per calendar month, which shall be considered as payment in full for:
   i) being available on 27 days' notice for all site visits and hearings;
   ii) becoming and remaining conversant with all project developments and maintaining relevant files;
   iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and
   iv) all services performed hereunder except those referred to in sub-paragraphs (b) and (c) of this Clause.

The retainer fee shall be paid with effect from the last day of the calendar month in which the Dispute Adjudication Agreement becomes effective; until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works.

With effect from the first day of the calendar month following the month in which Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by 50%. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Adjudication Agreement is otherwise terminated.

b) a daily fee which shall be considered as payment in full for:
   i) each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and the site, or another location of a meeting with the Other Members (if any);
   ii) each working day on site visits, hearings or preparing decisions; and
   iii) each day spent reading submissions in preparation for a hearing.

c) all reasonable expenses incurred in connection with the Member's duties, including the cost of telephone calls, courier charges, faxes and telexes, travel expenses, hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (b) of this Clause.

d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The retainer and daily fees shall be as specified in the Dispute Adjudication Agreement. Unless it specified otherwise, these fees shall remain fixed for the first 24 calendar months, and shall thereafter be adjusted by agreement between

University of Cape Town

the Employer, the Contractor and the Member, at each anniversary of the date on which the Dispute Adjudication Agreement became effective.

The Member shall submit invoices for payment of the monthly retainer and air fares quarterly in advance. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

The Contractor shall pay each of the Member's invoices in full within 56 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Adjudication Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the DAB; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Sub-Clause 14.8 of the Conditions of Contract.

If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under Clause 7.

7 Termination

At any time: (i) the Employer and the Contractor may jointly terminate the Dispute Adjudication Agreement by giving 42 days' notice to the Member; or (ii) the Member may resign as provided for in Clause 2.

If the Member fails to comply with the Dispute Adjudication Agreement, the Employer and the Contractor may, without prejudice to their other rights, terminate it by notice to the Member. The notice shall take effect when received by the Member.

If the Employer or the Contractor fails to comply with the Dispute Adjudication Agreement, the Member may, without prejudice to his/her other rights, terminate it by notice to the Employer and the Contractor. The notice shall take effect when received by them both.

Any such notice, resignation and termination shall be final and binding on the Employer, the Contractor and the Member. However, a notice by the Employer or the Contractor, but not by both, shall be of no effect.

8 Default of the Member

If the Member fails to comply with any obligation under Clause 4, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DAB which are rendered void or ineffective.

9 Disputes

Any dispute or claim arising out of or in connection with this Dispute Adjudication Agreement, or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of

University of Cape Town

Commence by one arbitrator appointed in accordance with these Rules of Arbitration.

2. ANNEX PROCEDURAL RULES

1 Unless otherwise agreed by the Employer and the Contractor, the DAB shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor. Unless otherwise agreed by the Employer, the Contractor and the DAB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.

2 The timing of and agenda for each site visit shall be as agreed jointly by the DAB, the Employer and the Contractor, or in the absence of agreement, shall be decided by the DAB. The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims.

3 Site visits shall be attended by the Employer, the Contractor and the Engineer and shall be co-ordinated by the Employer in co-operation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services. At the conclusion of each site visit and before leaving the site, the DAB shall prepare a report on its activities during the visit and shall send copies to the Employer and the Contractor.

4 The Employer and the Contractor shall furnish to the DAB one copy of all documents which the DAB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DAB and the Employer or the Contractor shall be copied to the other Party. If the DAB comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.

5 If any dispute is referred to the DAB in accordance with Sub-Clause 20.4 of the Conditions of Contract, the DAB shall proceed in accordance with Sub-Clause 20.4 and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DAB shall:

a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case and
b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.

6 The DAB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.

7 Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer, and to proceed in the absence of any party who the DAB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.

University of Cape Town

8 The Employer and the Contractor empower the DAB, among other things, to:

a) establish the procedure to be applied in deciding a dispute,
b) decide upon the DAB's own jurisdiction, and as to the scope of any dispute referred to it,
c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,
d) take the initiative in ascertaining the facts and matters required for a decision,
e) make use of its own specialist knowledge, if any,
f) decide upon the payment of financing charges in accordance with the Contract,
g) decide upon any provisional relief such as interim or conservatory measures, and
h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.

