

WORLD BANK

**"IMPROVING THE FUNCTIONING
OF
DISPUTE REVIEW BOARDS (DRB) IN INDIA"**

**STANDARD OPERATING PROCEDURES
FOR
DISPUTE BOARDS IN INDIA**

By
**INDIAN COUNCIL OF ARBITRATION
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INDEX

No. 1. Standard Operating Procedures for DBs	Page Nos.
Preface	(i)
Acknowledgements	(ii)
1.1 Introduction	1 - 2
1.2 Institutional DB Services	3 - 5
1.3 Pre Bid Stage Considerations for a DB Clause	6 - 7
1.4 Establishment of DB	8 - 12
1.5 Duties and Conduct of Members of DB	13 - 15
1.6 Fees & Expenses of Board Members	16 - 17
1.7 First Meeting of DB	18 - 22
1.8 Subsequent Meetings	23 - 24
1.9 Referring of Dispute(s) to DB	25 - 26
1.10 Hearings	27 - 33
1.11 Deliberations of DB and Recommendations	34 - 37
1.12 Actions by Parties on the DB's Recommendations	38 - 41
1.13 Advisory Opinions	42 - 44
1.14 Resignation/Termination of Members/Termination of DB	45 – 47
1.15 Reforms needed, especially in Employer's Organisation	48
INDEX OF APPENDICES	49
APPENDICES	50 - 84
BIBLIOGRAPHY	85

PREFACE

DB is a system of dispute prevention and dispute resolution mechanism to alleviate situations arising out of uncertainties and not always explicit in construction projects.

The system propagated in international contracts has been a great success. Inclusion of provisions in Standard Contract documents of FIDIC and Multilateral Development Banks has led to extensive use of the system. The performance of DBs in several other countries has been a definite success. It has, however, been found to be rather wanting in its effectiveness in India.

A study got conducted by the World Bank in 2006 brought out problems being faced and recommendations for improvement. The present exercise is to bring out workable Standard Operating Procedures for improvements in working of the DBs in India.

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1.1 Introduction

1.1.1 Dispute Board (DB) is a concurrent mechanism for resolution of disputes before recourse to arbitration or litigation. The DB is constituted at the very start of a construction project and consists of independent and impartial professionals. The DB follows construction progress, encourages dispute avoidance, and assists in resolving disputes that may arise during the execution of the project. Ad hoc DBs, which are appointed only when disputes arise, have also been gainfully used in other types of contracts like Installation/Operation/Supply.

1.1.2 Brief status meetings and site visits are held periodically at the job site. At these meetings, the Board Members confer with Employer's, and the Contractor's Representatives, become familiar with project procedures and participants and are kept abreast of job progress and potential disputes. The DB encourages the resolution of disputes at the job level; and at the mutual request of the parties may provide informal advice. Thus DB assists the parties by facilitating a harmonious atmosphere and by encouraging prompt solutions to job problems.

1.1.3 The Board usually consists of three members (though in small value contracts a one-member DB is used), acceptable to both the parties and becomes conversant with the developments of the project, gives its decision on a dispute within a prescribed time of its reference. DB, as it is generally operated in present times, was first introduced in 1975 during construction of Eisenhower Tunnel in the United States with great success and it was recognised as a cost-effective mechanism for amicable dispute resolution. DB has been in practice extensively in the United States and several other countries and demonstrated its effectiveness by the disputes being resolved at the DB level itself to the extent of over 95 percent.

1.1.4 For large projects and for projects with significant specialised works, requiring multi-disciplinary technical knowledge and expertise, more than one DB, one for each area of specialisation may be considered by the parties on case to case basis.

1.1.5 In India, the system of DB (then DRB) was first introduced in 1994 in the World Bank financed projects valuing US Dollars 50 million or more. Over time, a perception has developed that the DB system is not implemented in India as envisaged, and is not effective. The main reasons for delays and otherwise ineffectiveness of the DB system are –

- i) Delay in constitution of DBs and loss of considerable time before the DB mechanism is put in place;
- ii) Lack of requisite qualifications and expertise of the members of DB, as necessitated by the project and contract requirements and sometimes a lack of awareness about the spirit and procedures of DB operations;
- iii) Long time taken by the DB in resolving disputes referred, beyond the period stipulated in the contract; and
- iv) Tendency of parties to challenge the decisions of DB in Arbitration and Litigation, as DB decisions are not final and binding, unless both parties have accepted the same. There seems to be a mindset of non-acceptance of the system and as a result, the decisions given by DBs are not implemented.

1.1.6 Experience shows that the cost of a DB system is usually around 0.25% or less of the project cost and if it is implemented properly in the right spirit it will far more compensate by way of dispute avoidance in the first place and resolving of the disputes quickly. There is no denying the fact that the DB system has been useful and effective in some cases. It is helpful in resolving disputes expeditiously even when the same are taken to arbitration, because the documentation with regard to a dispute takes place contemporarily in the DB process. There is however a need to make it more effective by laying down a clear and effective Standard Procedures for the operation of DB system by due utilisation of the experience gained during the past two decades.

1.1.7 The concept of Institutional support in DB process is also required to be developed, which even though will not have scope of a direct intervention in the process of a DB; but has a potential to play an effective role in several aspects of the functioning of DBs.

1.2 Institutional DB Services:

- 1.2.1** The concept of Institutional support in DB process is a new one. The DB is a standing body of individual(s), which remains attached to a Project for its entire duration and carries out periodic meetings with the parties at the site of work and remains directly in communication with the parties as well as with the happenings on the Project by way of periodic visits. Thus the process of a DB in itself is independent of an Institution.
- 1.2.2** Nevertheless, the efficiency and effectiveness of the system can be considerably improved by involving a professional Institution, well versed with the operation of Dispute Resolution system. The financing organisations or the employer can involve a well-established, competent and result oriented Institution for assistance by providing Institutional services in the functioning of the system.
- 1.2.3** The Institution can provide the following services:
- a) Conceptualisation of DB services.
 - b) Provision of suitable DB Clause in the Bid Documents.
 - c) Organise empanelment of DB members, as well as updating the list of DB members from time to time and provide panel of DB members out of panels maintained by the Institution.
 - d) Provide a continuous platform for training of all stakeholders including the functional employees and operating staff of the Employer, the Contractor and the Engineer's organisations and giving guidance on issues and problems faced in the operation of DBs.
 - e) Assisting the parties by appointments to vacancies in the DB which could not be filled by the parties themselves as per contract conditions. For this purpose, the institution will have to be mentioned as the Appointing Authority in the respective contract.
 - f) Ensure observance of timeliness of DB decisions by overseeing the overall functioning of the DB from the date of start of the contract / formulation of DB till the defects liability period is over. The Institution will receive periodical reports from the employer and the contractor as also copies of

reports generated by the DB including minutes of the periodic meetings and dispute meetings.

- g) Monitor whether the DB is performing its functions as stipulated and as expected and point out deficiencies, if any and improvement required to DBs as also to the parties.
- h) Play role in standardising DB members' fee and offering infrastructure support whenever needed.
- i) Provide advice and guidance in the matter of working of system of DB in general and on particular issues provide expert support to DB members on technical/legal matters, if and when sought by the parties or a particular DB.
- j) Maintain database on the work done by the DBs for an organisation to be used for research and improvement.

1.2.4 The involvement of the Institution is expected to bring standardisation and lead to accountability of the DB as also the Employer, the Contractor and the Engineer, as a proper monitoring would be available which can be overseen by the parties i.e. Employer and Contractor and also by the financing authorities like multilateral development banks. Accountability will be possible because of the monitoring and the same will lead to efficiency and effectiveness of the system.

1.2.5 For meeting the expenses of the Institution, a fee based on the contract amount of each contract shall be payable by the Employer to the Institution. The same can be discussed and finalised before undertaking understanding between the employer and the Institution. Alternatively, lumpsum fee per month for the duration of each DB from the date of its constitution to the defects liability period of the contract can be considered.

1.2.6 Empanelment of DB members:

For the DB system to be effective, it is necessary that the DB members possess the needed qualifications and experience relevant to the trade/discipline. To this end, it would be required that a system of empanelment is developed for the relevant trades/disciplines. The Institution will play an important role in this regard.

The Empanelment of DB members will involve a) Identification/Classification of the Trades, b) drafting criteria for empanelment, including the qualifications in terms of educational and technical Qualifications, working knowledge of the language of contract, which in the Indian context is usually English, experience of contract management, experience in construction trade in terms of number of years, nature and quantum of jobs handled, experience in ADR mechanisms/ processes like DRB/ DAB/ DB/ Arbitration/ Conciliation/Mediation, knowledge of and familiarity with the laws governing ADR processes.

1.2.7 Training of DB members:

The Institution will need to play an important role on this aspect of Training. The DB system comprises of processes, which on one hand are related to the knowledge and experience in the relevant trade and on the other hand to the conditions of contracts and dispute resolution legalities and mechanisms. This would require that the DB members are trained so as to be able to efficiently handle the matters, which are referred to them.

The training of DB's Members would require the Institution to develop Training/Course Materials and conduct training programs through identified expert faculty. It will also require the Institution to have a system of evaluation of the trainees after the programme and certification. A system of feedback would also be required to be put in place for improvements in the Programme as a continuous process.

1.2.8 Launch of a Website for Institutional DB services:

For undertaking various activities of the Institution, a website for DB services would be launched and also it would publicise the DB services through advertisement/press release and other means.

For such Institutional DB Services, revenue will need to be generated by the Institutions lending such services to meet the expenses to be incurred by it, which are expected to be only marginal, while the accruing advantages can be significant for the success of DB as a preferred mode of dispute resolution. Hence the initiative to launch Institutional System for DB services is a pioneering step in India.

1.3. Pre Bid Stage Considerations for a DB Clause:

1.3.1 Construction Projects are highly prone to Disputes, which if not resolved quickly and concurrently have an adverse impact on the project delivery as well as on the construction industry as a whole. With no DB in place, resolution of disputes is usually expensive, time-consuming and not so satisfactory. It is prudent to have DBs in all major contracts of Construction, costing above Rs. 50 crore. It is helpful in resolving disputes concurrently and also in dispute avoidance. While for projects valued between Rs. 50 crore and 200 crore, a one-member DB may suffice; for projects of higher value above Rs. 200 crore as also for projects considered to be complex in nature, even with lower value there should be a three-member DB. The threshold values of projects may need to be reviewed every 5 years.

1.3.2 A Clause for DB with a set of essential provisions needs to be included in the Bid Document to assure the success of the DB process. Such a Clause needs to have the following features: -

- i) A selection procedure to ensure that the Board members are independent and impartial, besides possessing the requisite qualifications and professional knowledge.
- ii) Require periodic meetings that start soon after award of the contract and continue as long as the work is underway.
- iii) Include an agreement that binds the Parties to the Contract and each member of the DB.
- iv) Requires that the employer and the contractor share all costs of the DB equally. The Board is a resource for both parties to the contract and cost sharing encourages both parties to utilise it. Payment of Board invoices should be from one source only.
- v) Establish hearing procedures for faster dispute resolution. Issue of advisory nonbinding opinions should also be there. This will however not preclude a subsequent formal DB hearing.
- vi) Allow the DB to hear disputes on all aspects of the contract without diluting the provisions of the Clause.
- vii) Either party may refer a dispute to the DB.

- viii) Allow prompt hearing of disputes by not requiring multiple steps of submittals, denials, decisions, final decisions and appeals before a dispute can be brought to the DB.
- ix) Provide that a decision of DB becomes 'final and binding' if either accepted by both parties or not objected to within a time limit to be prescribed.
- x) Provide further that a decision of DB even if not becoming final would be 'binding in the interim on either party' i.e the decision to be implemented and remain so, until and unless the same gets changed in any subsequent Arbitration/Amicable Settlement/Litigation. Also provide that the party receiving payment against such a binding decision may be asked to furnish a Security in any suitable form to the party making the payment.
- xi) Provide that decisions are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation.
- xii) Absolve Board members from personal or professional liability arising from their DB activities.
- xiii) Allow termination of Board members only by agreement of both parties.
- xiv) Provide that the Board members are not called as witnesses in subsequent proceedings.
- xv) Encourage an early holding of the first DB Meeting and prescribing a time period for the same, within which it should preferably be held. Provide for constitution/establishment of DB before or simultaneously with the signing of formal contract between the parties.
- xvi) Indicating the name of the Appointing Authority in the tender documents, the Employer gets confirmation that the said authority can nominate competent, independent and impartial members with the requisite qualifications within a fixed time frame.
- xvii) In order to expedite the formation of the DB, it would be preferable if the Employer selects its nominee before inviting bids and mentions the same at the time of Bids and encourage the intending bidders to also likewise furnish the name of their nominees along with their respective bids.

