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Table of Contents

Articles

PAYAL CHAWLA
Arbitrability: From Fraud to Serious Fraud—the Controversy Continues … 35

SARAVANAN A AND DR. S. R. SUBRAMANIAN
Role of Domestic Courts in the Investor-State Dispute Settlement Process: The Case of South Asian BITs 42

JUAN EDUARDO FIGUEROA VALDÉS AND WILLIAM R SCHUBERT
The Role of Dispute Boards in the Construction Industry 55

LUKAS WYSS
Expedient and Efficient Arbitrations Need Strong Arbitrators—But How "Strong" Should and May Arbitrators Get? 69

News Section

DR HELENA HSI-CHIA CHEN
New Changes to Arbitration Framework in China's Pilot Free Trade Zones N-1

The Role of Dispute Boards in the Construction Industry[1]

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Arbitration awards; Construction contracts; Construction industry; Dispute boards; Dispute resolution; Enforcement; Singapore; Standard forms of contract

Just a few decades ago, the construction industry developed the idea of the "DB" as a tool to help contracting parties in complex projects to achieve timely and efficient performance. This introduced a novel problem-solving mechanism to the world of alternative dispute resolution (ADR)—one that not merely focused on dispute resolution, but also on real-time *dispute prevention*. The unique role of DBs in the construction industry has been fortified in recent years, thanks to two factors: (1) advancements in standardized DB composition and model contracts; and (2) the development of legal precedent recognizing the authority granted to DBs under model contract language.

This article discusses the various ways in which parties can design and implement DBs by contract, and also evaluates the legal weight afforded to DBs based on recent decisions by arbitral tribunals and courts. It contains three chapters. The first chapter discusses the historical context of DBs, the reasons for their creation, and the evolution that led to the various styles of DBs and model rule templates that exist today. The second chapter considers the legal precedent of courts and arbitration panels on the recognition of "step clauses"—provisions that require disputes to be submitted to DBs as a condition precedent to the jurisdiction of other tribunals. The third chapter discusses the legal precedent on the review and enforcement of DB decisions (which, according to model DB clauses, are usually considered to be non-final but nevertheless immediately binding on the parties).

1. Background on dispute boards in the construction industry

Dispute boards arose in the context of major construction projects, where project owners and contractors were compelled to look beyond arbitration, mediation or similar ADR mechanisms in order to control dispute-related costs. This chapter explores why DBs were created and how they became what they are today. The first section introduces the concept of DBs and the basic reasons for which they were introduced in the construction industry. The second section reviews the historical context of DBs, and how distinct model formulas for DB arrangements came into being. The third section introduces some of the integral features of modern DB arrangements, along with characteristics that parties are often able to vary by contract.

1.1 What are dispute boards and why were they created?

The rise of DBs can be explained by the limitations of more conventional ADR mechanisms in the context of the construction industry and the need for innovation to fit the needs of parties to construction projects. Educating a newcomer—whether a judge, a mediator, or an arbitral panel—about the underlying facts of a complex construction project driven by deadlines can create burdensome costs and undue delays[2]. Further, reproducing the relevant evidence for a tribunal or hearing body after the dispute has transpired is bound to be difficult, especially while the construction project is still ongoing.[3]

Additionally, mechanisms such as arbitration and mediation have proven insufficient because parties to construction contracts often need more than an impartial referee who provides a cost-effective alternative to litigation. They also need solutions to control the complexities that arise during contract performance, and to minimise the risk that variances and misunderstandings will blossom into delays or disputes. These needs are based on the inherently complex and unpredictable nature of construction projects. As one article has noted:

> "[F]ew construction projects are realized as planned and variations are the rule rather than the exception. Whether the contractor is entitled to additional

[1] This article is a product of FONDECYT (2015) project number 1150634.

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[2] See Arkin, Harry L., *Pre-Arbitration Dispute Resolution: What is It, Where is It and Why?*, 21 INT'L BUS. L. 373 (1993) (commenting on the drawbacks of arbitration and mediation in terms of cost in time-effectiveness). Of course, similar problems apply in the context of litigation. See Horner II, Christopher T., *Should Dispute Board Recommendations Be Considered Binding in Subsequent Proceedings?*, 32 CONST. L. 17, 18 & n.11 (2012) (judges are not construction specialists).

[3] See, e.g. Cyril Chern, *Chern on Dispute Boards*, 2nd edn (Wiley-Blackwell, 2011) at 3 (commenting that in the construction industry, where "corporate memory" is notably lacking, resolving disputes after they have transpired tends to be quite complicated); Figueroa Valdés, Juan Eduardo, "Los Dispute Boards o Panels Técnicos en los Contratos Internacionales de Construcción" (2010) 364 *Gaceta Jurídica* 9, 9-10 (noting the difficulties in gathering the best evidence or making it available for inspection in construction disputes before courts or arbitral tribunals); Ragnar Harbst and Volker Mahnken "ICC Dispute Board Rules: the Civil Law Perspective" (2006) 72(4) *Arbitration* 310, 311 ("arbitral tribunals are often faced with the tedious task of resolving complicated questions of defects and delays years after the relevant facts occurred.")

payments for changes often causes disputes. Time schedules for completion are always tight and delay can lead to severe penalties.”[4]

Dispute boards are creatures of contract, just like more conventional ADR mechanisms. However, DBs are distinguishable—and they have found a unique niche in the construction industry—for a critical reason: DBs can operate contemporaneously with the project as mechanisms for *dispute prevention*.

Unlike more conventional ADR mechanisms, DBs were designed to offer a real-time support system aiming to avert potential disputes.[5] In other words, the time of operation for DBs is not limited to after disputes have already transpired between the contracting parties. Ideally[6], a DB begins functioning at the commencement of the project, and continues to operate until project completion.

The duties of DB members during contract performance include making routine site visits, documenting potential areas of contention in project implementation, and conversing with the parties about how they intend to resolve foreseeable differences.[7] These functions add value to long-term construction projects by untangling inevitable uncertainties before they turn problematic, thereby insuring against costly legal battles and delays.[8]

Another responsibility of DBs is to deliver written determinations concerning actual disputes between owners and contractors. Depending on how the contract sets up the DB, DB decisions may be considered immediately binding or they may simply be characterised as recommendations.

The figure below compares the services and benefits that DB arrangements can provide, alongside those of other methods of dispute resolution.

	Litigation	**Arbitration**	**Mediation**	**Adjudication[9] (by project engineer)**	**Dispute board**
Impartiality and independence guaranteed	Y	Y	Y	N	Y
Industry expertise	N	Y	Y	Y	Y
Firsthand project knowledge (and involvement)	N	N	N	Y	Y
Decisions *may* bind the parties / require prompt compliance without delay	Y	Y	N	Y	Y
Offers support during contract performance to avert latent disputes	N	N	N	N	Y

1.2 History of DBs: Origins and early success stories

The history of DBs is only a few decades old and constantly evolving. While a variety of industries have recently found uses for DBs, the mechanism was originally created by and for the construction industry. Dispute boards have proven successful when implemented alongside major construction projects for the purpose of curbing unnecessary legal costs and minimising delays. The utility of DBs has been particularly noticeable in large-scale construction projects in which:

- the overall estimated value is high and/or the duration of the project is long;
- timely completion is of high importance;
- owners and contractors are from different countries and cultural backgrounds;
- multilateral development banks have provided funding; and/or
- public works concessions are involved.

This section discusses the history of DBs in the construction industry, and how they evolved into what they are today. Specifically, this section discusses: the similarities and differences between DBs and on-site adjudication (a mechanism to which modern DBs are related) in construction projects; early success stories that led to widespread interest in DBs in the construction industry; and the subsequent development of model contracts envisioning distinct types of DB arrangements.