9 The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DAB shall make and give notice to its decision in accordance with Sub-Clause 20.4, or as otherwise agreed by the Employer and the Contractor in writing. If the DAB comprises three persons:

a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;
b) it shall endeavour to reach a unanimous decision: if this proves impossible the applicable decisions shall be made by majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless:
d) i) either the Employer or the Contractor does not agree that they do so, or
ii) the absent Member is the chairman and he/she instructs the other Members to not make a decision.

University of Cape Town

ANNEXURE O : FIDIC 1999 – Dispute Adjudication Agreement

DISPUTE ADJUDICATION AGREEMENT

[for each member of a three-person DAB]

Name and details of Contract _____
Name and address of Employer _____
Name and address of Contractor _____
Name and address of Member _____

Whereas the Employer and the Contractor have entered into the Contract and desire jointly to appoint the Member to act as one of the three persons who are jointly called the "DAB" *[and desire the Member to act as chairman of the DA*B].

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the "General Conditions of Dispute Adjudication Agreement", which is appended to the General Conditions of the "Conditions of Contract for Construction" First Edition 1999 published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC), and the following provisions. In these provisions, which include amendments and additions to the General Conditions of Dispute Adjudication Agreement, words and expressions shall have the same meanings as are assigned to them in the General Conditions of Dispute Adjudication Agreement.

2. [*Details of amendments to the General Conditions of Dispute Adjudication Agreement, if any. For example:*

   In the procedural rules annexed to the General Conditions of Dispute Adjudication Agreement, Rule _ is deleted and replaced by: " ... "]

3. In accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member shall be paid as follows:

   A retainer fee of _____ per calendar month,
   plus a daily fee of _____ per day.

   In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member undertakes to to serve, as described in this Dispute Adjudication Agreement, as one of the three persons who are jointly to act as the DAB.

4. The Employer and the Contractor jointly and severally undertake to pay the Member, in consideration of the carrying out of these services, in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement.

University of Cape Town

5. This Dispute Adjudication Agreement shall be governed by the law of _____

SIGNED by: _____	SIGNED by: _____	SIGNED by: _____
for and on behalf of the Employer in the presence of	for and on behalf of the Contractor in the presence of	The Member in the presence of
Witness: _____	Witness: _____	Witness: _____
Name: _____	Name: _____	Name: _____
Address: _____	Address: _____	Address: _____
Date: _____	Date: _____	Date: _____

University of Cape Town

ANNEXURE P : Guidelines for DRB Recommendations

P1 TCCP of UTRC SAMPLE FORMAT OF DISPUTES REVIEW BOARD RECOMMENDATION

1. Introduction

As stated in the Disputes Review Board Specification (Appendix B – 2, Item 6), after a dispute hearing the Board's recommendation is submitted as a written report to both parties, together with an explanation of the Board's reasoning. The following general format is recommended.

2. Statement of Dispute

The first section should, in a few sentences, identify and describe the dispute in summary form. A full discussion of the dispute history is usually not necessary. Often it is appropriate to present a simple statement of the two opposing positions of the Owner and Contractor.

In many cases, clear identification of the dispute is a major step toward resolving the dispute. It usually is helpful if the Owner and Contractor jointly present to the Board a clear definition and statement of the dispute.

3. Board Recommendation

The Board recommendation should be stated as clearly and simple as possible. In some cases, it may be helpful if the Owner and Contractor can agree between themselves, and request from the Board, the format of the Board's recommendation. For example, in the Mt. Baker Ridge Tunnel case, the parties requested that work days of delay be identified in specified categories.

4. Explanation of Recommendation

An explanation of the Board's reasoning is given, so that the parties may understand how and why the Board arrived at its recommendation. The immediate objective is to convince both parties that the Board recommendation is reasonable. The explanation is also provided for the benefit of possible later reviewers. This is particularly helpful if the recommendation must be approved by the Owner's funding agencies. This is also valuable in case the dispute goes on to another dispute resolution proceeding.