1.3.3 A Model DB Clause covering the above aspects is given at Appendix-A.

1.4. Establishment of DB

1.4.1. The objective of establishing a DB is to foster conditions whereby the parties work together to avoid the development of disputes and to ensure that any disputes which do arise are settled as and when they arise. The DB members have to be familiar with the contract conditions, site conditions and the circumstances under which the work is being executed. It will therefore be necessary for them to visit the site at the earliest possible opportunity to familiarise themselves with the site conditions. To achieve this purpose, it is necessary that the Dispute Boards are established before the work starts at site.

1.4.2. Identification of Prospective Board Members

The contracting parties may identify prospective members of DB in several ways. Quite often they may already be in the know of professionals from their previous work experience and contacts through professional bodies. Several professional bodies usually maintain a panel of Engineers of various trades for the purpose of being considered for Alternative Dispute Resolution processes. To name a few - Indian Council of Arbitration (ICA), International Centre for Alternative Dispute Resolution (ICADR), Indian Roads Congress (IRC), Institution of Engineers (I), Delhi International Arbitration Centre (DAC under Delhi High Court), Construction Industry Arbitration Council (CIAC), Consulting Engineers Association of India (CEAI), which is the Indian Member of FIDIC, Indian Institution of Technical Arbitrators (IITArb) etc. The Employer Government Departments like NHAI (National Highways Authority of India), Government of Delhi and several other Government Departments also maintain panels.

1.4.3. Member Selection Process:

A mandatory condition giving procedural steps in the standard DB clause is needed for achieving early establishment of DB. The procedure will involve several steps, typically as under-

Step-1: Keeping in view the general obligations of prospective board members, as stated in the Appendix to the DB clause, the parties need to identify and shortlist a few prospective members and put the names in the

order of priority and contact them in that order to obtain their willingness/availability to serve as a DB member till a person contacted gives a preliminary confirmation.

Step-2: The parties after having identified the prospective board members and having obtained their preliminary confirmation, should send the project particulars along with the names of parties directly and indirectly involved, names of other prospective board members if known, a copy of the DB Clause and a copy of terms and conditions of the agreement to be drawn between the member and the two parties, to the prospective members, along with a copy of the format (Appendix-C) in which the prospective board member needs to furnish his/her details and experience along with a copy of the Code of Ethics (Appendix-D).

Step-3: The prospective board member after reviewing the particulars sent to him will convey his acceptance to serve on the Board and furnish the required disclosures and details in the format sent to him. Prospective members should however carefully consider the following aspects before agreeing to serve on a DB:

- Expertise and experience in the type of construction work involved and an understanding of the type of contract, besides knowledge of language of the contract, adequate enough for effective communication.
- Availability during the anticipated duration of construction, the number of DB Cases already in hand as also other engagements, which demand his/her time. (Desirably not more than four DB cases should be in hand at one time of a prospective member)
- Previous involvement in the project,
- Relationships that could lead to a perception of bias, including previous involvement with any of the parties directly or indirectly involved and/or their key project personnel, and
- Anticipation of future assignments with either party that could influence impartiality.

Step-4: Each party to consider and finally accept the prospective board member and communicate the name along with the particulars to the respective other party for approval.

Step-5: The DB to be in position before the date of signing of the construction contract agreement, requires that the employer should propose the name of the member to be nominated while issuing the letter of intent. Within 14 days of receipt thereof, the contractor should respond to the proposal and convey his acceptance or otherwise. The contractor should also send the name of its nominee within the same period.

Step-6: In case of non-acceptance of the proposal by the contractor, the employer should give alternative names within another 14 days and the parties should finalise the name of the member nominee of the employer within 14 days thereafter.

Step-7: The employer should convey his acceptance or otherwise regarding contractor's nominee within 14 days of receipt of the proposal. In case of non-acceptance of the proposal by the employer, the contractor should give alternative names within another 14 days and the nominee member of the contractor should be finalised in another 14 days thereafter.

Step-8: If there is no agreement between the parties on either of the names, the parties should approach the Appointing Authority and the two names shall be finalised before the issue of letter of award.

The Appointing Authority will endeavor to make the required appointment of DB member(s) within a period of 28 days and the same shall be binding on both the parties, except in a case when the appointee had earlier been proposed by one of the parties and not approved by other party. In such a case, on a representation by either party, the Appointing Authority shall revise the appointment.

Step-9: The parties to communicate to the approved board members of having been nominated to serve on the Board, with a copy to the other party.

Notes: i) 'Appointing Authority' is the authority to be named by the Employer in the Bid Document (Usually in the Appendix to Bid), which may be

an Institution, which comes into picture when the parties are unable to agree on the appointment of one or more Members of DB.

ii) The periods in days mentioned in the foregoing as also hereafter mean calendar days, irrespective of any intervening holidays.

1.4.4. Selection of third member (who will act as Chairperson):

- a) The two members should review the plans and specifications as necessary to understand the work as well as the Contract Conditions and select a third member who will supplement their expertise and experience. As soon as the letter of award of work is issued, the two members should propose the name of the third member within a period of 14 days. If the two members so desire, they can seek a panel of names of potential third member from an Institution. The prospective third member will then submit the necessary disclosure statement, his qualification and professional background details and experience for review by the parties.
- b) Within another 14 days, both the parties should convey their acceptance or otherwise to such a proposal. In case there is no agreement on the third member, immediate reference should be made by either or both the parties to the Appointing Authority, who shall appoint the third member.
- c) The third member will act as the Chairperson of the Board.

1.4.5. Signing the Dispute Board Agreement:

The Parties shall organise signing of 'Dispute Board Agreement' with the Members of DB, to enable the DB to start functioning.

1.4.6. Preparation for Meeting the Parties:

- a) All Meetings of DB in conjunction with periodic site visits, as also Hearings on Disputes shall normally be held at site of work. The Internal/Private Meetings of DB will be held at any cost effective location as per convenience of the Members of DB.
- b) Early in a construction project, the parties may have different priorities than starting the DB. The DB should emphasise the importance of

getting itself introduced to the project and project participants promptly and within the time frame prescribed in the Contract for the initial DB meeting.

- c) As soon as possible the DB should determine how familiar the parties are with the DB process. It is a good practice that each party keeps a copy of this 'Standard Operating Procedures' to assure that everyone is working from the same guidelines.
- d) After conferring with the parties, and having internal discussions, the DB prepares the agenda, which should be sent to the parties at least 14 days prior to the first DB meeting. The agenda for the first meeting with the parties will typically have the following items –
 - i) An overview of the project by Employer.
 - ii) Contractor's description of plans to accomplish the work – means and methods, schedule of major subcontractors and suppliers.
 - iii) Round-table discussion of plans for completion of the work.
 - iv) DB discusses the DB process and the Operating Procedures.
 - v) Round-table discussion of application of the DB process.
 - vi) Other items as the parties may wish to discuss with the DB, including variation orders and current and potential disputes, claims and other controversies.
 - vii) Set dates for the next meeting.
 - viii) Site visit.
- e) The DB should prepare a preliminary list with the mail and e-mail addresses of each Board member, and the phone, cell phone, and fax numbers of the Chairperson and each party's tentative contact. This list will be used by the parties and the DB to send progress reports, invoices, payments, etc.
- f) The members of DB should perform a brief familiarity review of critical portions of the contract documents.

1.5. Duties and Conduct of DB Members:

1.5.1. Conduct of Board members during meetings and Site Visits:

- a) The Members of DB should ensure that they understand the construction methods being used, scheduling, and other project details by suitable interaction with and inquiries from the parties. However, such inquiries from Board members with extensive construction experience may result in field personnel interpreting the questions as advice. Board members need to be careful that their questions are not so interpreted by the parties.
- b) The Board members must not give suggestions on construction methods or on solutions to construction problems. The members of DB also need to be careful in relaying personal knowledge and experience so that it is not construed as giving advice.
- c) The parties should be encouraged to actively discuss and resolve potential disputes before they escalate to the point where a hearing is required. Questions may be asked to ensure that the DB is informed as to the status of all issues that have the potential to become disputes. Questions may also be asked so as to make the parties understand the issues, but without commenting on the credibility or viability of issues. The questions have to be raised tactfully and with care. The DB should also be careful so as not to take positions of advocacy.
- d) One of the primary benefits of the DB process is that it can help the parties avoid disputes and is not there just to resolve disputes. Therefore, the parties should be encouraged to settle their disputes without referral to the DB. Sometimes just a clarification of the issues may be sufficient to enable the parties to come to a resolution themselves.
- e) The Board members must strive to avoid a perception of bias by their conduct or questions during meetings and site visits. During site visits, it is desirable that the Board members stay together and remain within earshot of at least one representative of each party. Questions may be asked, which both parties can clearly hear and both have the opportunity to participate in any answer given.

1.5.2. Duties of Board Members Between Meetings:

Board members' obligations are typically set forth in the Dispute Board Agreement. Between meetings Board members should observe the following -

- i) Be aware of job activities and developments by reviewing construction progress reports and minutes of periodic project meetings.
- ii) Take note of any potential conflicts of interest that develop.
- iii) Refrain from disclosing sensitive project information.
- iv) Interact and explore with the other Board Members, proactively for prompt resolution of issues and disputes before hearings are required.
- v) Communications with the parties shall be made by the Chairperson only.

1.5.3. Duties of Chairperson Between Meetings:

The Chairperson's role is to coordinate the DB process. The Chairperson's duties between meetings include:

- a) Correspondence with the other Board members regarding items that should be addressed at upcoming DB meetings.
- b) Prepare a draft agenda for each upcoming DB meeting, contact the parties and other Board members for their input, and prepare and distribute the final agenda.
- c) Handle all correspondence and communications with the parties, except invoicing directly by DB members and distribution of project materials by the parties.
- d) Investigate any misconduct by a Board member, discuss with the other Board member, and develop and implement a course of action, if and when necessary, to correct such misconduct.
- e) Discuss potential conflicts of interest of Board members and ensure disclosure to the parties.
- f) The Chairperson of DB is responsible for submitting information to the Institution concerned for the DB Database, recognising that data considered sensitive by either party should not be provided.

1.5.4. Dealing with Obstructive Behaviour by a Party:

Occasionally, the contracting parties may behave in a manner as to obstruct the DB process. Examples of such behaviors are:

- a) Making ex parte communications.
- b) Failure to attend DB meetings and/or hearings, or attending but not participating in the same.
- c) Not deputing senior functionaries at the project site for meetings/hearings.
- d) Failure to meet agreed dates in the submission of documents as required for hearings and/or not responding to DB.
- e) Refusing to bring disputes to the DB in a timely manner and letting disputes accumulate for a global settlement.
- f) Disruptive behavior at DB periodic meetings and/or hearings.
- g) Tendency to reject all adverse decisions.

Such behaviors are indicative that a party is not using the DB process purposely and effectively. Although the Board members may have limited ability to affect these behaviors in a direct manner, it is their obligation to minimise such obstructive behaviors to the extent possible, either by encouragement, discouragement, or other means, all within the bounds of propriety and the provisions of the contract.

1.5.5. Termination of Regular Activities of DB:

- a) The DB shall terminate its regular activities in the event of either of the following –
 - i) The Defects Liability Period (or, if there are more than one, the Defects Liability Period expiring last) has expired.
 - ii) The Contract has been terminated under any of its provisions.
Provided that the DB has communicated to the parties and the Engineer (as defined in the Contract), its decision on all the Disputes previously referred to it.
- b) Once the DB has terminated its regular activities, it shall remain available to process any dispute(s) referred to it by either party.

1.6. Fees and Expenses of Board Members

- a) The fee consists of daily fees for the days of the meeting and travel and a retainer fee per month which is generally equivalent to three days' daily fee in the international practice of DB.
- b) The daily rate of fees of DB members should be mentioned in the Bid Documents. In order to ensure that competent members volunteer to become DB members, it is necessary that the fee is reasonable. Since the construction projects vary in size and complexity, the fee for DB members need also to correspond to the attributes of the project.
- c) It is suggested that there may be two grades of DB Fees depending on the size and complexity of the project involved and/or the expertise/experience required of the Members of DB.
- d) The daily fee is suggested to be of the order of Rs. 10,000/- and Rs. 15,000/- respectively for the two grades. These may be revised from time to time.
- e) The monthly retainer accordingly is proposed to be Rs. 30,000/- and Rs. 45,000/- respectively for the two grades.
- f) Other provisions are -
 - i) When the project is substantially completed, the monthly retainer would be payable at one half the normal rate.
 - ii) Once the DB has terminated its regular activities, the monthly retainer would no more be payable, except as below, even though the DB shall remain available to process any dispute(s) referred to it by either party.
 - iii) In case of a referral after the Board has terminated its regular activities, the Board Members shall receive all payments as provided above except that the retainer fee would be payable at reduced rate (50 %) from the first day of the month in which a dispute is referred till the last day of the month in which the DB issues the decision which shall be made within the time as prescribed or as enlarged by consent of both parties.
- g) A person to be nominated to the DB should be asked to accept the daily rate of fees and the monthly retainer fee while entering into the Dispute Board Agreement.