1.2.1 Origins in adjudication (e.g. by the project engineer)

As noted above, the limitations of mediation arbitration, and similar ADR mechanisms include that they are backwards-looking and disconnected from the construction project itself. Submitting a dispute to a mediator or an arbitration panel implies attempting to inform new people on the details of a dispute that

[4] Harbst and Mahnken “ICC Dispute Board Rules: the Civil Law Perspective” (2006) 72(4) *Arbitration* 310, 310.
[5] See Chern, Chern on Dispute Boards, 2nd edn (2011) pp.25 and 78.
[6] However, “ad hoc” dispute board arrangements lack this characteristic; ad hoc boards are limited to resolving disputes after they transpire. *See* Part 1.3, *infra*.
[7] For discussion on the importance of these function, see: Peter Chapman, “The Use of Dispute Boards on Major Infrastructure Projects” (2015) 1 Turk. Com. L. Rev. 219, 226–27 (“One cannot emphasise enough the potential value of these informal review meetings during site visits.”).
[8] Chapman, “The Use of Dispute Boards on Major Infrastructure Projects” (2015) 1 Turk. Com. L. Rev. 219.
[9] Adjudication is another mechanism uniquely associated with the construction industry; it is discussed in greater detail in Part 1.2 below.

transpired during implementation of an ongoing project. This can create excess costs for the parties in a variety of ways (e.g. legal expenditures, delays in performance, information asymmetries).[10]

Before dispute boards became popular in the construction industry, project owners in certain jurisdictions utilised on-site "adjudication"—typically by the project engineer (or architect)—as a way to reign in the types of problems noted above.

However, depending on contractual provisions that require the owner and contractor to resolve disputes by deferring to the determination of the project engineer also has shortcomings.

One problem is that from the perspective of owners and contractors, project engineers—regardless of how fair or impartial they might be—tend to have credibility problems. From the perspective of contractors, project engineers are generally chosen by owners, and such an arrangement therefor implies a bias in favour of the owner.[11] In any event, adjudication by a project engineer lacks the same guarantees of independence found in third-party ADR mechanisms. Consequently, courts in some jurisdictions are unlikely to enforce decisions by project engineers.[12] (This tends to be a serious issue only in jurisdictions that do not have statutory adjudication schemes for construction contracts.)[13] From the perspective of owners, defaulting to the engineer's determinations on when and how much to pay the contractor may also be seen as undesirable—particularly if the engineer is foreign and not accustomed to the trade practices in the host country.[14]

A second problem is that engineers acting as quasi-adjudicators are only able to resolve disputes between contractors and owners after they transpire.[15] While a project engineer may be able to promptly understand the facts of a dispute based on familiarity with the project, eliminating disputes before they begin is certainly not a priority of the engineer.[16]

The concept of DBs effectively took the idea of adjudication by an on-site engineer to a new level by overcoming these obstacles. First, DBs can provide the benefits of prompt on-site resolution of disputes while also making use of independent third parties whom the parties are likely to perceive as unbiased and credible.[17] Second, introducing DBs to construction contracts combines retrospective dispute resolution with prospective and ongoing dispute avoidance. Adding the latter provides a new way to save costs and prevent delays.[18]

1.2.2 Early DB trials and successes

By most accounts, DBs originated in the United States in the 1960s and 1970s, and later gained recognition on the world stage. Below is an overview of two commonly-cited DB experiments, the first involving a domestic tunnelling project in the U.S., and the second involving the construction of a hydroelectric power plant by an international construction team in Honduras.

Eisenhower Tunnel Contract (State of Colorado, USA) One often-cited illustration of the rise of DBs involved the construction of a highway tunnel in the U.S. by domestic parties in 1975. The idea to use a DB in this project arose from a research project of the National Committee on Tunneling Technology and a related report entitled *Better Contracting for Underground Construction*, published in 1974. The report highlighted how disputes in underground construction projects threatened timely completion.[19] Based on the findings and recommendations of the report, the first so-called "dispute review board" (DRB) was implemented in 1975 to oversee the construction of the second road bore pursuant to the Eisenhower Tunnel Contract.[20] While construction of the first road bore for this project had experienced delays and cost problems due to disputes, the segment of the project that was subject to the DRB provision fared much better.[21] The parties resolved all disputes amicably during the construction of the second road bore, notwithstanding the fact that the board's input was limited to giving non-binding recommendations.[22]

El Cajon Dam and Hydropower Project (Departamento de Cortés, Honduras) One of the first examples of a DB in the international context was during the construction of the El Cajon Dam and Hydropower project in Honduras during the 1980s. The World Bank had provided part of the funding for the project, and it was eager to make sure that the multinational team—which included the Honduras Electric Company (the owner), a Swiss engineer, and an Italian contractor—adhered to the project calendar and

[10] See See Chern, *Chern on Dispute Boards*, 2nd edn (2011) at 3; Figueroa Valdés, "Los Dispute Boards o Panels Técnicos en los Contratos Internacionales de Construcción" (2010) 364 *Gaceta Jurídica* 9, 9-10; Harbst and Mahnken, "ICC Dispute Board Rules: the Civil Law Perspective" (2006) 72(4) *Arbitration* 310, 311.
[11] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.2.
[12] See Richard Appuhn and Jesse B. Grove, Comparative Experience with Dispute Boards in the United States and Abroad, (2012) 32 Constr. L. 6, 11 (noting that courts in the United States are particularly unlikely to enforce the decisions of engineers for this reason).
[13] In contrast, courts in jurisdictions with statutory adjudication regimes in place—for example, the U.K., Singapore, and much of Australia—must promptly enforce adjudication decisions that comply with statutory requirements.
[14] See Jane Jenkins, *International Construction Arbitration Law*, 2nd edn (Aaphen den Rijn: Kluwer Law International, 2013) pp.102–03 & fn.6. See also Appuhn and Jesse B. Grove, Comparative Experience with Dispute Boards in the United States and Abroad, (2012) 32 Constr. L. 6, 11.
[15] Chern, *Chern on Dispute Boards 3*, 2nd edn (2011), p.2.
[16] Chern, *Chern on Dispute Boards 3*, 2nd edn (2011).
[17] Chern, *Chern on Dispute Boards 3*, 2nd edn (2011), p.20.
[18] Chern, *Chern on Dispute Boards 3*, 2nd edn (2011), p.2.
[19] Appuhn and Jesse B. Grove, Comparative Experience with Dispute Boards in the United States and Abroad, (2012) 32 Constr. L. 6, 6.
[20] Appuhn and Jesse B. Grove, Comparative Experience with Dispute Boards in the United States and Abroad, (2012) 32 Constr. L. 6, 6.
[21] Appuhn and Jesse B. Grove, Comparative Experience with Dispute Boards in the United States and Abroad, (2012) 32 Constr. L. 6, 6.
[22] Appuhn and Jesse B. Grove, Comparative Experience with Dispute Boards in the United States and Abroad, (2012) 32 Constr. L. 6, 6.

budget.[23] The World Bank organised an expert panel whose duties included making non-binding recommendations to the parties with an eye toward mending potential disputes.[24] The panel worked with the parties throughout the duration of the project, and the endeavour ended successfully without any disputes having proceeded to arbitration or litigation.[25] Further, the investment in the DB was minimal.[26] The estimated final cost of the project was around US $236 million, while the cost of the DB was roughly US $300,000.[27]

1.2.3 The advent of model rules for DBs

The success of the Cajon Dam and Hydropower project set the stage for the widespread endorsement of DBs by international organisations with a stake in large infrastructure projects. These organisations, which included private trade associations, international development banks, and non-profit groups with a hand in promoting ADR mechanisms, provided a variety of model contract provisions concerning the use of DBs.