University of Cape Town

P2 CONSTRUCTION DISPUTE REVIEW BOARD MANUAL SAMPLE FORMAT OF DRB RECOMMENDATION

Many different formats have been used successfully for DRB recommendations. The following general format is suggested as a good starting point for DRB that are preparing their first recommendation.

Statement of Dispute and Positions

These first sections should, in a few sentences, identify and describe the dispute in summary form. A full discussion of the dispute history is not necessary.

Usually it is appropriate to present a simple statement of the two opposing positions of the owner and contractor.

In many cases, clear identification of the dispute and both parties' positions is a major step toward resolving the dispute.

Recommendation

The Board's recommendation should be stated as clearly and simply as possible. In some cases, it may be helpful if the owner and contractor can agree between themselves, and request from the board, the content of the board's recommendation. For example, the parties might request that only merit be considered, or that workdays of delay be identified in specific categories.

Explanation of Recommendation

An explanation of the board's reasoning is given, so that the parties may understand how and why the DRB arrived at its recommendation. The immediate objective is to convince both parties that the board's recommendation is reasonable. The explanation is also provided for the benefit of possible later reviewers. This explanation is particularly necessary if the recommendation must be approved by the individuals who did not attend the hearing or by the owner's funding agencies. The explanation is also valuable in case the disputes goes on to another dispute resolution proceeding.

University of Cape Town

[Project Name]
Recommendation of Disputes Review Board

Dispute No. XX [NAME OF DISPUTE]

Hearing Date: _____, 19xx

Dispute

Description of dispute. A one – or two-sentence summation of the dispute.

Contractor's Position

A short summation of the contractor's position as understood by the board.

Owner's Position

A short summation of the owner's position as understood by the board.

Recommendation

The board's specific recommendation for settlement of the dispute. (The recommendation course is consistent with the explanation.)

Explanation

(This section could also be called Considerations, Rationale, Findings, Discussion, and so on.)

The board's description of how each recommendation was reached.

Respectfully submitted,

Date: _____ _____

Date: _____ _____

Date: _____ _____

University of Cape Town

P3 CONTRACT EXAMPLE GUIDELINES OF DRB RECOMMENDATION

FORM OF FINDINGS AND RECOMMENDATIONS OF THE DISPUTES REVIEW BOARD.

I. INTRODUCTION

This section shall contain the following information about the Contract:

- Name, Number, and effective Date of Contract;
- Number (if any), title (if any) and brief description of the dispute under reference; and
- General Contract background and information (as appropriate to facilitate the parties' understanding of these findings and recommendations).

II. STATEMENT OF DISPUTE (S)

This section shall include a full description of each dispute as presented by each party. It must set forth each element of the relief requested (e.g. adjustments to Time for Completion or Contract Price) and the basis of each claim and each response maintained by the Parties.

III. ANALYSIS AND FINDINGS

This section shall include

a) the Board's findings on the merit of each element of the claim(s), and, if merit is found, each element of cost constituting an adjustment to each element or any other relief found due to a party. However, if either Party puts a dispute to the Board as a matter of principle, the quantum determination shall only be made by the Board, if the Parties cannot resolve the dispute on the basis of the merits found, upon express request from either or both Party or Parties.

b) the Board's analysis of, justification for, and findings supporting the recommendations in Section IV; and

c) references to all contractual, statutory, or other applicable authority relied upon by the Board in making its findings and recommendations.

IV. RECOMMENDATIONS

This section shall contain the Board's specific recommendation(s) for resolution of the dispute. The recommendation(s) should be consistent with and follow from the analysis and findings set forth in Section III.

University of Cape Town

V. DISSENTING OPINION

This section should contain any dissent to the findings and recommendations made by the majority of the Board, explaining the dissenting member's reasons for disagreeing with the findings and recommendations made by the majority of the Board.

VI. CERTIFICATION

The following certification shall be included above the Board Members' signatures:

"I certify that I participated in all of the meetings of the Board regarding the dispute indicated above and concur with the findings and recommendations made in Sections III and IV, except as I may have stated in my dissent in Section V."

.....
(Signature, Board Member A)

.....
(Signature, Board Member B)

.....
(Signature, Board Member C)

University of Cape Town

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