- h) The Retainer Fee: The retainer fee per calendar month shall be considered as payment in full for:
- (i) being available on 14 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/her duties; and
 - (iv) all services performed hereunder except those referred to under 'Daily Fee' and 'Expenses'.
- i) The Daily Fee: It 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;
 - (ii) each working day on site visits, hearings or preparing decisions.
- j) The expenses:
- (i) All reasonable expenses incurred in connection with the Member's duties would be reimbursed to the Members of DB. Such expenses would include travel expenses, hotel and subsistence costs. A receipt shall be required for each item, which is in excess of ten percent of the daily fee. For items of expenses, which are less than ten percent of the daily fee, self-certification by the Members of DB shall suffice.
 - (ii) The travel expenses should include less than first class airfare and highest class in case of travel by Rail/Road, including hiring of AC cars of adequate standard as may be chosen by the members of DB.
 - (iii) The scale of expenses on hotel will need to be decided with reference to the place of work. Hotel accommodation should be of a decent standard corresponding to the status of the members of DB.
- k) The retainer and daily fees shall be specified in the Dispute Board Agreement. Unless stated otherwise, these fees shall remain fixed for the first 24 calendar months. Unless the agreement between the Employer, the Contractor and the DB member provides otherwise, the retainer and daily fee shall be enhanced by 10% after the completion of 24 calendar months and thereafter enhanced by the same value every 12 calendar months.

1.7. First Meeting of DB

1.7.1 Preparation:

Having established a date for the first meeting and the agenda having been issued to all concerned at least 14 days prior to the date of the said first meeting, the DB may consider to meet in private, before the first meeting to get acquainted, affirm that all members fully ascribe to the Code of Ethics and understand the process, and discuss the operating procedures to be adopted. The discussion during such a private meeting for the first time should include the following matters:

- i) **The role of the Chairperson:** The DB is a panel of equals with the Chairperson having the additional duties of coordinating the work of the DB, communicating with the parties, chairing the meetings and hearings, and making procedural decisions. Any action/communication by DB would always mean the same by Chairperson DB in consultation with the other Members of DB.
- ii) **Understanding the DB Process:** It is to be ensured that all Board members correctly understand the DB process and are committed to their duties and responsibilities as Board members.
- iii) **Affirming impartiality:** It needs to be affirmed that each Board member is impartial and neutral in all respects. If there are any questions of possible conflict of interest or bias, they must be included in the agenda for the first meeting with the parties and resolved.
- iv) **Continuous disclosure:** it needs to be understood that there is a continuing obligation on the part of Members of DB to disclose any relationships, which may have developed subsequently, giving the perception of a bias.

In order to demonstrate the DB's function as a group, not as individuals, Board members should as far as possible arrive at meetings together and should plan accordingly for the first as well as all subsequent meetings.

1.7.2 The Meeting:

- a) The DB, prior to opening meetings, should arrange for an attendance list to be compiled and distributed, containing the name, mobile numbers, affiliation and project role of each attendee. The email addresses may also be included in the compilation. The meeting follows the agenda previously distributed by the Chairperson.
- b) The meeting attendees, including the Board members, should introduce themselves, describing their position and role on the project as well as a brief summary of their background and work experience. Any previously unknown or undisclosed relationships with any of the attendees should be disclosed at this time.
- c) Although the Chairperson needs to control the meeting as needed, the DB should endeavour to encourage open communication with the parties.
- d) First the employer describes the project, including critical design details, interfaces with other projects, geotechnical, environmental, third party funding and other constraints, and interim and final completion dates. The salient features of the Contract are also brought out.
- e) The contractor next describes plans to accomplish the work, the personnel and equipment resources it plans to utilise, major subcontractors and suppliers involved, and details of the construction schedule. These employer and contractor presentations usually transition into a round-table discussion of plans to accomplish the work in answer to questions from the Board members.
- f) The DB then discusses in details, the DB process and its implementation on the project as under-
 - i) The role of the DB is explained, emphasising dispute avoidance as well as dispute resolution. The Board members should be prepared to discuss and answer questions concerning the process.
 - ii) If any of the parties have previously used the DB process, it would be worthwhile to know the party's experience and whether the party has been satisfied with the process and the outcome. If there were

any problems with the process, then DB may discuss how these might be avoided on this project.

- iii) It may be brought out to the parties that if it becomes clear that the parties cannot resolve their differences, the DB will encourage prompt referral of disputes for a hearing.
- iv) The contract provisions that pertain to dispute resolution should be discussed. The complete contractual procedure, including time frames for submitting disputes to the DB should be thoroughly understood. Determine if clarification of the contractual procedure is required prior to referral of a dispute to the DB. If the language in the contract is not specific, the DB should draft a suggested procedure for discussion with the parties. This procedure, agreed to by all parties, should be incorporated into the DB Operating Procedures before the next meeting.
- v) The familiarity of the parties with advisory opinions should be seen and in case necessary the same should be explained, bringing out its reported success and to see if the parties are open to this preliminary process that often leads to resolution of disputes without resorting to DB hearings.
- vi) The authority making the final decision for each party regarding acceptance or rejection of DB decision should be ascertained.
- vii) The contract provisions, in the event of a DB decision not being accepted and the contractual time limit to take further steps, should be gone through.
- viii) The DB discusses the previously transmitted DB Operating Procedures, considers suggestions for any additions or alterations, which could enhance the efficiency of the DB processes and if considered to be useful by DB, seeks concurrence of the parties. It is however to be understood by all concerned that the DB Operating Procedures do not take precedence over or modify the contract documents and subject to that it can be changed at any time by agreement of the parties and the DB.

- ix) Frequency of meetings should be discussed and decided by mutual agreement rather than by directive or unilateral decision of any one party. The parties must clearly understand that a DB is not an arbitration or judicial panel; it doesn't only meet after there's a dispute (except in case of ad hoc DBs, which are constituted only when disputes arise). DBs meet periodically throughout the construction period so they are able to encourage the parties to settle issues before they become disputes. In so doing, DBs become aware of issues on a contemporaneous basis. This feature distinguishes the DB process from all other alternative dispute resolution forums.
- x) The specific documents required by the Board members to understand the work should be identified. These usually include a copy of all the contract documents and a summary level version of the contractor's approved baseline construction schedule.
- xi) The DB should indicate the periodic reports to be provided to each Board member. These normally include minutes of periodic project meetings and progress reports and also significant schedule updates. Although the employer is generally responsible for preparing such progress reports, the contractor also usually makes out a report on progress and it is desirable to receive copies of this report as well to ensure that the Board is familiar with each party's perspective. The DB should only request documents that are produced in the normal course of business.
- xii) All communication from DB to the contracting parties will be made only through the Chairperson. Communications from the contracting parties to the DB shall be addressed to the Chairperson, simultaneously endorsing copies to the Members.
- xiii) The contracting parties must not contact any member of the DB other than the Chairperson. Indirectly involved parties must not contact any member of the DB.
- xiv) The DB must only contact the designated representative of each party. Board members must not contact any employee of the contracting parties or the indirectly involved parties.

- xv) There must not be any ex parte communications. All written correspondence between a contracting party and the Chairperson is to be copied to the other party and directly to the other Board members.
- xvi) The DB shall ascertain where and to whom DB invoices are submitted.
- xvii) It should be made clear to the parties that the DB cannot give advice to either party regarding construction methods and execution of the work and that the Board members will refrain from expressing opinions on the merits of disputes or potential disputes.
- xviii) If construction is underway at the time of the first meeting, dates for the next meeting should also be set. With a view to making the site visits meaningful, all the Board members need to remain together during site visits and each party should have the functional representatives present with the Board.
- g) Minutes of Meeting should be prepared at the conclusion of meetings, containing only the items discussed and the special points of interest during site visit, without going into the details of discussions. These are circulated to the parties and all the Board members just after the meeting.
- h) Throughout the meeting, the DB should manage the DB process in a business-like fashion and respond promptly to the needs of the parties.

1.8. Subsequent Meetings of DB

The agenda for each meeting is prepared by the Chairperson in consultation with the parties and other DB members. The agenda will vary to suit the project and the circumstances, but will usually include the following items:

- a) An attendance sheet is circulated and signed by all attendees with their affiliation and project role. The minutes of the previous meeting, if the same were not circulated immediately after the meeting, are corrected if necessary and adopted. As a rule, the minutes of meeting should be prepared at the conclusion of meeting.
- b) The contractor describes the work accomplished since the last meeting, the current status of the work and the construction schedule progress (schedule days gained/lost since the last meeting, the reason for the gain/loss and proposed solutions, if any), and plans for future work with particular emphasis on the period of time from the present until the DB's next scheduled meeting.
- c) The employer's representative then describes its perspective of the status of the work including its view of construction progress.
- d) An open discussion by both employer and contractor of possible construction problems, potential disputes (without arguing the merits), the status of unresolved issues, a report on meetings to resolve issues and the progress achieved, the status of contract change orders, and any foreseen future potential problems. It is important for the parties to discuss unresolved issues. Appropriate, tactful questioning from the DB at this time can often assist in resolution of potential disputes.
- e) The issues of Extension of Time and Variation Orders are some of the prime sources of disputes and the parties should be encouraged to have clarity and a common understanding of such issues.
- f) If either party believes that a matter is urgent, a request shall be made by both the parties to schedule an advisory opinion or a full hearing at the earliest convenience, taking into account the time required for the parties to prepare and submit documentation for review.

- g) When a hearing is to be scheduled as per above para, it is best to discuss the details of dispute to be referred, including the joint statement of dispute, the common reference document and the respective statement on the dispute/claim and the schedule for submitting these documents.
- h) Tentative dates may be set for the next meeting. Special DB meetings may be requested by the parties to enable consideration of some emergency issue, or to observe an alleged differing site condition, or some other important project activity or event.
- i) Holding DB meetings at a frequency of about three months is usually effective for allowing the DB to stay current with contract progress. Projects that get off to a fast start and larger, more complex projects may require more frequent meetings initially in order that the DB becomes duly and properly conversant with the project under execution and thereafter the DB adopts the usual less frequent schedule of about 3 months' interval.
- j) The DB should invariably visit all active portions of the work. Both contractor and employer senior most personnel at the project level must be present during meetings, save for exceptional circumstances. As far as possible, such senior personnel should also accompany Board members during site visits, especially when there are certain contentious issues, which need proper appreciation by the members of DB. The parties should point out and discuss potential issues and disputes as they get noticed during the site visit.
- k) If any key personnel is changed during the course of the project, it would be advisable for the DB to re-visit the appropriate sections of the discussion of the DB process and its implementation, as listed in the Section for 'First Meeting of DB'.

1.9. Referring of Dispute(s) to DB

1.9.1 Reference:

- a) Either the Contractor or the Employer may refer any issue to the DB once it becomes clear, that a dispute or controversy exists and is not likely to be resolved without DB participation. Notwithstanding any reference to DB, the parties would be free to settle the dispute between them, provided the DB is kept informed.
- b) Disputes by a subcontractor or supplier with the contractor cannot be considered by the DB. The Dispute Board Agreement is with the Employer and Contractor; the subcontractors and suppliers are not included.
- c) For maximum effectiveness, the DB should become involved as soon as it becomes clear that a bona fide dispute exists. The contracting parties should make every effort to resolve issues without taking them to the DB. However, disputes should be referred to the DB as soon as one of the parties believes that a negotiated settlement cannot be reached.
- d) The DB process is a dispute resolution process, not a claims review process. It is not productive to require that the contractor prepare voluminous documentation, including calculation of quantum, for submittal to the Employer for review and final decision prior to referring the dispute to the DB. This increases the difficulty of the dispute, fosters animosity between the contracting parties, and may often lead to unproductive posturing between the parties. It also diverts the Employer's and the contractor's efforts from their primary concern for execution of the work. After the DB's decision, the quantification can be made by the Engineer.

1.9.2 Letter of Referral

- a) Referral of a dispute to the DB, by either the Contractor or the Employer, should be to Chairperson DB, with copies to the other party and the other Board members.
- b) The letter of referral should be accompanied with a Statement of Dispute, concisely describing there in the nature and extent of the dispute that is being referred to the DB, as well as scope of the desired decision: merit (entitlement) only, merit with guidelines for quantum if merit is found, or merit with quantum amount if merit is found.