The World Bank and FIDIC models Around 1990, the World Bank published model provisions contemplating the use of DBs that would issue non-binding recommendations on potential disputes before the parties could proceed to arbitration.[28] Later, in the 1995 version of its Standard Bidding Documents—Procurement of Works (SBDW), the World Bank made use of DRBs (or dispute review experts) mandatory for owners and contractors working on Work Bank funded projects.[29] Under the 1995 SBDW provisions recommendations of dispute panels or experts were not considered binding, so long as the party dissatisfied with a recommendation filed a notice of arbitration within 14 days of the decision there was no immediate obligation to comply with the DB determination.[30]

The International Federation of Consulting Engineers (or FIDIC, for its name in French) followed the lead of the World Bank in 1995 and 1996, when it released model provisions providing for a DB as an alternative to adjudication by the project engineer.[31] This was a major shift in position for the FIDIC, an industry group comprised of engineers that had long endorsed model contracts requiring on-site adjudication by the project engineer.[32] Beginning in 1999, the FIDIC began recognising DBs as the chief dispute resolution mechanism under several of its model construction contracts which were tailored to different types of projects.[33]

The FIDIC provisions introduced the concept of the "dispute adjudication board" (DAB), which is distinct from the DB model that the World Bank was following in the 1990s.[34] The FIDIC DB provisions contemplated that the DAB would have authority to make adjudicative determinations and not merely recommendations.[35] These determinations would immediately bind the parties, notwithstanding the parties' ability to later challenge those determinations in another forum.[36]

Beginning in 2000, the World Bank moved closer to FIDIC's vision of DBs in a few important ways. First, it embraced binding decisions instead of recommendations in its 2000 SBDW provisions, under which parties were obliged to follow the board's decision unless or until an arbitral panel or a court overturned it.[37] Second, the World Bank eliminated the option of having an independent engineer to decide disputes in lieu of a DB beginning in 2000.[38] Third, the World Bank and other multilateral development banks worked with the FIDIC to produce a harmonised set of provisions for projects funded by development banks in 2005.[39]

Model Rules from ADR Organisations (e.g. AAA, ICC) Around the year 2000, organisations that have historically facilitated other types of ADR mechanisms started to develop model provisions on DBs. Among the most noteworthy of these organisations are the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC).

The AAA first published its DRB Guide Specifications in 2000.[40] The AAA's approach to DBs is noteworthy due to: (1) its adherence the DRB model, under which the panel gives only non-binding recommendations; and (2)

[23] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 222.
[24] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 222.
[25] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 222.
[26] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 222.
[27] Arkin, "Pre-Arbitration Dispute Resolution: What is It, Where is It and Why?" (1993) 21(8) I.B.L. 373, 373–74.
[28] See Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 221 (discussing the 1990 publication *Procurement of Works*, released by the World Bank in 1990, which included modified FIDIC contracts and accompanying dispute board provisions).
[29] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.101.
[30] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.102, (discussing the 1995 version of the SBDW).
[31] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.102; Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 221.
[32] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 221 (discussing the 1990 publication *Procurement of Works*, released by the World Bank in 1990, which included modified FIDIC contracts and accompanying dispute board provisions).
[33] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 221.
[34] The latter model, under which the dispute board issues recommendations, reflects the "dispute review board" (DRB) approach, which has origins in the United States.
[35] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 221.
[36] Chapman, "The Use of Dispute Boards on Major Infrastructure Projects" (2015) 1 Turk. Com. L. Rev. 219, 221
[37] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.102. Consistent with this shift in position, the World Bank ultimately abandoned the term "dispute review board"—which usually implies that the board issues non-binding recommendations—in favor of the more-neutral term "dispute board" in 2005. *Seeid.*
[38] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.102.
[39] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.102. This FIDIC model contract, created for projects funded by development banks, is commonly known as the *Pink Book*.
[40] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.103.

the power afforded to the AAA in forming the DRB and in brokering the relationship between the DRB and the parties.

With respect to the first point, the term "DRB" has become synonymous with the "U.S. approach" to DBs, under which the board does not purport to be a quasi-adjudicator but rather a hands-on support mechanism whose decision-making powers are limited to issuing non-binding recommendations.[41] This approach dates back to the Colorado tunnel construction and similar projects in the United States, which took place before using DBs became an international phenomenon.[42] Under the AAA provisions, the parties are free to refer the dispute to arbitration or another ADR method at any time after the board has issued a recommendation.[43]

With respect to the second point, the AAA provisions reflect the view that having an independent administrator manage the DB process enhances the perception of neutrality.[44] Under the AAA provisions, the organisation brokers the relationship between the parties and the DRB from start to finish.[45] To initiate the process, the owner and contractor must file a request with the AAA providing details of the project.[46] Among other things, the parties must include: the name and location of the project; the contract date; the contract details, including the timeline for performance of the project; and the approximate overall value of the project; the parties' expectations regarding DB expenses and compensation; and a list of all relevant contacts, which may include parties other than the owner and general contractor (for example, engineers, first-tier subcontractors, etc.)[47] The next step is a conference call between the AAA and the contracting parties to discuss the parties' needs in greater detail.[48] Then, the AAA provides the parties with a list of potential DRB members based on their needs.[49] After the DB has been formed, the AAA provisions keep the organisation involved in the process. Among other things, the AAA serves as a liaison between the DRB and the parties during site visits and meetings, and administers the payments from the parties to the DRB members throughout the duration of the project.[50]

In 2004, the ICC published a comprehensive set of documents regarding the composition and implementation of DBs. These included the ICC Dispute Board Clauses; the ICC Dispute Board Rules; and a Model Dispute Board Agreement.[51]

The ICC approach was intended to be comprehensive, allowing contracting parties a variety of options to fit their needs.[52] For example, the ICC envisioned that the parties may use one of three types of DBs: (1) a DAB, similar to the mechanism described in the FIDIC contracts, which issues binding opinions; (2) a DRB, similar the mechanism described under the AAA model, which issues non-binding recommendations; or (3) a combined DB (CDB), which typically issues recommendations but may issue decisions upon request if there is no objection.[53] There is an interesting twist to how the ICC default provisions treat the "recommendations" of DRBs and CDBs: unless the parties agree otherwise, these recommendations become binding after 30 days if neither party has contested it by serving a notice of dissatisfaction.[54]

While the ICC approach is not as hands-on as the AAA approach in terms of administration, the ICC Dispute Board Rules do contain a number of default provisions that allow the ICC to intervene in certain circumstances. For example, the ICC Dispute Board Rules provide that when the parties fail to establish procedures for nominating the DB members, the ICC's procedures govern automatically.[55] Further, the ICC's rules give the organisation the ability to appoint board members and to set up the board to the extent the parties fail to do so.[56]

1.3 Features of DBs

Beyond the preliminary framework discussed in the previous section, the model provisions on DBs—including revisions and new publications from the World Bank, FIDIC, the ICC, the AAA, and many other organisations—are continuously evolving to meet the needs of parties. Of course, as the contracting parties are masters of their own agreement, they are free to choose their own provisions or to vary existing ones.[57] Along

[41] Chern, Chern on Dispute Boards, 2nd edn (2011), p.25.
[42] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.4 (noting that the earliest forms of dispute boards in construction projects issued non-binding recommendations).
[43] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.111 (describing same effect under AAA framework).
[44] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.104. As noted in this section (e.g. with respect to dispute board characteristics) and in Part 1.1, having an image of neutrality is a big reason why dispute board mechanisms tend to be successful. Where parties perceive the arrangement as fair and professional, this can reduce the likelihood that the parties will lose trust in the process and elect to spend more time and money in adjudicatory fora. That being said, many organizations will not go as far as the AAA in terms of their willingness to administer the process to maintain the perception of neutrality. See, e.g. Harbst and Mahnken "ICC Dispute Board Rules: the Civil Law Perspective" (2006) 72(4) *Arbitration* 310, 313 (describing the ICC's administrative role under its model rules as limited).
[45] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.90 (describing AAA framework generally).
[46] See Chern, Chern on Dispute Boards, 2nd edn (2011).
[47] See Chern, Chern on Dispute Boards, 2nd edn (2011).
[48] See Chern, Chern on Dispute Boards, 2nd edn (2011).
[49] See Chern, Chern on Dispute Boards, 2nd edn (2011).
[50] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.104 (describing same with respect to the AAA framework).
[51] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), p.104.
[52] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013).
[53] See Harbst and Mahnken "ICC Dispute Board Rules: the Civil Law Perspective" (2006) 72(4) *Arbitration* 310, 312–13.
[54] ICC Dispute Board Rules, art.4(5).
[55] ICC Dispute Board Rules, art.7.
[56] ICC Dispute Board Rules, art. 7.
[57] However, to the extent the parties wish to rely on the services of a third-party organization (such as the ICC or the AAA), the organization may require the parties to agree to certain conditions regarding dispute board implementation as a condition to the organization offering its services to the parties. Organizations typically accomplish this by signing separate contracts with the parties, which are sometimes called "Three Party Agreements." Daniel D. McMillan and Robert A. Rubin "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements" (2005) 25 Constr. L. 14, 15.

with the proliferation of many different types of model clauses comes the challenge of drafting a workable agreement.