1.9.3 Scope of decision

- a) Many disputes involve only merit. If quantum is involved and merit is recommended, it is common for DBs to offer guidelines for quantum along with the decision for entitlement. Once the DB becomes aware of the details concerning a dispute, it is usually in a good position to determine whether guidelines for quantum would be beneficial to the parties.
- b) Entitlement should be agreed by the parties first, followed by renewed negotiation efforts before asking the DB to determine the quantum amount. The parties are in a much better position to determine quantum issues. It is usually time consuming for the DB to establish the quantum. However, the DB's purpose is to assist in dispute resolution and if the parties request that the DB recommend the quantum, the DB will do so.

1.9.4 Response to Statement of Dispute

The responding party shall respond to the Statement of Dispute within the period prescribed by the DB. Such response should bring out the principles based on which the claim is disputed. In case the claim is quantified, the quantification should also be duly commented upon, even if the claim is not acceptable on principles. Such comments on the quantification would not prejudice the stand of the responding party with regard to the claim not being acceptable on principles.

1.10. Hearings

1.10.1 Preparations:

- a) The reference to the DB has to be clear and unambiguous. If the DB considers that the reference is not so, it must seek clarifications before proceeding further in the matter. Thereafter the DB in consultation with the Contractor and the Employer shall fix an early date for the hearing.
- b) Simultaneously, the parties should strive to jointly agree on the precise scope of dispute and correspondingly on the exact wording of the statement of the dispute. Occasionally one party does not understand the nature of the dispute, or in some cases the parties disagree as to its potential ramifications. If the parties are unable to reach agreement on this statement, each party should define it from their perspective and the DB should then restate the dispute in their own terms and provide it to the parties prior to preparation of the statement by the responding party and the rejoinder thereafter by the referring party.
- c) The parties should jointly agree on the requested scope of the decision. If the parties do not agree, the DB should work with the parties to reach agreement.
- d) Normally, the hearing should take place at the earliest date convenient to all concerned. Allowance however is to be made for the time the parties will need for preparation. Dates for exchange of Statements should be established in accordance with the DB Operating Procedures. When a matter is not urgent or will not require lengthy presentations, the hearing could be held in conjunction with the next scheduled DB meeting.
- e) In exceptional cases, the DB may consider a need for consultations with an outside expert to advise it on technical (audit, geotechnical, schedule analysis, unusual construction materials or techniques, etc.) or legal issues that may be outside the experience or expertise of the Board members. This will require the DB to identify the expert and formulate a proposal for appointment of the said expert, in consultation with both the parties, indicating the number of sittings expected for the consultations and the fee to be paid to the expert. The DB should obtain agreement to the terms of compensation for the engagement of such an expert. The Fee/Expenses of the Expert shall be borne equally by both the parties.

- f) The DB shall notify the date of hearing to both the parties as well as the Engineer/ Engineer's representative at the project site, sufficiently in advance. At least 14 days prior to the hearing, the parties should submit to the DB and the other party a list of proposed attendees and their role at the hearing.
- g) The DB may request participation of key personnel, like Engineer's representative at site of work who are likely to have first-hand knowledge of the facts in dispute.
- h) Occasionally, the parties may request that their attorneys attend as observers so that they may hear all the evidence and arguments, and thus knowledgeably contribute to subsequent in-house discussions regarding acceptance of the DB's decision.
- i) It is not recommended that the parties' legal counsel participate in the DB hearings as this can intimidate hearing participants and inhibit open and candid discussion. If one or both parties request participation of legal counsel, the pros and cons should be discussed and allowed only if both the parties agree.
- j) The DB must operate within the contract and statutory requirements. DB hearings are private and therefore are not open to the public.

1.10.2 Position Papers by the parties

- a) The Statement of Dispute by a party and Response to the same by the other party are referred to as Position Papers.
- b) The DB should insist that the parties include all arguments they will put forth at the hearing in their Position Papers, namely the Statement of Dispute and the response thereto. Besides, the Position Papers by the parties are also to include a statement of the dispute, the party's position, including the contractual justification, reference material and pertinent exhibits.
- c) Whenever feasible, the parties may be asked to jointly prepare a common reference document to facilitate DB review and understanding of the Position Papers by the parties, and to minimise confusion during the hearing. This is usually composed of a common set of exhibits that include facts, dates, quantities, etc. Depending on the complexity of the dispute, adequate time should be allowed for the parties to jointly prepare the common reference document.

- d) Within each party's Position Papers, there should be a reference to specific provisions of the contract documents. Visual aids, exhibits, charts or summaries of documents may be included in order to facilitate the DB's understanding of the issues, but voluminous records are discouraged.
- e) The Position Papers by the parties and the common reference document are submitted to the other party and the DB simultaneously, in accordance with the time frame previously established with the DB. Position Papers by the parties should be complete so as to avoid surprise presentations at the hearing, and the DB typically will not permit any further exhibits or correspondence regarding the dispute between the time of submittal of the Position Papers by the parties and the hearing, unless it allows the submittal of rebuttal papers.

1.10.3 Rejoinder

It is sometimes desired by the party referring the dispute, to submit a written rejoinder to the response of the other party before the hearing. The DB must consider several factors before agreeing to allow the parties to submit pre-hearing rejoinder:

- a) The Rejoinder gives the opportunity to counter each other's facts and arguments in hard copy before the hearing. The issues are clarified and the DB better understands where the parties differ.
- b) Rejoinder is usually not needed when the parties have fully disclosed all arguments in the position papers and when disputes are confined to only a few issues.

The decision to have pre-hearing rejoinder is made on a case-by-case basis by the DB and the parties, usually when scheduling the hearing or sometimes after receipt of the Position Papers from the parties.

1.10.4 Conducting Hearings

- a) In opening the hearing, the Chairperson should review the hearing procedures set forth in the DB Operating Procedures with the parties and determine if there is agreement on each item.
- b) Typically, a hearing starts with the opening remarks of the Chairperson before the Referring Party makes its presentation, which is followed by Rebuttal by the other party and in turn followed by a rejoinder/rebuttal by the Referring Party. There may be more such rounds of Presentation and Rebuttals till the parties are satisfied that they have made all their relevant points before the DB, which will then seek clarifications, if any, from the parties before concluding the hearing.
- c) If there is disagreement on any item, the same should be resolved before proceeding further.
- d) A Review of the sequence of hearing should be undertaken as under-
 - i) Review plans for breaks, internal meetings among DB members (if required) etc.
 - ii) To ensure that Position Papers by the parties, written rebuttals, etc. have been submitted and exchanged between the parties in accordance with the DB Operating Procedures.
 - iii) To confirm the scope of the decision desired by the parties.
 - iv) It should be explained that the DB hearing is not formal.
 - v) All attendees should sign an attendance sheet in every hearing/meeting every day.
 - vi) The Presentations will not be made under oath and there will be no cross-examination.
 - vii) Interruptions will not be permitted while a party is making its presentation, other than clarification requests or other questions by the DB.
 - viii) The Board members will ask questions whenever necessary to uncover the facts and ensure that they fully understand the parties' positions. To this end, they may pose question(s) to the parties during their

- presentations on the facts of the case, and solicit their interpretation of the contract documents.
- ix) Questions should be thoughtfully phrased so that it is not construed as favoring either party. The parties should not infer or otherwise construe that the DB is favoring one side or the other by the nature of these questions. No Member should make any observation or comment or interrupt the presentation of any party which may convey an impression that any particular member is favourably inclined towards a particular party.
 - x) Direct questioning of one party by the other party is not permitted. However, some interaction between the parties may be allowed as long as it is courteous and productive and is carefully controlled by the Chairperson.
 - xi) If electronic visual and/or audio presentation aids are used, a hard copy must be distributed to each Board member and the other party prior to the presentation to facilitate note taking.
 - xii) No stenographic, video, or audio recording of the proceedings should be allowed.
 - xiii) Cell phones are to be turned off during meetings.
 - xiv) The Board Members shall refrain from expressing any opinion regarding the merits of either party's position.
- e) If it becomes apparent during the hearing that either party has not addressed a key provision of the contract documents, the DB should ask both parties for their interpretation of that provision. If this is discovered after the hearing, both parties should be asked to address that provision in writing.
 - f) Generally, each Board member takes individual notes during the hearing, so the services of a court reporter are not required. Audio or video recording should always be prohibited, since it tends to inhibit discussion.
 - g) The DB should not render a decision based on information that both parties have not had an opportunity to fully address. Should new information be offered that is not contained in the position or rebuttal papers previously submitted to the DB and the other party, the new information should either

not be permitted to be introduced, or the hearing continued if necessary to allow the other party to review, research and rebut such new information.

- h) The hearing should not be closed until both parties have nothing further to add. The satisfaction of the parties of having made their point adequately is important for ensuring credibility of the DB.
- i) During or after the hearing, the DB may request further documents or information that would assist the DB in making its findings and decision including purchase orders, materials delivery slips, or other job records. The request may necessitate additional hearings in order for the DB to ask questions to fully understand such additional material. The Chairperson should make all requests for such additional materials, and direct any questions to the parties after the conclusion of the hearing. Copies of post-hearing submittals and written responses to the DB must be simultaneously provided to the other party.
- j) Other than as part of their written report, Board members must never express any opinions concerning the merits of either party's position or of the probable outcome of the dispute.

1.10.5 Disputes Over the DB's Authority to Hear Disputes

- a) Sometimes the parties contend that the DB is not authorised to hear a dispute, either because the precedent process established by the contract has not been completed, because the Contract Conditions limit the DB process to only disputes on certain portions of the contract, or for other reasons.
- b) When there is disagreement among the parties as to whether the DB has authority to hear a particular dispute, the DB should consider the nature of the disagreement regarding the authority issue and the nature of the dispute, and then decide whether the wiser course is to proceed with a hearing, or to encourage the parties to resolve the authority issue first. If the parties are amenable, the DB could hear the authority issue.

1.10.6 A Party's Refusal to Attend

- a) In the case of one party refusing to attend the hearing, the DB must decide whether to proceed with the hearing without that party's presence, to postpone the hearing, or to cancel it. One of the factors that should be considered in making this decision is whether the refusing party simply needs additional time to prepare, or is unwilling to participate for reasons directed at obstructing the process.
- b) The DB must recognise its contractual obligation to provide a forum for hearing disputes. Sometimes the referring party is precluded by the contract from pursuing subsequent dispute resolution measures unless the DB dispute resolution process has been followed. In this case, the DB must proceed with the hearing unless otherwise provided by the contract and render a decision according to the facts made available to it by the attending party and any pre-hearing documentation submitted by the non-attending party.
- c) When the contract does not preclude the referring party from pursuing subsequent dispute resolution measures, the DB must proceed at their discretion, considering
 - i) the provisions of the Dispute Board Agreement,
 - ii) the facts and circumstances of the dispute as known to them, and
 - iii) the ramifications of refusing to hear the dispute.

1.11. Deliberations and Decision by DB

1.11.1 Deliberations

- a) After the hearing on a reference is closed, the DB holds an internal meeting to discuss the dispute and arrive at a conclusion/decision. If all three members have generally similar conclusions, the effort will be mainly directed toward composing the report suitably. If not, one or more sessions may be held to reconcile differences. DB deliberations can be conducted at any convenient location, ensuring privacy.
- b) In order to ensure timely completion of the report, the DB may prepare a schedule covering all anticipated steps to complete its deliberations and prepare its report, taking into account other commitments of the individual members.
- c) Basic objectives of the deliberations include:
 - i) Finding and agreeing on the pertinent facts.
 - ii) Reaching agreement on interpretation of the pertinent contract requirements.
 - iii) Agreeing on the DB's position with respect to the issues, questions, and disputes posed by the parties in the referral.
 - iv) Composing the report so that the decision and the supporting reasons and rationale are clear and easy to understand.
- d) Whenever feasible, initial deliberations are held and an outline of the report prepared immediately after the hearing is concluded. Later, drafts of the report are exchanged by facsimile or e-mail, followed by telephone conference discussions until agreement is reached. The Chairperson should take the lead in organising these activities and keeping them on schedule. Details of the dispute should never be discussed outside the DB deliberations.
- e) If, during the deliberations, the need arises for additional information, such as copies of documents not in the DB's possession, a request may be made to either party with a copy to the other party. The additional information is provided to the other party as well as the DB. The DB must not consider additional information in support of or against either party without both parties having the opportunity to address the additional information.