On this note, some characteristics of DBs are of fundamental importance, while others are more easily susceptible to variation by the parties. Below is an overview of some of the essential characteristics and considerations with respect to DB clauses in construction contracts. First is a list of characteristics that should be reflected in most (if not all) DB arrangements. Second is a list of considerations that parties should be able to vary by contract in order to fit their specific needs.

1.3.1 Integral characteristics of DBs

Impartiality and independence The board members should be required to maintain impartiality and to disclose any interest (past or present) that could compromise their independence from the contracting parties. Impartiality is a subjective test; to be impartial, a potential board member must not favour one party over the other.[58] Independence is an objective test; a board member must be able to *show* that it does not have any interest (whether personal or professional) that could create a reasonable suspicion of bias.[59] To show independence, potential board members should have an ongoing duty to disclose any relationships with the owner or contractor.[60] Publications from the groups discussed above contain provisions that touch on impartiality and independence. Further, organisations such as the Dispute Resolution Board Foundation (DBRF) and the Dispute Board Federation (DBF) have published extensive ethical codes designed to ensure that board members adhere to the highest standards of impartiality and independence throughout the duration of the project.[61]

Time limits for written determinations and notice of challenges Virtually all the model provisions discussed above contain time limits to keep the process manageable should disputes transpire.[62]

One important time limit that appears in virtually any DB contract is the amount of time the board must issue its findings—whether in the form of a recommendation or a binding decision—after the parties have submitted a question or dispute. The model provisions contain a default time limit for the board to issue decisions (typically around three months, although the AAA framework provides for a considerably shorter turnaround of 14 days), which the parties may extend by contract.[63]

A second necessary time limit prescribes the time a party must issue a notice of dissatisfaction with the DB's recommendation or decision.[64] For provisions that define the DB's determination as a *binding* decision, the decision typically becomes *final* when this period lapses.[65] This may result in waiver of the party's right to challenge the determination in arbitration or court.

Inquisitorial proceedings Any DB must be allowed to solicit the relevant information from the parties without too many burdensome formalities. This allows for low-cost proceedings that do not necessarily depend on legal counsel to offer evidence and to submit legal arguments.[66] Further, as DB members are experts in the subject matter and familiar with the project first hand, they should be capable of probing for and identifying the relevant evidence.[67]

While the inquisitorial authority of the DB is essential to allow the mechanism to work in a cost-effective manner, there is room for variation in the precise procedural rules. For example, the parties and the DB members can fine tune the rules on the scope of evidence and submissions that the board can receive, and the extent to which lawyers are involved in DB hearings.[68]

1.3.2 Open-ended characteristics (variable by contract)

Standing v ad-hoc boards (*standing boards strongly recommended) Technically, the parties have a choice with respect to this issue. They may agree by contract to either: (1) nominate and implement a "standing" board at the commencement of the project; or (2) agree that if a dispute arises, an "ad-hoc" DB will be formed to help resolve it. Experts on DBs tend to agree that the first option is indispensable for parties seeking a real-time dispute avoidance mechanism.[69]

Standing board members are required to learn the potentially contentious details of the project from the parties before they give rise to actual disputes. This is

[58] See See Chern, Chern on Dispute Boards, 2nd edn (2011), pp.116–17.
[59] *See* See Chern, Chern on Dispute Boards, 2nd edn (2011), p.117.
[60] See Chern, Chern on Dispute Boards, 2nd edn (2011).
[61] See Chern, Chern on Dispute Boards, 2nd edn (2011), pp.112–13 (discussing ethics codes of the DRBF and the DBF).
[62] For a comparison of the model provisions of the World Bank, FIDIC, AAA, and ICC (with respect to several key features, including time limits), see See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), pp.106–111.
[63] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), pp.106–107 (comparing time limits for issuing a written determination under the model provisions of the Word Bank, FIDIC, AAA, and ICC). The AAA rules provide for a default time limit of 14 days. The default limits under the FIDIC, World Bank, and ICC rules are considerably longer (84, 84, and 90, respectably).
[64] See Jenkins, *International Construction Arbitration Law*, 2nd edn (2013), pp.106–107 (discussing same with respect to the World Bank, FIDIC, AAA, and ICC model provisions).
[65] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.252.
[66] According to Chern, Chern on Dispute Boards, 2nd edn (2011), p.26.
[67] See Chern, Chern on Dispute Boards, 2nd edn (2011).
[68] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.219 (discussing procedural guidelines).
[69] For example, Chern, Chern on Dispute Boards, 2nd edn (2011), p.81 (noting that standing boards are the standard under most model contracts and suggesting that ad hoc arrangements may be problematic due to lack of familiarity and rapport); Harbst and Mahnken "ICC Dispute Board Rules: the Civil Law Perspective" (2006) 72(4) *Arbitration* 310, 312 (most dispute board rules use standing boards to provide for boards that are familiar with the project).

what enables DBs to function as they were intended—to reduce the likelihood of costly disputes and delays before they begin.

While the option of an ad-hoc board does not involve upfront expenditures by the contracting parties, ad-hoc boards are limited to providing retroactive dispute resolution services. Unfortunately, this negates the utility of DBs as they were originally conceived.[70] Dispute boards were designed to provide ongoing on-site support for major construction projects in real-time, and to reduce the chances of future disputes. A mechanism that serves merely to referee disputes that have already transpired does not accomplish these purposes.

A less profound problem with ad-hoc board provisions is that they may not be implemented by the parties as initially planned. If not drafted carefully, ad-hoc board clauses may turn out to be futile after disputes transpire due to a lack of cooperation between the parties.[71]

Composition of board—size, professional qualifications The most common size of a DB is three members[72], although single-member boards are a popular option for smaller projects.[73] In particularly complex projects, parties have agreed to larger panels.[74]

Dispute boards may be comprised of various types of professionals. Having at least one engineer and an attorney on a three-member board is a popular option in the construction industry.[75] If the parties have doubts, they should keep in mind that certain third-party organisations (including the AAA, as noted above) can assist in identifying the most appropriate candidates for the project.

Manner of appointment The parties may agree to appoint the board in a variety of ways. A popular option under is to have a three-member panel, consisting of: one member appointed by the owner (subject to approval of the contractor); one member appointed by the contractor (subject to approval of the owner); and a chairman appointed by the first two board members (subject to approval by both parties).[76] As noted above, an organisation such as the AAA or ICC may play a role in identifying potential board members or in actually nominating them pursuant to the terms of a separate contract between the organisation and the parties.

Authority of board determinations (binding or non-binding?) A fundamental issue that the parties must consider with respect to any DB arrangement is whether the board's determinations will take the form of: (1) immediately binding decisions; or (2) non-binding recommendations. There does not appear to be a clear consensus on which of the two approaches is more effective, and it may not be possible to form one to the extent case-specific variables play into this decision.[77] Generally speaking, each approach has advantages and drawbacks.