1.11.2 Report and Decision

- a) Decision by DB must be based on the information presented by the parties and must be compatible with all applicable provisions of the contract, the facts and circumstances related to the dispute and applicable laws and regulations. It is of crucial importance that the Board members be familiar with and thoroughly consider all applicable provisions of the contract when preparing their report. Depending on the facts and circumstances, the DB also need to consider relevant trade practices and standards in developing its findings and conclusions.
- b) However, the DB must not ignore any provision of the contract documents, even if not discussed by either party. DBs must not recommend a compromise settlement according to what they believe would be acceptable to both the parties. It is essential that all decisions be based solely on the provisions of the contract, the facts of the dispute and applicable laws and regulations. Any decision that is not consistent with the contract, facts, and circumstances of the dispute will undermine the credibility of the DB.
- c) In some cases, some provisions of the contract may be perceived by the Board members as unfair to one of the parties. Individual notions of "fairness" or "equity" are not part of the contract, and have no place in the DB process. Relief from an unfair contract lies with the courts.
- d) The DB must limit its decision and report to the issues in dispute. The parties, and not the DB, determine which issues are referred to DB.
- e) Even when the DB has initially been asked to address only entitlement, later if both parties agree, the DB may include suggested guidelines for determining quantum. The DB should strive to render its Decision as soon as possible, within the time limit prescribed in the relevant Clause/Annex to the Clause.
- f) While drafting the report, the DB must strive to convince both parties of the wisdom and benefits of accepting the report. This is best accomplished by demonstrating that all points raised in the Position Papers and at the hearing have been considered. Every important point of each party's position should be summarised, both points accepted as well as those rejected by the DB. The DB's logic and line of reasoning should be fully explained, in a clear and logical

sequence that both parties can understand. The DB should not disparage either party's position or presentation.

- g) Reports should neither be too brief, with little explanation, nor too long and wordy, with pages of material having little relevance to the basic issues in dispute. Both of these extremes are to be avoided. The report should be concise, yet detailed enough for a member of either party, including those unfamiliar with the dispute, to be able to adequately understand the issue, the positions of the parties and the reasoning supporting the decision of the DB. The report must be professional, objective and impersonal.
- h) It is often helpful to include a chronology of events associated with and leading to the dispute, and a listing of the particular sections of the contract cited by each party in support of their position.
- i) The DB's Report with its Decision need to be prepared keeping in mind that the disputes could be taken to arbitration or litigation, which calls for a thorough, detailed and convincing report and that the report will almost certainly be used as evidence in any subsequent proceedings.
- j) One Board member is usually delegated to assemble the first draft of the report. For complex disputes having several different issues, this work may be divided among the members. The first draft is circulated among the members for comments and revisions. This process is continued, with the wording of all elements carefully considered until the report is finalised.

1.11.3 Minority Report

- a) The goal is always to produce a unanimous report. By thoroughly reviewing and exploring one another's perspectives and by reasonable understanding, the members can almost always prepare a report acceptable to all.
- b) Dissenting opinions are discouraged and should be offered only when the dissenting member strongly disagrees with the majority opinion. It needs to be kept in mind that a dissenting opinion may undermine the entire DB process on the project, especially the aspect of resolving issues before they become disputes. If, however, in spite of their best efforts, the DB is unable to reach a unanimous conclusion, the dissenting member, preferably with input from the other Board members, prepares a minority report with supporting rationale. This is included with the majority report.

1.11.4 Delivering the Report

Usually the Report is signed by all the members of DB and transmitted by post or courier or by hand, as convenient, by the Chairperson DB to both the parties. Sometimes the Other Members of DB may authorise the Chairperson DB to sign and issue the Report/Decision, whenever it is not so convenient to meet again merely for signing a Report, which has otherwise been agreed. When doing so, the Chairperson needs to mention "For and with the Concurrence of all Members."

1.12. Action by Parties on DB's Decision

1.12.1 Acceptance/Rejection

- a) In choosing to accept or reject a decision of the DB, the parties look primarily at the rationale expressed in the report. If the rationale does not adequately support the decision, the parties are not likely to accept it.
- b) The decision of the DB is binding on both Parties, who are required to give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award. Any intent of commencement of arbitration is not to be a ground for its non-implementation.
- c) When a party does not accept a DB's decision, the dispute may continue on to other forums for resolution. However, it is advisable for the parties to continue their negotiations using the DB report as a guide. If the parties are sincere in resolving the issue, such negotiations are likely to be successful. The model DB sub-clause 'X.5 Amicable Settlement' provides that both Parties shall attempt to settle the dispute amicably before the commencement of arbitration.
- d) If either Party is dissatisfied with the DB's decision, then it may, within 28 days after receiving the decision give notice to the other Party of its dissatisfaction, with a copy to the Engineer, of its intention to commence arbitration, as provided in the DB clause.
- e) Also if the DB fails to give its decision within the prescribed period, or within such other period as approved by both Parties, after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its intent of commencement of Arbitration.
- f) In either event, the notice of dissatisfaction shall state that it is given under the relevant Sub-Clause of the DB clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Neither Party is entitled to commence arbitration of a dispute unless a notice of intent of commencement of Arbitration has been given in accordance with the relevant Sub-Clause under DB clause. Further, the aforesaid notice for commencement of Arbitration shall become effective only after the Decision of DB has been implemented.

- g) If no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision becomes final and binding upon both Parties.
- h) All decisions, which have become final and binding shall be implemented by the parties forthwith.
- i) If the decision of the DB which has not become final and binding, is required to be implemented. If it requires a payment by one Party, who desires an appropriate security for such payment, the DB should normally direct the payee to provide such a security (say a Bank Guarantee).
- j) Any payment which becomes due to the Contractor in terms of any decision of DB shall qualify as a 'Payment' under the relevant Contract-Clause and any default in such a payment by the Employer will attract the provisions of the relevant Contract-Clause on delayed payment.
- k) For any such default in payment by the Employer, all other remedies as per Contract shall also be available to the Contractor.
- l) Any payment due to the Employer from the Contractor in terms of any Decision of DB shall be recovered from the Payments due to the Contractor.
- m) If a decision of DB gets revised in subsequent arbitration/litigation, the amount becoming refundable, if any, shall carry interest at the rate applicable for delayed payments as provided in the Appendix to Bid.
- n) Whether or not a decision has become final and binding upon the Employer and the Contractor, it shall always be admissible as evidence in any subsequent dispute review procedure, including any arbitration or litigation having any relation to the dispute to which the decision relates.

1.12.2 Clarifications

- a) Either party may make a detailed request for clarification of specific elements of a DB report, in writing, on a Decision of DB within a period of 14 days following receipt of the report, with a copy of the request to the other party. The DB shall respond in writing to the same within 14 days of the receipt of the request. The DB on its own may also issue any correction to its decision, if it notes any

computational/arithmetical and or typographical error within a period of 14 days of the communication of the said decision.

- b) Sometimes a party is honestly unable to understand the rationale for a decision and thus has a legitimate basis for seeking clarification. Occasionally, what was believed to be agreement on a factual matter turns out to be incorrect and clarification is needed. The DB may only need to address specific questions for the parties to become convinced to accept the report. The DB should respond as quickly as possible to any requests for clarification.
- c) Occasionally, a party will submit what it considers to be a request for clarification, but which in reality is nothing more than an attempt to re-argue the dispute. DBs should tactfully decline to be drawn into an argument with either party about whether the DB correctly decided the dispute or not.
- d) Each party should be permitted to submit only one request for clarification of any individual DB report.

1.12.3 Reconsideration or Appeal to the DB

- a) Reconsideration should be an exception and not a rule and such a request should be dealt in accordance with the DB Clause. In the event that the DB clause does not provide for it, then the same should be established by the DB in the Operating Procedures. Reconsideration should only be based on evidence not available prior to or during the hearing.
- b) Unless otherwise agreed between the parties, either party may request the DB in writing, with a copy of the request to the other party, for reconsideration of any Decision of DB within a period of 14 days from the receipt of the same, duly supported with reasoning of new evidence or a reasonable demonstration that the DB misunderstood or failed to consider pertinent facts of the dispute. The other party may respond to give its version on the request within 14 days of the receipt of the same. The DB shall deliberate upon the request, first to determine whether reconsideration of its report is justified and if so give its decision within a period of 28 days of the receipt of the request. In the event that DB does not consider any reconsideration of its report as justified, then the decision of DB for non-consideration of the request may be given within minimum possible time.

- c) The DB should allow a request for reconsideration only when the same is justified. If one party submits new evidence to the DB, the other party must be given an opportunity to review and respond to that evidence before the DB determines whether reconsideration of its report is warranted.
- d) Reconsideration should not be granted simply because one party either
 - i) does not like the report,
 - ii) wants to portray evidence in a different way,
 - iii) wants to present information that was available but not offered at the hearing, or
 - iv) wants to assert an additional argument.
- e) Rearguing the same issue on the same facts is not productive and the DB should respectfully decline to reconsider the decision.
- f) Each party should be permitted only one request for reconsideration for each DB report.
- g) An additional hearing may not always be needed for such reconsideration of any decision of the DB. The DB reviews any new evidence together with commentary from the parties and, if necessary, prepares a clarified or revised report that responds to the issues raised.

1.13. Advisory Opinions:

1.13.1 The model DB clause has a provision that "*If at any time the Parties so agree, they may jointly refer a matter to the DB for it to give its opinion. Neither Party shall consult the DB on any matter without the agreement of the other Party.*"

1.13.2. Advisory opinions may be gainfully used whenever the parties find they have an issue, which has duly been considered by them and they have formed their positions but before further hardening of the parties' positions, the Advisory opinions of the DB may be useful in settling the issues. Advisory opinions have been used when the parties disagree as to the interpretation of a specific provision of the contract. This process is quick and may be entirely oral and does not prejudice the opportunity for a DB hearing if the dispute eventually comes up.

1.13.3. The global experience shows that 'Advisory Opinions' have been successfully used on many projects to provide a quick insight into the DB's likely assessment of the relative merits of the parties' positions on a dispute.

1.13.4. Advisory opinions are an informal method of advising the parties on issues involved before they escalate into a dispute, provided both parties agree to seek an advisory opinion. The procedure for requesting and issuing advisory opinions should be first discussed with the DB at a meeting with the parties. Such a meeting need not be specially convened but could be in conjunction with a periodic site visit.

1.13.5. If both parties agree to request the DB for an 'advisory opinion' and the Contract between the parties does provide for a clause for seeking *advisory opinion* from the DB, the parties may submit a brief written statement and some documentation supporting their position to the DB and to the other party at the prescribed time prior to the meeting. Submissions in writing, though not mandatory, enable the DB to be prepared and educate itself on the issue.

1.13.6. The advisory meeting will consist of brief oral presentations by each party, followed by any questions from the DB, who will thereafter have an internal meeting among the members of DB to form their opinion. The meeting

is then reconvened with the parties and the DB provides an opinion in writing on the matter. In absence of unanimity among the Members of DB, the majority opinion will prevail.

1.13.7. Advisory opinions are based only upon information available at the time, subject to change later based upon further data, and are not to be used or referred to in future.

1.13.8. The opinion furnished by the DB is only advisory in nature and does not require an acceptance or rejection by either party. If however the dispute crops up and a hearing is held, the presentations by the parties and the advisory opinion by the DB are completely disregarded and the regular DB hearing procedure is followed.

1.13.9. When deciding whether a matter should be submitted for an advisory opinion, the parties should consider the complexity of the issue(s) involved. The parties and the DB should recognise that if the issues are more complex than can be realistically dealt with in an advisory opinion, the DB may decline to hear the same on an informal basis. In general, however, such an informal presentation of an issue and the subsequent DB opinion provides useful input in the negotiation process at minimal cost.

1.13.10. The system of Advisory opinions should generally be limited to merit issues only as a discussion of quantum is usually complex.

1.13.11. The DB's preliminary views by way of an advisory opinion on an issue can form a basis for the parties to negotiate a settlement without further assistance from the DB. In case of failure, the parties are not bound by their earlier presentations and the DB shall give its formal decision on the basis of subsequent presentations made by the Parties.

1.13.12. The process of issuing an advisory opinion will usually comprise of the following steps:

- i) The DB sets a date for presentation in consultation with the parties. This could be in conjunction with the next scheduled meeting, unless the matter is urgent and if so a special meeting may be held.

- ii) The parties may or may not submit a written summary of its position to the DB and the other party prior to the meeting. The parties need not submit comprehensive position papers or backup documentation.
- iii) At the meeting, each party presents its position, makes rebuttals, provides key contract documents, and responds to the DB's questions and requests.
- iv) The DB then meets in private until they agree on a response to the parties, which is given in writing. It is considered advisable that the DB keeps a record of its advisory opinion, including the reasoning, to ensure clarity and unanimity among the Board members.
- v) After the advisory opinion is delivered, the parties may ask for clarifications, which should be provided by the DB.
- vi) In the event that the DB is unable to formulate an opinion, then the DB will advise the parties accordingly. Nonetheless, this opportunity for the parties to state their positions in a clear, uninterrupted fashion, and with subsequent questions from the DB, may still be a useful step in resolving disputes. Advisory opinions are often sufficient to enable the parties to promptly resolve the dispute without a DB hearing.