A key advantage of a DAB-type board that issues binding decisions is that it commits the parties (by the terms of their own contract) to a "pay now, argue later" approach during the project.[78] However, a proceeding in which a binding decision is at stake may become adversarial and expensive, which negates the reasons for using a DB in the first place.[79]

As for DRB-type DBs that issue non-binding recommendations, one key advantage is that they encourage cooperation while minimising the need for formal, lengthy submissions and for using lawyers during proceedings.[80] Notably, the DRB approach reflects the "original" DB model, which was created to avoid disputes rather than to judge them in retrospect. The drawback to this approach, of course, is that there is little or nothing to stop the parties from taking a potentially costly dispute to the next forum while the project is ongoing.[81]

2. Recognition of the Dispute Board's Jurisdiction (enforcing "step clauses")

This chapter discusses the extent to which arbitral tribunals and courts honour DB "step clauses" and recognise the DB's jurisdiction over disputes arising from the construction contract. Standard DB contract provisions in construction contracts tend to require that the DB resolve disputes arising under the contract in the first instance.Traditionally, these mandatory step clauses were only used in connection with DABs. Today, however, many DRB arrangements also include such clauses. For example, the Standard ICC Dispute Boards Clauses for DABs, CDBs, and DRBs each provide that the parties shall submit disputes to the DB.[82]

[70] *According to*Chern, *Chern on Dispute Boards 3*, 2nd edn (2011), p.81.
[71] See Chern, Chern on Dispute Boards, 2nd edn (2011).
[72] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.80.
[73] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.79.
[74] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.80 (discussing examples of "mega panels" on exceptionally large projects).
[75] Harbst and Mahnken "ICC Dispute Board Rules: the Civil Law Perspective" (2006) 72(4) *Arbitration* 310, 313.
[76] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.80.
[77] For example, the parties to a construction contract may need to consider the likely treatment of the dispute board's determinations in subsequent fora under both approaches. This issue will be addressed in Part 2.
[78] This approach, of course, is reflected in on-site adjudication and in the typical FIDIC and World Bank provisions.
[79] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.6.
[80] See Chern, Chern on Dispute Boards, 2nd edn (2011), p.5.
[81] See Chern, Chern on Dispute Boards, 2nd edn (2011.
[82] Standard ICC Dispute Boards Clauses, International Chamber of Commerce (2015). Available at: *http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/standard-icc-dispute-boards-clauses/* [Accessed 13 March 2017].

If a party plans to take a dispute to the next tribunal beyond the DB (typically arbitration, as stipulated by contract), a party must follow specific procedural steps. Among the most basic steps typically required in model DB provisions include:

- submitting any dispute arising under the construct contract to the DB, in a manner consistent with the conditions stipulated for preserving claims and filing disputes [see *FIDIC Red Book*, subcll.20.2, 20.4; Standard ICC Dispute Board Clauses];
- obtaining the written determination of the DB, which typically must be issued in three months or less after the dispute has been submitted [see *FIDIC Red Book*, subcl.20.4; ICC Dispute Board Rules art.20]; and
- timely issuing a notice of dissatisfaction with the written determination of the DB, in order to preserve the right to bring a challenge in arbitration [see *FIDIC Red Book*, subcl.20.4; ICC Dispute Board Rules arts 4(5–6) and 5(5–6)].

There are limited exceptions that might allow for a party to circumvent mandatory DB procedures and go straight to arbitration.

For example, subcl.20.8 in the *FIDIC Red Book* (entitled "Expiry of Dispute Adjudication Board's Appointment") states that:

> "If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:
>
> a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and
>
> b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration]."

The ICC Dispute Board Rules recognise similar exceptions. Specifically, they provide for arbitration in the case that the DB has disbanded (art.14(3)) and in the case of the failure of the DB to issue a "Decision" (or in the case of a DRB, a "Recommendation") within the timeframe agreed upon by the parties (arts 4(6) and 5(6)).

In interpreting clauses similar to those discussed above, arbitral and court decisions have recognised that DB "step clauses," in most cases, create a condition precedent to advancing to another tribunal. In limited circumstances, arbitral and court decisions have also recognised exceptions to enforcing DB step clauses as conditions precedent to arbitration or litigation. These exceptional situations, in addition to those expressly noted above with respect to the FIDIC and ICC model language, have at times extended to other circumstances where following the DB procedures would be highly burdensome or against mandatory public policy. Illustrative case law pertaining to these points is outlined below.

2.1 DB step clauses generally enforced

Courts and arbitral tribunals will typically enforce contract provisions under which the parties have agreed to submit disputes to give a DB jurisdiction over its disputes.

The English case of *Peterborough City Council v Enterprise Managed Services Ltd*[83] illustrates this general principle, and how it may be upheld even under trying circumstances for the parties. In *Peterborough City Council*, the party who had been named as the defendant in court sought a stay of the claimant's action due to the failure of the claimant to submit the claim to the DAB as required by the contract. The contract was based on the *FIDIC Silver Book*, the pertinent provisions of which are substantially similar the *Red Book* provisions cited above. The claimant argued that it was entitled to "opt out" of the DAB process required by subcl.20.2 and proceed directly to court (which had been chosen by the parties instead of arbitration) based on the exception set forth in subcl.20.8.[84] The claimant argued, based on the language of subcl.20.8, that the DAB was not "in place" because the parties had not signed the "third agreement" with the DAB, which was necessary to implement the DB. The court rejected this argument, interpreting the language "not in place" from FIDIC subcl.20.8 narrowly.[85] It determined that the contract required the parties to complete the process of setting up the DAB and noted that any failure by the respondent to cooperate with the DAB implementation in the future could be addressed in an action for breach of contract.

Several ICC decisions likewise support the basic principle that DB step clauses are enforceable as a condition precedent to arbitration.[86] Given these examples, it appears that arbitral tribunals will generally relinquish or stay their own jurisdiction over construction disputes if parties have not followed the mandatory DB clause.

[83] *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC); [2014] 2 C.L.C. 684 (United Kingdom).
[84] Both clauses in this case are substantially similar to the *Red Book* subcll.20.2 and 20.8 cited above.
[85] Sub-Clause 20.8 is triggered when a dispute covered by the agreement arises and "there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise." Under the facts of the case, the exception for expiry of the DAB's appointment was inapplicable. Further, the court determined that "or otherwise" could not be interpreted so broadly so as to permit a party to opt out of a contract that could still be performed.
[86] See, e.g. ICC Case No.14431 (enforcing adjudication by engineer pursuant to FIDIC provisions); ICC Case No.16262 (declining jurisdiction pending compliance with DAB procedures in FIDIC contract); ICC Case. No.16765 (interpreting the provisions in cl.20 of the *FIDIC Yellow Book* as creating a mandatory multi-tier dispute resolution mechanism).

2.2 Exception: DB not in place/implementation not feasible

On at least a few occasions, tribunals have relieved parties of the obligation to comply with DAB clauses. This may happen when, due to a breakdown in cooperation or other exceptional circumstances, utilising the mandatory DB procedure would be unfairly burdensome for the claimant.

For example, in ICC Case No.16155, the contractor had tried to work with the employer to establish a DAB during performance of the contract, but the employer had ignored these requests. The contractor later commenced arbitration. The majority decision of the arbitral panel ruled that under these circumstances, the employer forfeited its right to enforce the DAB provision against the contractor.

A recent decision by the Swiss Supreme Court (Case No.4A_124/2014)[87] applied similar reasoning to affirm the jurisdiction of an arbitral panel over a dispute in circumstances involving an extensive delay in implementation of the DAB. This case also involved a contract based on the *FIDIC Red Book* where the parties had agreed to appoint an ad-hoc board instead of a standing board. According to the arbitral tribunal's findings, the claimant-contractor and the defendant-owner/employer had gone through several rounds of fruitless negotiation in attempt to appoint and implement the ad-hoc board. After about 15 months had passed, the claimant proceeded directly to arbitration. Soon afterward, the owner/employer requested that the claimant sign the DAB agreement to finally implement the DAB, but the contractor refused. The owner/employer raised the DAB clause as a defence to jurisdiction, but the arbitral tribunal rejected this defence and accepted jurisdiction over the contractor's claim. The owner/employer appealed, and the Swiss Supreme Court likewise rejected its argument. The Swiss Supreme Court stated that DAB dispute resolution proceedings are mandatory as a general rule, but subject to the exceptions (set forth in subcl.20.8 of the *Red Book*). The Court determined that in this case, the employer should not be allowed to rely on the DAB clause after the parties had gone 15 months[88] without putting the ad-hoc DAB in place.

2.3 Exception: public policy conflicts

Another exception to the enforceability of mandatory DB clauses is when a clause violates public policy. In some scenarios, a country's law may not permit the DB arrangement selected by the parties. In these circumstances, national courts will not allow the parties to follow DB clauses that violate mandatory public policy applicable to the case at bar.

For example, in *Hutuma-RSEA Joint Operations, Inc v Citra Metro Manila Tollways Corporation*,[89] a court ruled a FIDIC adjudication clause unenforceable because it conflicted with Philippine law. The court determined that under Philippine construction law, the parties' agreement to use a DAB board automatically vested the Construction Industry Arbitration Commission (CIAC) with jurisdiction over their dispute. It ruled that one party could not rely on the DAB clause to diminish the other party's right to proceed directly to the CIAC, since that right was provided by statute.