1.13.13. If after hearing the parties' presentations, the DB comes to a conclusion that the dispute is too complex to issue an advisory opinion, then the parties should be advised accordingly, suggesting a regular DB hearing.

1.14. Resignation/Termination of Members/ Termination of DB:

1.14.1 Resignations

- a) The Dispute Board Agreement provides that the entire DB, or any Board member, may be terminated with agreement of both the parties.
- b) Any request by only one of the parties to one or more of the Board members to resign is not valid under the terms of the Contract. The Model Dispute Board Agreement also does not provide for this option. Still however maintaining the faith of the parties in the DB being important, the underlying reasons behind seeking the resignation must therefore be examined and remedial measures taken.
- c) It may happen that one of the parties is reluctant to refer disputes to a DB hearing. This may be because they have lost faith in the DB's impartiality. Board members need to take proactive measures to avoid this situation. If the Chairperson senses that this is a possibility, the situation should be investigated and everything possible done to address it, including discussions and correspondence with both parties for understanding their concerns and points of view.
- d) After thorough investigation and discussion among the Board members, if the DB concludes that despite the fact that none of the Board members have violated any principles of impartiality, yet both the contracting parties no longer trust the DB to be impartial, then the DB has lost much of its value and replacement of the entire DB with new Board members should be considered. In such a case, the entire DB should offer its resignation, in order to benefit the project's dispute resolution process.
- e) The decision to accept DB's resignation lies with the contracting parties, which should agree to any such action. In the event that the parties disagree as to whether the DB should be replaced, then the resignation is deemed not to be accepted. This is so that neither party is deprived of the benefit of the contractual dispute resolution process. The effective date of such an action must be contingent on the parties having selected new Board members and successfully establishing the replacement DB.

- f) When considering resignation, Board members may be concerned with issues such as the loss of members' project knowledge, the value of the members' experience, and how strongly the other party and/or the other Board members feel about resignation. Although these are significant reasons for the success of the DB process, they should not be overriding factors in the decision to resign.
- g) Members must carefully consider if their resignation will contribute to the success of the project and the process and resign if it could help the parties resolve their disputes without litigation, but resist any one party's attempt to gain an advantage over the other party. The primary consideration should be whether or not the Members of DB continue to enjoy the trust and confidence of the parties.
- h) In the event of resignation (or death, disability, or termination) of any Member, such Member shall be replaced in the same manner as the Member being replaced was to be appointed.
- i) If for any other reason, a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman either of the other Members) shall inform the parties and such non-serving Member shall be replaced in the same manner as the Member being replaced was to be appointed.
- j) Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board. Replacement shall be considered completed when the new Member signs the Dispute Board Agreement. Unless otherwise agreed by the parties, throughout any replacement process, the Members not being replaced shall continue to serve and the DB 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 DB shall not conduct a hearing nor issue a decision until the replacement is completed.

1.14.2 Termination of one or more members of DB:

- a) The model DB clause and the Dispute Board Agreement provide that neither the Employer nor the Contractor can unilaterally terminate any appointed Board member or the DB itself. Individual Board member or the entire DB can be terminated only by the agreement of both parties.
- b) This provision prevents one party from changing the makeup of the DB just because they don't like the decisions. The other party may not want to terminate the DB or any of the Board members when the DB has been meeting with the parties for some time and is familiar with the parties and the work of the contract. If the party wanting to terminate the DB or any Board member cannot convince the other party to agree to the termination, that party may stop participating (refuse to attend meetings and/or hearings), rather than continuing to use the process and simply reject unfavorable future DB decisions.
- c) In such a situation, the parties can still solve their disputes with arbitration/litigation. The parties must decide whether they would rather litigate, or whether they believe it to be more in their interest to proceed with the existing DB or using a new DB or a new Board member.
- d) Resolution of disputes is much more likely when both parties trust the DB. This is more important than keeping a DB simply because of its knowledge of the participants and the project.
- e) If an entire DB is replaced, either due to resignation or dismissal by the parties, the DB having been replaced should not perform any further work other than completing any unfinished DB reports on previously referred disputes for which hearings had been completed.
- f) The problems involved with removing Board members emphasise the importance of initially selecting impartial and neutral Board members by researching backgrounds, past experience, etc. of prospective members.

1.14.3 Termination of DB Functions:

Unless the DB has been terminated earlier for any reason, the DB functions shall stand terminated when the discharge referred to in Sub-Clause providing for discharge/final accounts (FIDIC/MDB Sub-Clause 14.12) shall have become effective.

1.15. Reforms needed, especially in Employer's Organisation

- a) It has been observed that the DB decisions are rejected, mostly by Employer and sometimes by Contractor, without much consideration/deliberation. In many cases it may either be because of inadequate delegation of powers or because of a fear psychosis - fear of Audit and/or Vigilance. The matter then goes into arbitration and in most cases the DB decision is upheld and yet in most cases, the matter goes into Court but seldom the award is set aside. The awarded payments to be made eventually get inflated because of the interest liability, which is quite significant because of the long time gap from the time DB gave its decision and its eventual payment. Besides, avoidable time and effort is spent by the Officers of the departments.
- b) In the end analysis, it is the project that suffers. If the DB decision is accepted in good time and the due payment released, the money would become available to the Contractor for progressing with the work.
- c) To overcome this mindset issue, which is causing harm to the timely progress of the projects, the Employer's Organisation should have an "Empowered Committee" for considering and accepting the 'DB decisions' to ensure that the DB decisions are not rejected routinely.

INDEX OF APPENDICES

(Standard Operating Procedures for DBs)

<u>APPENDIX No. & TITLE</u>	<u>PAGES</u>
A. Model DB Clause	50 - 59
B. Dispute Board Agreement: -	
B-1. General Conditions of Dispute Board Agreement	60 - 69
B-2. Dispute Board Agreement with Parties for a 3-person DB	70 - 71
B-3. Dispute Board Agreement with Parties for a 1-person DB	72 - 73
C. Format for Declaration by each prospective Member of DB	74
D. Code of Ethics for Members of DB	75 - 80
E. Grounds which may render a prospective Member ineligible for appointment to a Dispute Board	81 - 82
F. Grounds as may give rise to doubt about Independence and Impartiality of a prospective Member of Dispute Board	83 - 84

Model DB Clause:

A clause for the constitution and operation of DB is necessary to be incorporated in the Contract between the Employer and the Contractor. Such a clause, which would cover the DB process as well as arbitration in the event of either party being dissatisfied with the DB's decision, needs to reflect the SOP for the DB. It needs to clearly spell out the role and responsibilities of all concerned with the operation of DB. A draft Model Clause for Dispute Board is given here under. The Clause would have a number in the Contract document and the same is denoted here as "X", followed by Sub-Clauses denoted here as 'X.1', 'X.2' and so on.

The Clause, as follows, will form part of bid-document/contract. It refers to several other standard provisions of contract. The clause number of such standard provisions will require to be filled in this clause by the employer. The locations of the same are identified and given in the "*Instructions for Adoption of the Model Clause for Dispute Board*" at the end of this Model Clause. (In case the bid document is based on the FIDIC Red Book or Harmonized Conditions of Contract for Construction by FIDIC/MDB Conditions of Contract, the clause numbers are duly mentioned in brackets for ready reference, wherever relevant.)

Draft Model Clause for Dispute Resolution in Construction Contracts: -**X. Claims, Disputes and Arbitration****X.1 Contractor's Claims:**

- a) If the Contractor considers himself to be entitled to any Extension of Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given within 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.
- b) The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.
- c) The Contractor shall keep such contemporary records as may be necessary to substantiate any claim. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records.

The Contractor shall permit the Engineer to inspect all these records, and shall submit copies to the Engineer if so instructed.

- d) Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:
 - i) this detailed claim shall be considered as interim;
 - ii) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
 - iii) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.
- e) Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and agreed by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. The Engineer may also request any further particulars as considered necessary, but shall nevertheless give his response on the principles of the claim within such time.
- f) Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provisions of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.
- g) The Engineer shall proceed in accordance with Sub-Clause ____ (FIDIC/MDB Sub-Clause 3.5) [*Determinations*] to agree or determine (i) the Extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause ____ (FIDIC/MDB Sub-Clause 8.4) [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

- h) The requirements of this Sub-Clause are in addition to those of any other Clause/Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim.

X.2 Appointment of the Dispute Board:

- a) Disputes shall be adjudicated by a Dispute Board (DB) in accordance with Sub-Clause X.4 [*Obtaining Dispute Board's Decision*]. The Parties shall jointly appoint a DB by the date stated in the Appendix to Bid.
- b) The DB shall comprise, as stated in the Appendix to Bid, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DB shall comprise three persons.
- c) If the DB is to comprise three members, each Party shall nominate one member for the approval of the other Party. The third Member, to act as Chairman DB, shall be selected by these two members and approved by the parties.
- d) However, if a list of potential members is included in the Bid Document, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DB.
- e) The Board shall be established when an agreement between the Parties and either the sole member or each of the three members shall be signed as per the General Conditions of Dispute Board Agreement contained in the Appendix to this Clause, with such amendments as are agreed between them. The payment of IPCs would start only after the DB as aforesaid is established and is in position.
- f) The terms of remuneration of either the sole member or each of the three members shall be mutually agreed upon by the Parties when agreeing upon the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.
- g) If the DB considers a need for consultation with an expert, the DB shall identify the expert and formulate a proposal for its appointment, in consultation with both the parties, indicating the number of sittings expected for consultations and the fee to be paid to the expert. Such Fees/Expenses of the expert shall be shared equally by both parties.

- h) If at any time the Parties so agree, they may jointly refer a matter to the DB for it to give its opinion. Neither Party shall consult the DB on any matter without the agreement of the other Party.
- i) The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.
- j) In the event of death, disability, termination or resignation of any Member, such Member shall be replaced in the same manner as the Member being replaced was to be appointed. If for whatever other reason a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman, the other Member) shall inform the parties and such non-serving Member shall be replaced in the same manner as the Member being replaced was to be appointed.
- k) Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board. Replacement shall be considered completed when the new Member signs the Dispute Board Agreement. Throughout any replacement process, the Members not being replaced shall continue to serve and the DB 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 DB shall not conduct a hearing nor issue a Decision until the replacement is completed, unless otherwise agreed by both parties.
- l) Unless otherwise agreed by both Parties, the DB shall cease to exist when either the contract is terminated under Clause __ (FIDIC/MDB Clause 15.2 or 16.2) [Termination by Employer or by Contractor] or the discharge referred to in Sub-Clause ___ (FIDIC/MDB Sub-Clause 14.12) [*Discharge*] shall have become effective.

X.3 Failure in Constitution of the Dispute Board:

If any of the following happens, namely:

- i) the Parties fail to agree upon the appointment of the sole member of the DB by the date stated in the first paragraph of Sub-Clause X.2,
- ii) either Party fails to nominate a member (for approval by the other Party) of a DB of three persons by such date,
- iii) either party fails to approve the nominee of the other party as a member of DB,

- iv) 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,
- v) the Parties fail to agree upon the appointment of the third member of the DB, as agreed upon by the two nominee members within 14 days, or
- vi) the Parties fail to agree upon the appointment of a replacement person within 28 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 upon the request of either or both of the Parties, such Member shall be nominated promptly by the Appointing Authority specified in the Appendix to Bid. This appointment shall be final and conclusive.

X.4 Obtaining Dispute Board's Decision:

- a) If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, whether during execution or after completion of the work or after repudiation or termination of the Contract, including any dispute as to any action, inaction, certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.
- b) Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract, despite any dispute being under consideration.
- c) For a DB of three persons, the DB shall be deemed to have received such reference on the date when it is received by the chairman of the DB.
- d) Both parties shall promptly make available to the DB all such additional information, further access to the Site, and appropriate facilities, as the DB may require for the purposes of making a decision on such dispute.
- e) Within 84 days after receiving such reference, or within such other period as may be proposed by the DB and agreed by both Parties and after hearing the parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause.
- f) Either party may seek a clarification, in writing, on a Decision of DB within a period of 14 days from the receipt of the same. The DB shall respond in writing to the same within 14 days of the receipt of the request.