3 Review and Enforcement of Dispute Board Decisions

Review and/or enforcement of a DB decision in subsequent tribunals may become necessary where the contract provides that a DB's decision regarding a dispute can bind the parties. This chapter discusses the key topics related to review and enforcement of DB decisions.

First, this chapter outlines the typical two-step framework for review and enforcement of DB determinations with respect to disputes that the parties had agreed to submit to the DB by contract. In most construction contracts utilising DBs, the two steps for review and enforcement are: (1) arbitration; and (2) (if necessary) enforcement in court. Second, this chapter discusses the question of how much weight arbitral tribunals (and courts) give to DB decisions, and the circumstances that impact the amount of deference given to the DB's conclusions. Finally, this section discusses an enforcement-related issue that has been evolving recent years: how arbitral tribunals (and courts) give effect to non-final DB decisions that are immediately binding under the parties' contract.

3.1 The two-step review/enforcement process: arbitration then court

Ultimately, it is important for the parties to have a pathway to obtain the relief initially ordered through the DB determination by obtaining enforcement in court, if necessary. The court must be able to exercise jurisdiction over the resisting party—and if necessary, seize its assets—to give effect to the binding decision rendered by the DB.

Standard form contracts usually provide for arbitration as the step between receipt of the initial DB decision and ultimate enforceability in court. Thus, review and enforcement of arbitral awards is typically a two-step process: first, an arbitral tribunal issues an award with

[87] Case No.4A_124/2014, judgment of 7 July 2014 (Switzerland: Swiss Supreme Court), available at: *http://www.swissarbitrationdecisions.com/sites/default/files/7%20juillet%202014%204A%20124%202014.pdf[Accessed 13 March 2017].*

[88] The Swiss Supreme Court noted that a 15-month delay in implementation of the DAB was unreasonable, given that 15 months is far beyond the 84-day timeframe in which a DAB ordinarily must render a decision on the dispute.

[89] *Hutuma-RSEA Joint Operations, Inc v Citra Metro Manila Tollways Corporation*, 24 April 2009 (Philippines: Manila Supreme Court).

respect to the dispute that was initially within the DB's mandate;[90] and second, the arbitral award is presented to a court with jurisdiction over the party resisting enforcement.

There is a legal rationale behind this two-step practice: the nearly-universal enforceability of arbitral awards. Specifically, arbitral awards enjoy practically universal recognition and enforcement in national courts under the New York Convention, but DB decisions do not. The problem is that most national courts would not consider a DB's decision to be an "arbitral award" under the Convention.[91]

Parties are free to vary the two-step approach in their contract to fit their needs. Furthermore, it may be possible to obtain "enforcement" of non-final but immediately-binding DB decisions by bringing an action for breach of contract in a competent court. (See Subsection 3.3).

3.2 How much weight do dispute board determinations have (and do they shift the burden of proof)?

With respect to the weight given to DB decisions during the review and/or enforcement process, one can distinguish between three types of situations: (1) submissions of disputes that the arbitral tribunal has jurisdiction to hear without prior review by the DB based on exceptional circumstances (e.g.,e.g. those discussed in Subchapters 2.2 and 2.3); (2) challenges to the merits of DB decisions that are submitted to the arbitral tribunal; and (3) submissions to the arbitral tribunal of requests to compel immediate compliance with a DB order, per the terms of the contract.

With respect to the first type of situation—where the arbitral tribunal has jurisdiction to hear a dispute in the first instance—it goes without saying that there can be no deference to the DB when the DB has not ruled on the issue. Both the ICC and FIDIC rules recognise that only a narrow set of circumstances would fall into this category. For example, the *FIDIC Red Book* contemplates that a party may submit a dispute directly to the arbitral tribunal "there is no DAB in place, whether by expiry of the DB's mandate or otherwise."[92] The ICC Dispute Board Rules similarly provide for submission of the dispute directly to arbitration if the DB has disbanded[93] or if it has failed to timely render a decision.[94] As discussed in Chapter 2, these exceptions to enforcing DB "step clauses" are construed narrowly.

The second type of situation—where a party challenges the DB's decision—presents questions with respect to the weight to be afforded to the DB decision and the effect of the DB decision on the burden of proof. Although arbitral tribunals will generally have broad power to re-decide issues of fact and law, it is unsettled whether the DB's initial decision shifts the burden of proof to the challenging party.

The model rules on point do not squarely address whether the DB's decision effectively shifts the burden of proof against the party who is unsatisfied with the decision. Sub-clause 20.6 of the *FIDIC Red Book* only states that the arbitral tribunal has power to open the record and revise decisions made by a DAB. The ICC Rules contain no language that would require the arbitral tribunal to defer to the determinations of the DB. Both the FIDIC and ICC model framework provide that the DB decision is admissible as evidence in the arbitration, but provide nothing more in the way of assigning weight to the DB's determinations.[95]

Further, there is very little case law on point with respect to the effect of the DB decision on the burden of proof. Some of the most relevant cases on this issue are rulings by English courts with respect to adjudicators' decisions.[96] These cases have reached different conclusions. Some have taken the so-called "orthodox approach", under which the burden of proof always belongs to whichever party is bringing a claim. Applying this approach to the context of DB decisions would mean that the DB decision has no effect on the burden of proof.[97] Other English cases analysing adjudicators' decisions have reached the opposite conclusion, determining that the burden of proof rested with the party challenging the adjudicator's decision in the arbitration.[98]

In the third type of situation—where a party merely seeks to enforce the other party's obligation to comply with the DB's decision—the decision of the DB should be considered binding unless or until it is reversed. Based on this presumption, one can infer that the existence of a DB award essentially shifts the burden of proof to the party challenging the decision. However, this does not necessarily mean that an arbitral tribunal will assign weight to the DB's decision once the decision has been challenged. As demonstrated by the *Persero* case and

[90] The DB's jurisdiction over the matter could be invoked based on: a challenge on the merits; an exceptional circumstance that allows the arbitral tribunal to rule on the dispute in the first instance (see Subsection 2.2); or based on an "enforcement" request.
[91] See Julian Bailey, *Construction Law Vol. III*, 1st edn, (London: Routledge, 2011) §23.13 & fn.34.
[92] *FIDIC Red Book*, subcl.20.8.
[93] ICC Dispute Board Rules, art.14(3).
[94] ICC Dispute Board Rules, arts 4(6) and 5(6).
[95] See *FIDIC Red Book* subcl. 20.6; ICC Dispute Board Rules, art.25. On a related point, it appears that the FIDIC and ICC models differ slightly regarding the use of DB members as witnesses in arbitral proceedings, as art.9(3) of the ICC Dispute Board Rules expressly excludes this possibility.
[96] For a discussion of the burden of proof issue in the context of adjudication decisions, see: Andrew Tweeddale and Keren Tweeddale, "Shifting the Burden of Proof: Revisiting Adjudication Decisions" in Julio Cesar Betancourt (ed.) *Defining Issues in International Arbitration* (2016), Ch.36.
[97] See, e.g. *City Inn Ltd v Shepherd Construction Ltd* [2002] SLT 781 (Scotland) (discussed in Tweedale and Tweedale, "Shifting the Burden of Proof: Revisiting Adjudication Decisions" in Betancourt (ed.) *Defining Issues in International Arbitration* (2016), at 36.12).
[98] See, e.g. *Walker Construction (UK) Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93 (England, 2014) (discussed in Tweedale and Tweedale "Shifting the Burden of Proof: Revisiting Adjudication Decisions" in Betancourt (ed.) *Defining Issues in International Arbitration* (2016), at 36.21–36.27).

other arbitral decisions discussed in Subchapter 3.3, it is not necessary to weigh the merits of an "interim binding" DB decision.

3.3 "Immediately binding" dispute board decisions: enforcing them promptly

In situations where the parties submit a live dispute to a DB, the expectation is that the board will quickly render a decision and the parties will promptly comply with it (to the extent they agreed by contract to do so)—even if one party plans to challenge it in another tribunal. This is based on the standard language in construction contracts. Clause 20.4 of the *FIDIC Red Book*, for example, states that "the [DAB] decision shall be binding on both Parties, who shall promptly give effect to it unless or until it shall be revised in an amicable settlement or an arbitral award". Similarly, art.5(2) of the ICC Dispute Board Rules provides that a "Decision"[99] will be "binding on the parties upon its receipt" and that "[t]he Parties shall comply with it without delay, notwithstanding any expression of dissatisfaction".