- g) Either party may request the DB in writing, with a copy to the other party, for Reconsideration of any Decision of DB within a period of 14 days from the receipt of the same, duly supported with reasoning of new evidence or a reasonable demonstration that the DB misunderstood or failed to consider pertinent facts of the dispute. The other party may respond to give its version on the request within 14 days of the receipt of the same. The DB shall deliberate upon the request, first to determine whether reconsideration of its report is justified and if so give its decision within a period of 28 days of the receipt of the request.
- h) The decision of the DB 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 and any intent of commencement of arbitration will not be a ground for its non-implementation.
- i) If either Party is dissatisfied with the DB's decision, then the Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction with the Decision and its intention to commence arbitration, with a copy to the Engineer, as hereinafter provided, as to the matter in dispute. If the DB fails to give its decision within the period of 84 days, or within such other period as agreed by both Parties, after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its intent to commence Arbitration.
- j) 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 X.7 [*Failure to Comply with Dispute Board's Decision*] and 'Sub-Clause X.8 [*Dispute in the absence of a Dispute Board*], 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. Provided further that the notice for commencement of Arbitration, corresponding to any such dissatisfaction shall become effective only after the Decision of DB has been implemented.
- k) If the DB has given its decision as to a matter in dispute to the Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision shall become final and binding upon both the Parties.

- l) All Decisions which have become final and binding shall be implemented by the parties forthwith, such implementation to include any relevant action by the Engineer.
- m) If the decision of the DB, against which dissatisfaction has been expressed by one party, needs for its implementation a payment by one Party, and the party requires an appropriate security for such payment, the DB may allow the same.
- n) Any payment due to be made by the Employer to the Contractor in terms of any decision of DB shall qualify as a 'Payment' under the relevant Contract-Clause __ (FIDIC/MDB Sub-Clause 14.7) [*Payment*] and any default in such a payment will attract the provisions of the relevant Contract-Clause __ on delayed payment (FIDIC/MDB Sub-Clause 14.8) [*Delayed Payment*]. All other remedies as per Contract Clause __ (FIDIC/MDB Sub-Clause 16.1 & 16.2) shall also be available to the Contractor.
- o) Any payment due to the Employer from the Contractor in terms of any Decision of DB shall be recovered from the Payments due to the Contractor.
- p) If a decision of DB gets revised in subsequent arbitration/litigation, the amount becoming refundable, if any, shall carry interest at the rate applicable for delayed payments as provided in the Appendix to Bid.
- q) Whether or not a Decision has become final and binding upon the Employer and the Contractor, it 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 Decision relates.

X.5 Amicable Settlement:

Where notice of dissatisfaction has been given under Sub-Clause X.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, provided that the Arbitration proceedings can begin only after the Decision of the DB has been implemented.

X.6 Arbitration:

(a) Unless settled amicably, any dispute in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration.

Unless otherwise agreed by both Parties:

- i) A dispute with an Indian contractor shall be finally settled under the Arbitration and Conciliation Act 1996, or any statutory amendment thereof. In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. However, if agreed to by both the parties, the disputes shall be settled in accordance with the Arbitration and Conciliation Act 1996.
 - ii) The arbitral tribunal shall consist of 3 (three) Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed later, the Presiding arbitrator shall be appointed by the Appointing Authority as specified in the Appendix to Bid. For the purposes of this Sub-Clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juridical person created under Indian law as well as a joint venture between such a Contractor and a Foreign Contractor. The term "Foreign Contractor" means a contractor who is not registered in India and is not a juridical person created under Indian Law.
 - iii) The arbitration shall be conducted in the language for communications defined in Sub-Clause ____ (FIDIC/MDB Sub-Clause 1.4) [*Law and Language*].
- (b) 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 DB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.
- (c) Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DB to obtain its decision, or to

the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DB shall be admissible in evidence in the arbitration.

- (d) Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DB shall not be altered by reason of any arbitration being conducted during the progress of the Works.
- (e) The award of the majority of Arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its pleadings as also the share of fees and expenses paid to the Arbitrators shall be borne by each party itself.

X.7 Failure to Comply with Dispute Board's Decision:

In the event that a Party fails to comply with any decision of the DB, whether final and binding or not, then the other Party, who has not shown dissatisfaction with that decision, may, without prejudice to any other rights it may have, refer the failure itself to arbitration for compliance under Sub-Clause X.6 [*Arbitration*]. Sub-Clause X.4 [*Obtaining Dispute Board's Decision*] and Sub-Clause X.5 [*Amicable Settlement*] shall not apply to this reference.

X.8 Dispute in the absence of a Dispute Board:

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 DB in place for any reason or the DB is not in a position to conduct a hearing or issue a decision as per Clause X.2.(k), then -

- (a) Sub-Clause X.4 [*Obtaining Dispute Board's Decision*] and Sub-Clause X.5 [*Amicable Settlement*] shall not apply, and
- (b) the dispute may be referred directly to arbitration under Sub-Clause X.6 [*Arbitration*].

INSTRUCTIONS FOR ADOPTION OF THE MODEL CLAUSE
FOR DISPUTE BOARD.

The model clause for Dispute Board, as will form part of bid-document/contract, refers to several other standard provisions of contracts. The clause number of such standard provisions will require to be filled in this clause by the employer and the locations of the same are identified as below. (In case the bid document is based on the FIDIC Red Book/MDB Conditions, the clause numbers are duly mentioned herein below)

- i) The Clause for dispute board (including arbitration) has been numbered as 'X', and the same will be replaced by the concerned clause number as appearing in the contract/bid document. (FIDIC Red Book/MDB Clause 20)
- ii) The sub-para (g) under sub-clause X.1 refers to the clause relating to 'Determinations by the Engineer' (FIDIC Red Book/MDB Sub-Clause 3.5) and to the clause relating to 'Extension of Time for Completion' (FIDIC Red Book/MDB Sub-Clause 8.4). The relevant clause numbers as per bid document shall be filled in.
- iii) The last sub-para under Sub-Clause X.2 (sub-para (l)) refers to the clauses relating to, termination of contract by parties (FIDIC/MDB Clause 15.2 or 16.2) [Termination by Employer or by Contractor] and 'Discharge' (FIDIC Red Book/MDB Sub-Clause 14.12). The relevant clause numbers shall be filled in.
- iv) The Sub-Clause X.2 (sub-para a) & b)) and Sub-Clause X.3 (last sub-para) refer to 'Appendix to Bid', which sometimes is named differently by some organisations and if so the different name shall be substituted in place of 'Appendix to Bid'.
- v) The sub-para (o) under sub-clause X.4 refers to clause relating to 'Payment' (FIDIC Red Book/MDB Sub-Clause 14.7) [*Payment*] and to the clause relating to 'Delayed Payment' (FIDIC Red Book/MDB Sub-Clause 14.8) and also to the clause relating to 'Suspension and Termination by Contractor' (FIDIC Red Book/MDB Sub-Clauses 16.1 & 16.2). The relevant clause numbers as per bid document shall be filled in.
- vi) The sub-para (a) i) under Sub-Clause X.6 refers to the applicable law of arbitration, which in the case of most contracts in India would be the Arbitration and Conciliation Act 1996. The same would require to be substituted by the name of the applicable law, where needed.
- vii) The sub-para (a) iii) under Sub-Clause X.6 refers to the clause relating to 'Law & Language' and the clause number of the same would require to be filled in. (FIDIC Red Book/MDB Sub-Clause 1.4)

APPENDIX TO DB CLAUSE

[See Sub-Clause X.2 (e) of Model DB Clause (Appendix-A)]

General Conditions of Dispute Board Agreement**1. Definitions**

Each "Dispute Board Agreement" is a tripartite agreement by and between:

- (a) the "Employer";
- (b) the "Contractor" and
- (c) the "Member" who is defined in the Dispute Board Agreement as being:
 - (i) the sole member of the "DB" 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 "DB" (or "Dispute Board") and, where this is the case, the other two persons are called the 'Other Members'.
- (d) 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 Board Agreement, which incorporates this Appendix.
- (e) In the Dispute Board Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

2. General Provisions

- a) Unless otherwise stated in the Dispute Board Agreement, it shall take effect on the latest of the following dates;
 - i) the Commencement Date defined in the Contract,
 - ii) when the Employer, the Contractor *and* the Member have each signed the Dispute Board Agreement, or
 - iii) when the Employer, the Contractor and each of the Other Members (if any) have respectively signed a Dispute Board Agreement.
- b) When the Dispute Board Agreement has taken effect, the Employer shall inform all the Members accordingly with intimation to the Contractor.
- c) 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 Board Agreement shall terminate upon the expiry of this period.

- d) The Board shall terminate its regular activities when the Defects Liability Period (or, if there are more than one, the Defects Liability Period expiring last) has expired, and when the Board has communicated to the parties and the Engineer its Decisions on all the disputes previously referred to it.
- e) After the Board has terminated its regular activities as provided by the previous para, the Board shall remain available to process any dispute referred to it.

3. Undertaking

- a) The Member undertakes and agrees to perform these duties in accordance with the terms of the Contract, the Rules and the terms of this Agreement and 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 undertaking and agreement of impartiality and independence.
- b) When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is:
 - i) experienced in the work which the Contractor is to carry out under the Contract,
 - ii) experienced in the interpretation of contract documentation, and
 - iii) fluent in the language for communications defined in the Contract.

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 Board Agreement;
- (b) shall not have any of the relationships with the parties and/or with the contract or the existence of a direct or indirect interest in the contract, as listed in the Appendix-E;
- (c) 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 Board Agreement;

- (d) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Board 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, keeping in view the various grounds listed in the Appendix-F;
- (e) not, for the duration of the Dispute Board 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);
- (f) comply with the annexed procedural rules and with Sub-Clause ____ (FIDIC Red Book/MDB Clause 20,4) of the Conditions of Contract;
- (g) 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;
- (h) 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 Board Agreement;
- (i) ensure his/her availability for all site visits and hearings as are necessary;
- (j) 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;
- (k) treat the details of the Contract and all the DB'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);
- (l) 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); and
- (m) not to assign or subcontract the Dispute Board Agreement.

5. General Obligations of the Employer and the Contractor

- a) 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, otherwise than in the normal course of the DB's activities under the Contract and the Dispute Board 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.
- b) 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):
 - i) be appointed as an arbitrator in any arbitration under the Contract;
 - ii) be called as a witness to give evidence concerning any dispute before arbitrator(s) appointed for any arbitration under the Contract; or
 - iii) 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,
- c) 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.
- d) For any scheduled visit of a member to attend a meeting/hearing or for a periodic visit, the Contractor shall provide an advance towards the expenses to be incurred by the Member if so desired by the said member and such advance be adjusted while making payment against the relevant bill.
- e) The Contractor shall furnish to each Member one copy of all documents which the Board may request including Contract Documents, progress reports, variation orders, and other documents pertinent to the performance of the Contract and in cooperation with the Employer, coordinate the Site visits of the Board, including conference facilities, and secretarial and copying services.
- f) The Employer will also ensure that whenever so desired by the DB in the process of consideration of a dispute, the Engineer's representative at work site shall provide necessary assistance in any assessment based on the prevailing site conditions and information on records.

6. Payments

The Member shall be paid as follows:

- a) A retainer fee per calendar month, which shall be considered as payment in full for:
 - (i) being available on 14 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/her duties; and
 - (iv) all services performed hereunder except those referred to in subparagraphs (b) and (c) of this Clause.
- b) The retainer fee shall be paid with effect from the first day of the calendar month in which the Dispute Board 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 last day of the calendar month in which the Member resigns or the Dispute Board Agreement is otherwise terminated or till the completion of the Defects Liability Period, whichever is earlier.
- c) 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
- d) 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 ten percent of the daily fee referred to in sub-paragraph (c) of this Clause. For items of expenses, which are less than ten percent of the daily fee, self-certification by the Member shall suffice.
- e) The retainer and daily fees shall be as specified in the Dispute Board Agreement. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months; thereafter the retainer and daily fee shall be

enhanced by 10% for the next 12 calendar months and further enhanced by the same value every 12 calendar months.

- f) Payments to the Board Members shall be shared equally by the Employer and the Contractor. All invoices shall be sent to the Contractor with a copy to the Employer.
- g) The Member shall submit invoices for payment of the monthly retainer fee on a quarterly basis. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a site visit or a hearing. If required, a Member may furnish invoices claiming advance of airfare, hotel expenses etc., which would be adjusted in the Bills to be submitted on the conclusion of the corresponding meeting/site visit.
- h) The Contractor shall pay Members' invoices within 28 calendar days after receipt of such invoice and shall invoice the Employer (through the monthly statements to be submitted in accordance with the Sub-Clause ___ 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 Contract for other payments to the Contractor.
- i) If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Board 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 DB 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 ____ (FIDIC/MDB Subclause 14.8) of the Conditions of Contract.
- j) 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.
- k) After the Board has terminated its regular activities, the Board shall remain available to process any dispute referred to it. In case of such a referral, Board Members shall receive all payments as provided above except that the retainer fee would be payable at reduced rate (50 %) from the first day of the month in which a dispute is referred till the last day of the month in which the DB

issues the decision which shall be made within the time as prescribed or as enlarged by consent of both parties.