Despite the seemingly clear language in the provisions above, parties in some cases ignore the duty to promptly comply with the DB decision or argue that no such duty exists. The question then becomes: how can one party compel the other to immediately comply with a binding, non-final DB decision? The short answer is that the party should proceed to arbitration (or a court of competent jurisdiction, if possible) and frame the issue presented as simply whether the opposing party failed to comply with its contractual duty to promptly comply with the DB decision. [100] In other words, the party should ask the arbitral tribunal or court to simply decide that the other party has failed to comply with the DB decision—a fact that is likely to be uncontested—and that this breaches the contract. As discussed below, standard form DB contract terms are amenable to this interpretation, but arbitral tribunals and courts have historically struggled to interpret such clauses in a way that allows for prompt enforcement of the duty to immediately comply with DB decisions.

For example, *FIDIC Red Book* subcl.20.7 (entitled "Failure to Comply with Dispute Adjudication Board's Decision"), provides:

> "In the event that:
> (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],
> (b) the DAB's related decision (if any) has become final and binding, and
> (c) a Party fails to comply with this decision,
>
> then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference."

The ICC Dispute Board Rules likewise provide that when a party fails to comply with a decision that is immediately binding (or with a Recommendation that has become binding due to the failure to file a notice of dissatisfaction), the other party "may refer the failure itself to arbitration". See ICC Dispute Board Rules, arts 5(4) and 4(4).

Arbitral tribunals and courts have nonetheless historically struggled to interpret these types of clauses in a way that compels *prompt* compliance. On several occasions, courts and arbitrators have debated the propriety of going directly to arbitration (or to court, if that is the next forum pursuant to the agreement) to compel compliance with the decision of an active DB without reviewing the merits of the decision. Specifically, the decisions on point have considered: (1) whether, as a condition to arbitration, a party must submit to the DB a dispute over failure to comply with the DB's own decision; (2) whether an arbitral tribunal can enforce an immediately-binding DB decision that is still non-final (e.g. due to the filing of a notices of dissatisfaction by one party); and (3) whether the failure to promptly comply with a DB decision can be submitted as a stand-alone claim in arbitration.

Thanks in part to guidance from an influential decision by the Singapore Court of Appeal in 2015, the pathway to enforcing binding DB decisions promptly will hopefully become easier in the years to come. The reasoning of the Singapore Court of Appeal in this case (see discussion of *Persero II* below) also finds support in a variety of other authorities, several of which predate the final appellate decision in *Persero II*.

3.3.1 The Persero cases

In two recent sequences of cases (commonly referred two as *Persero I* and *Persero II*), Singapore courts addressed important issues related to the enforcement of immediately-binding, non-final DAB decisions by the courts. The final resolution reached by the Singapore Court of Appeal in *Persero II* provides a roadmap for achieving prompt enforcement of binding DB decisions in arbitration—and obtaining enforcement in national courts—in the future.

Persero I This series of cases began with *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)*, [2010] 4 SLR 672 (Singapore

[99] Under the ICC terminology, "Decisions" refer to binding written determinations that are issued by DABs (or by CBDs pursuant to the authorization of the parties). With respect to "Recommendations," which are issued by DRBs, the ICC Dispute Board Rules state that these do not become immediately binding when the party seeking to challenge the Recommendation timely files a notice of dissatisfaction. See art.4(2–3).

[100] Usually, the next step for a party in an international construction contract is to request an arbitral award ordering this relief. Once armed with an international arbitral award, the party can seek enforcement of the award in court in a jurisdiction where the party-opponent has assets pursuant to the New York Convention.

High Court, 2010). In this case, which is commonly referred to as *Persero I*, the owner/employer in an international construction project sought to set aside an arbitral award ordering it to comply with a DAB decision. The DAB decision, which was binding but not final, had ordered the owner/employer to pay approximately US $17 million to its contractor. The Singapore High Court set aside the arbitral award for two reasons. First, it ruled that the arbitral tribunal lacked jurisdiction over the contractor's action because the contractor had failed to submit a separate dispute to the DAB over the failure of the owner/employer to comply. Second, it ruled that the arbitral tribunal's award—which purported to be a "final award" ordering the owner/employer to comply with the DAB decision—was unenforceable because the arbitral tribunal lacked jurisdiction to issue a *final* award without having reviewed the merits of the original decision. The Singapore Court of Appeal[101] affirmed the decision of the Singapore High Court, but based on somewhat different reasoning. The Singapore Court of Appeal did not conclude that the contractor should have gone back to the DAB to raise the dispute over the owner/employer's failure to promptly comply with the DAB decision. The Court of Appeal instead based its decision to affirm the High Court on the second conclusion noted above – that the arbitral tribunal must also hear the merits of the underlying dispute (not just the issue of the failure to promptly comply with the DAB award). However, the Court of Appeal's conclusion on this point was nuanced; it acknowledged that pending the arbitral tribunal's decision on the merits, an "interim or partial" final award on the alleged failure to promptly comply with the DAB decision could be issued and enforced.

Persero II Consistent with the *dicta* provided by the Singapore Court of Appeal in *Persero I*, the contractor went back to the arbitral tribunal to obtain an interim award requiring the owner/employer to comply with the DAB decision. This time, the contractor also sought a final award on the merits. When the contractor received an interim arbitral award on the compliance issue, the owner/employer again challenged the second award. The Singapore High Court affirmed the revised award of the arbitral tribunal enforcing the DAB's decision, on the basis that a binding, non-final award could be enforced through a so-called "interim" award connected with the primary dispute.[102]

The owner/employer appealed, but this time, the Singapore Court of Appeal ruled that the award was valid and enforceable.[103] Further, it issued a decision that weighed strongly in favour of facilitating enforcement of DAB decisions through arbitration. Specifically, the Singapore Court of Appeal reached three conclusions in *Persero II*. First, it clarified that there is no need to submit disputes over a failure to comply with a DAB decision back to the DAB to preserve the right to challenge it later. Second, the court concluded that the failure to comply with a DAB decision may be brought directly to arbitration, even if the DAB decision is non-final. Third and finally, the Court of Appeal determined that because the issue of prompt compliance with the DAB decision is a separate dispute from one concerning the merits of the DAB decision, an arbitral tribunal may exercise jurisdiction over the issue of prompt compliance independently. In other words, the arbitral tribunal may issue a *final* award regarding the failure to promptly comply with the DAB decision without ever exercising jurisdiction over the merits of that same DAB decision.

Persero II thus overruled the Singapore Court of Appeals decision in *Persero I* with respect to the question of whether courts can exercise jurisdiction over a party's alleged failure to promptly comply with a DAB decision without asserting jurisdiction over the merits. In rejecting the approach, it had initially taken in *Persero I* (i.e. the view that the same arbitral tribunal exercising jurisdiction over a failure to promptly comply with a DAB decision must also review the merits of that decision before it can issue a final award), the court explained:

> "[the reasoning in *Persero I*] fails to adequately appreciate that an NOD issued in respect of a DAB decision is capable of covering the paying party's dissatisfaction with two aspects of the DAB decision: (a) the quantum that it is required to pay the receiving party; and (b) the need to make *prompt* payment of that sum […] The dispute over the paying party's failure to *promptly* comply with its obligation to pay the sum that the DAB finds it is liable to pay is a dispute in its own right which is capable of being 'finally settled by international arbitration'. In our judgment, it is possible to refer that dispute to a separate arbitration."[104]

3.3.2 Other authorities supporting the reasoning in Persero II

Several other authorities—some new and some old—support the legal reasoning advanced by the Singapore Court of Appeal in *Persero II* with respect to the enforcement of binding, non-final DB decisions.

Several examples of case law supporting the reasoning of the Singapore Court of Appeal in *Persero II* appear in South African court decisions. In *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*,[105] for example, the court ruled that issuing a notice of dissatisfaction with a DAB had no effect on the party's duty to promptly comply with that decision "unless or until" it is changed in arbitration. This reasoning is comparable to the rule from *Persero II*, which states that disputes over

[101] *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (Singapore Court of Appeal).
[102] *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 (Singapore High Court).
[103] *Persero* [2015] SGCA 30.
[104] *Persero* [2015] SGCA 30 at [83].
[105] *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* (06757/2013) [2013] ZAGPJHC 155, 3 May 2013 (South Africa: South Gauteng High Court [Johannesburg]).

non-compliance with DAB decisions which are non-final (e.g. due to the resisting party having filed a notice of dissatisfaction) can be enforced in arbitration.

Moreover, South African courts have expanded on this reasoning by allowing claimants to go straight to court to compel compliance with immediately-binding, non-final DB decisions. In several cases, South African courts have granted specific performance in this situation, thus promptly compelling the resisting party to comply with the DB award *without* having required the party seeking enforcement to present the non-compliance issue to the arbitral panel as a prerequisite to enforcement in court.[106]

It is also worth pointing out that arbitral tribunals analysing DB clauses have for decades been reaching conclusions similar to those reached in *Persero*. While arbitration cases are not routinely reported, certain ICC decisions have been identified by construction law experts as leading authorities regarding the duty of prompt compliance. One example is Case No.10619[107] (decided in 2001), which ruled that binding, non-final determinations by the engineer-adjudicator[108] were enforceable by way of an arbitration award. The ICC arbitrator made clear that the basis for granting this relief in the award arose from the plain language of the parties' contract, which make prompt compliance with the engineer's decision a contractual duty. For example, the decision stated:

> "If the above Engineer's decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the arbitral tribunal should refrain from an immediate judgment giving the Engineer's decisions their full force and effect. This simply is the law of the contract."[109]

Additionally, the decision stressed that the relief granted was based on the substantive rights arising under the contract and nothing more:

> "[T]he judgement [sic] to be hereby made is not one of a conservatory or interim measure, *stricto sensu*, but rather one [of] giving full immediate effect to a right that a party enjoys without discussion on the basis of the Contract and which the parties have agreed shall extend at least until the end of the arbitration."[110]

Other ICC arbitral tribunals have similarly characterised the duty to promptly comply with a binding DB decision as a breach of contract issue that is independent from other disputes arising between the parties. For example, the decision of the sole arbitrator in ICC Case No.16948/GZ stated that:

> "[T]he Respondent's breach of 20.4 of the GCC can only be remedied by confirming the Claimant's right to immediately receive the payment of the principal amounts determined by the DAB Decisions Nos 2 and 3. … This obligation to pay the sums on the basis of Sub-Clause 20.4 of the GCC is *completely independent* from whether or not the amounts decided by the DAB in Decisions Nos 2 and 3 will be later reversed, revoked or confirmed." (Emphasis added)."[111]

In ICC Case No.15751/JHN, another case involving a failure to promptly comply with the decision of the DAB, the arbitrator made a point to characterise the failure to comply as a breach of contract for which damages could be rewarded:

> "If a Party is obliged to pay a sum of money under a Decision of a DAB in respect of which an NOD has been served and he has failed to do so in breach of Sub-Clause 20.4, that party should be required to pay that sum and interest from the date when payment was due by way of damages for breach of Sub-Clause 20.4."[112]

4. Conclusions

This article has discussed issues pertaining to: (1) the core characteristics and purposes of DBs in the construction industry; (2) the recognition of the jurisdiction of DBs; and (3) the review and enforcement of DB decisions. The following conclusions can be made from these discussions.

(1) **With respect to the core characteristics and purposes of DBs:**

Dispute boards are becoming increasingly dynamic, and they can be designed to accommodate the parties' specific needs. However, there are some characteristic that

[106] *SeeEsor Africa (Pty) Ltd / Frankl Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd* (38844/11) [2012] ZAGPJHC 54 (April 11, 2012). *See alsoStefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* (20088/2013) [2013] ZAGPJHC 388 (October 23, 2013) (approving of the holding in *Bombela* that prompt compliance with a DAB decision is an enforceable contract obligation under the FIDIC model language, and applying the same reasoning to require compliance with an adjudicator's decision).

[107] For discussion of the decision ICC in Case No.10619, including excerpts, see: Christopher R. Seppala, "International Construction Contract Disputes: Second Commentary on ICC Awards Dealing Primarily with FIDIC Contracts" (2008) 19(2) ICC International Court of Arbitration Bulletin 41, 52.

[108] The contract was based on the 1987 *FIDIC Red Book* (prior to the endorsement of DABs by FIDIC). *Seeid*. Under the 1987 *Red Book*, the engineer served as the adjudicator of disputes.

[109] See Seppala, *supra* note 102, at 52. (Excerpt reproduced from this source).

[110] *Seeid*. (Excerpt reproduced from this source).

[111] See Natasha Peter and Rupert Reece "Enforcing Adjudication Decisions" [2013] Int'l Bus. L. J. 403, 412 (excerpt reproduced from this source). For further discussion of this case, see: David Brown and Oana Soimulescu, "Enforcement of binding but not final DAB decisions: the impact of ICC Case 16948/GZ" (2012–13) 7 Const. L. Int'l 7.

[112] Peter and Rupert Reece "Enforcing Adjudication Decisions" [2013] Int'l Bus. L. J. 403, 412 (excerpt reproduced from this source).

are essential to DBs. For example, they must be impartial and independent, they must have access to the facts necessary to resolve potential or actual discrepancies, and they must be able to resolve disputes within a short timeframe. Further, it is strongly recommended that parties utilising DB provisions appoint standing boards, to prevent potential disputes from forming.

(2) **With respect to the recognition of the jurisdiction of dispute boards**

The model contract provisions and legal decisions show that "step clauses" purporting to require the submission of disputes to DBs are generally enforceable, subject to limited exceptions. The model provisions and the decisions on point, taken together, tend to reflect the following:

First, mandatory DB step clauses are enforceable—and exceptions such as those outlined in cl.20.8 of the *Red Book* do not apply—when the DB required to hear the dispute has been appointed and its mandate has not yet expired.

Second, in some cases, courts or arbitral tribunals may refuse to enforce mandatory step clauses in exceptional circumstances. These circumstances may include when the mandate of the DB has expired, or where there has been an extreme delay in implementation of the DB procedures by the parties.

Third, in some circumstances, mandatory DB step clauses in construction agreements could be considered unenforceable due to having violated the public policy of a jurisdiction connected to the dispute. Accordingly, it necessary as an initial matter to know whether an agreement to use a DB could conflict with a statutory dispute resolution scheme or similar requirements set forth in the applicable national law. Generally speaking, these sorts of public policy conflicts are more likely to exist in the context of public works concessions contracts (which are subject to statutory dispute resolution schemes in many countries) than in the context of private construction contracts.

(3) **With respect to the review and enforcement of dispute board decisions:**

The contract language generally defines the steps for obtaining review and enforcement of awards, the weight and evidentiary value assigned to DB determinations, and the enforceability of non-final but immediately binding decisions. Thus, parties are advised to use model language suitable for their expectations, and to further adjust the contract terms if necessary to fit their specific needs.

Careful contract drafting is especially critical to enable the parties to timely enforce immediately-binding, non-final DB decisions. The reasoning in Persero and the other decisions noted in subs.3.3, if followed by courts and arbitral tribunals, will facilitate prompt compliance with DAB decisions in the future. Further, there appears to be strong consensus among construction law experts that the failure to comply promptly with a binding, non-final DAB decision can be considered as a breach of contract, which would provide an independent basis for proceeding to arbitration. However, the case law is not necessarily uniform, and arriving at this conclusion requires the interpretation of the parties' specific contract and the application of the governing laws. Accordingly, parties that which to be able to enforce prompt compliance must use contract language clearly requiring immediate compliance with DB decisions. Parties should also consider adding liquidated damages or penalty clauses that would apply in the case of a failure to promptly comply. Finally, if the parties want to ensure that a term requiring immediate compliance with a DB decision can be enforced by going directly to court (i.e., without arbitration as a prerequisite), they should use contract language that clearly permits this.