7. Termination

- a) At any time: (i) the Employer and the Contractor may jointly terminate the Dispute Board Agreement by giving 42 days' notice to the Member; or (ii) the Member may resign as provided for in Clause 2.
- b) If the Member fails to comply with the Dispute Board 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,
- c) If the Employer or the Contractor fails to comply with the Dispute Board 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 both of them.
- d) 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.
- e) the DB shall cease to exist when either the contract is terminated by either of the parties or the *Discharge* shall have become effective.

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 any fees and expenses received by the Member, for proceedings or decisions (if any) of the DB which are rendered void or ineffective.

9. Disputes

- a) Any dispute or claim arising out of or in connection with this Dispute Board Agreement, or the breach, termination or invalidity thereof, shall be finally settled by a sole arbitrator appointed in accordance with the Rules of Arbitration of the Institute mentioned in the Contract. In case no Institute is mentioned in the Contract, then the Arbitrator shall be appointed by the Employer.
- b) 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 non-defaulting party to take the measures set forth, respectively, in Clause __ or Clause __.(FIDIC/MDB Sub-clauses 16.1 and 16.2)

Annex PROCEDURAL RULES

1. Unless otherwise agreed by the Employer and the Contractor, the DB shall make the first visit to the site within 30 days of its formation or the commencement of the work, whichever is later. The DB shall thereafter, 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 DB, 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 DB, the Employer and the Contractor, or in the absence of agreement, shall be decided by the DB. The purpose of site visits is to enable the DB to become and remain acquainted with the progress of the Works and of any actual or potential problems or disputes.

3. Site visits shall be attended by the Employer, the Contractor and the Engineer and shall be coordinated by the Employer in co-operation with the Contractor. At the conclusion of each site visit and before leaving the site, the DB 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 DB one copy of all documents which the DB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DB and the Employer or the Contractor shall be endorsed to the other Party. If the DB comprises three members, the Employer and the Contractor shall send copies of these requested documents and communications to each of the members.

5. If any dispute is referred to the DB in accordance with Sub-Clause ____ (FIDIC/MDB Sub Clause 20.4) of the Conditions of Contract, the DB shall proceed in accordance with Sub-Clause ____ (FIDIC/MDB Sub Clause 20.4) and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DB 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. Conduct of Proceedings:

a) 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 DB may require that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing. The parties shall submit, in so far as possible, agreed statements of the relevant facts.

b) 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 Decisions 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 more than 84 days or any extended period as mutually agreed with the Employer and the Contractor.

c) 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 utilized by the Board. Private sessions of the Board may be held at any cost effective location convenient to the Board.

d) The Employer, the Engineer and the Contractor shall be given the opportunity to have representatives at all hearings.

e) After the hearings are concluded, the Board shall meet privately to formulate its Decision. All Board deliberations shall be conducted in private, with all Members' individual views kept strictly confidential. The Board's Decision, together with an explanation of its reasoning shall be submitted in writing to both parties and to the Engineer. The Decision shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

7. Except as otherwise agreed in writing by the Employer and the Contractor, the DB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than the representatives of the Employer, the Contractor and the Engineer, and to proceed in the absence of any party who the DB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.

- 8.** The Employer and the Contractor empower the DB, among other things, to:
- (a) establish the procedure to be applied in deciding a dispute,
 - (b) decide upon the DB' 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,
 - (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute, and
 - (i) seek from the Engineer's representative at work site necessary assistance in any assessment based on the prevailing site conditions and information on records.
- 9.** The DB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties.
- 10.** The DB shall make and give notice of its decision in accordance with Sub-Clause __ (FIDIC/MDB Sub-Clause 20.4), or as otherwise agreed by the Employer and the Contractor in writing. If the DB comprises three persons:
- (a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;
 - (b) it shall endeavor to reach a unanimous decision. If this proves impossible, the decision shall be made by a 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 either the Employer or the Contractor does not agree that they do so.

DISPUTE BOARD AGREEMENT WITH PARTIES

[for each member of a three-person DB]

Name and details of Contract

Name and address of Employer

Name and address of Contractor

Name and address of Member

Whereas

- (a) 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 "DB" [*and desire the member to act as Chairman of the DB*]
- (b) Clause X. of the General Conditions of the Contract and the Appendix to Bid to said Conditions provide for the establishment and operation of a Dispute Board (the Board)

The Employer, the Contractor and the Member jointly agree as follows:

1. The conditions of this Dispute Board Agreement comprise the "General Conditions of Dispute Board Agreement", which is appended to the General Conditions of the Contract, and the following provisions. In these provisions, which include amendments and additions to the General Conditions of Dispute Board Agreement, words and expressions shall have the same meaning as are assigned to them in the General Conditions of Dispute Board Agreement.

2. [Details of amendments to the General Conditions of Dispute Board Agreement, if any. For example:

In the procedural rules annexed to the General Conditions of Dispute Board Agreement, Rule___is deleted and replaced by “.....”]

3. In accordance with Clause 6 of the General Conditions of Dispute Board Agreement, the Member shall be paid as follows:

A retainer fee of Rs..... per calendar month,

A daily fee of Rs..... per day.

4. 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 Board Agreement*, the Member undertakes to serve, as described in this Dispute Board Agreement, as one of the three persons who are jointly to act as the DB.

5. 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 Board Agreement.

6. This Dispute Board Agreement shall be governed by relevant Indian laws.

SIGNED by	SIGNED by	SIGNED by
for and on behalf of the Employer	for and on behalf of the Contractor	the Member
in the presence of	in the presence of	in the presence of
Witness:.....	Witness:.....	Witness:.....
Name:.....	Name:.....	Name:.....
Address:.....	Address:.....	Address:.....
Date:.....	Date:.....	Date:.....

DISPUTE BOARD AGREEMENT WITH PARTIES

[for a one-person DB]

Name and details of Contract
Name and address of Employer
Name and address of Contractor
Name and address of Member

Whereas

- (a) the Employer and the Contractor have entered into the Contract and desire jointly to appoint the member to act as sole adjudicator, who is also called the “DB”.
- (b) Clause X. of the General Conditions of the Contract and the Appendix to Bid to said Conditions provide for the establishment and operation of a Dispute Board (the Board).

The Employer, the Contractor and the Member jointly agree as follows:

1. The conditions of this Dispute Board Agreement comprise the “General Conditions of Dispute Board Agreement”, which is appended to the General Conditions of the Contract, and the following provisions. In these provisions, which include amendments and additions to the General Conditions of Dispute Board Agreement, words and expressions shall have the same meaning as are assigned to them in the General Conditions of Dispute Board Agreement.

2. [Details of amendments to the General Conditions of Dispute Board Agreement, if any. For example:

In the procedural rules annexed to the General Conditions of Dispute Board Agreement, Rule___is deleted and replaced by “.....”]

3. In accordance with Clause 6 of the General Conditions of Dispute Board Agreement, the Member shall be paid as follows:

A retainer fee of Rs..... per calendar month,

A daily fee of Rs..... per day.

4. 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 Board Agreement, the Member undertakes to act as the DB (as adjudicator) in accordance with this Dispute Board Agreement.

5. 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 Board Agreement.

6. The Dispute Board Agreement shall be governed by relevant Indian laws

SIGNED by	SIGNED by	SIGNED by
for and on behalf of the Employer	for and on behalf of the Contractor	the Member
in the presence of	in the presence of	in the presence of
Witness:.....	Witness:.....	Witness:.....
Name:.....	Name:.....	Name:.....
Address:.....	Address:.....	Address:.....
Date:.....	Date:.....	Date:.....

Format for Declaration by each prospective Member DB

- 1) Name:
- 2) Contact Details:
- 3) Qualification, Expertise and Experience in the type of work involved and understanding of the type of contract:
- 4) Prior Experience of DB/DAB/DRB (Including Experience in Arbitration):
- 5) Number of ongoing DBs/Arbitration Cases:
DB/DAB/DRB:
Arbitration Cases:
- 6) Relationships, if any, that could lead to a perception of bias, including previous involvement with the project and/or any of the parties directly / indirectly involved and/or their key project personnel or anticipation of future assignments with either party that could influence impartiality:
- 7) Circumstances which are likely to affect availability during the anticipated duration of DB activities and ability to devote the time needed for the same:

I confirm to have read the “General Conditions of Dispute Board Agreement” and I undertake to abide by the same.

Signature of the prospective Board Member

Note: Please use separate sheets wherever necessary.

The DB Code of Ethics

The DB's role makes it essential that all Board members be trusted implicitly by the contracting parties. This calls for establishment of a Code of Ethics for the conduct of the Board Members to instill confidence of contracting parties in the DB process, which in turn demands the faith of contracting parties in the impartiality and independence of Board members.

The following are the fundamental tenets of the code to be observed and practiced by each member of the Board:

- TENET 1.** To disclose any interest or relationship, as a continuing obligation throughout the life of the DB that could possibly be viewed as affecting impartiality or that might create an appearance of partiality or bias.
- TENET 2.** To be above reproach and to avoid even an appearance of a conflict of interest.
- TENET 3.** To follow the DB operating procedures faithfully and conscientiously in discharge of the functions and to refrain from any of the undesirable acts of commissions and omissions to uphold the individual as well as the collective dignity and honour of DB members, during the entire life of a DB.
- TENET 4.** Not to use information acquired during DB activities for personal advantage, or divulge any confidential information to others unless allowed by the parties.

The above tenets are further elaborated hereunder-

TENET 1:

To disclose any interest or relationship, as a continuing obligation throughout the life of the DB that could possibly be viewed as affecting impartiality or that might create an appearance of partiality or bias.

With a view to protecting the credibility of the DB, it would be necessary that the disclosure of interests or relationships between a Board member and a party involved, which includes the owner/employer and contractor in the contract that may create an appearance of partiality or bias is made right in the beginning and also at any time during the life of DB whenever any such interest/relationship arises. It is

essential that Board members are perceived by both parties as independent individuals, competent to make impartial decisions and are not influenced by any member's relationship with other parties to the dispute. More specifically, the Board Members need to meticulously practice the following.

The Board Members -

1. Must not have any financial interest in any party directly or indirectly involved (The term "party indirectly involved in the project" includes the construction manager, subcontractors of any tier, suppliers, designers, architects, engineers and other professional service firms, consultants to the project, et al) in the project, or a financial interest in the contract or the project, except for payment for service on the DB. "Financial interest" includes, for example, the beneficial ownership of shares in a party, whether held personally or by family members, or in legal arrangements such as trusts, partnerships, other companies or the like. The intention is that a member must not profit, however indirectly, from the results of DB service except by payment established under the DB arrangements.
2. Must disclose, in writing to both parties prior to appointment to the DB, all current and previous employment by, or financial ties to, any party directly or indirectly involved in the project, including consultancy services on other projects. All previous and current service as a Board member, mediator, or arbitrator pursuant to other contracts involving one or more of the parties (or a constituent part of any of the parties) also must be disclosed. Full disclosure in advance of appointment will ensure that each party can assess and become satisfied that such contact will not affect the independence and impartiality of the member's service.
3. Must disclose, in writing to both parties prior to appointment, any and all professional or personal relationships, during past three years, with any director, officer, or employee of any party directly or indirectly involved in the project, and any prior involvement in the project to which the contract relates. Persons with the depth of experience desired for DB service often will have had some previous professional contact with one or more of the parties. Disclosure of relationships is to ensure that all parties are made aware of any non-financial relationships that might be perceived as affecting impartiality or independence. Examples would include a family relationship, whether by birth or marriage; employment of a relative; or common membership on a board of directors of another company or organization.

4. Must not, while serving on a DB, have an employment relationship in any capacity, including either as full-time or part-time employee, as a consultant with parties involved in the contract. Any such employment relationship with one of the parties directly involved in the contract is strictly prohibited.
5. Must not, while serving on a DB, engage in discussions or make any agreement regarding future employment relationships, either as a direct employee, as a consultant, or otherwise have any such discussions with one of the parties directly or indirectly involved in the contract.
6. Must disclose to the parties and to fellow Board members, in writing, any fact or circumstance that might be such as to cause either party to reasonably question their continued impartiality, keeping also in view the various grounds listed at Appendix-F.
7. As with each aspect of disclosure, the standard of conduct must be such that a member not only remains independent and impartial, but also always be perceived to be such. Disclosures must include any approach that could be perceived by either party to the contract as an attempt to influence the member's independence or impartiality.

TENET 2:

To be above reproach and to avoid even an appearance of a conflict of interest.

1. The Board Members have to conduct themselves in a manner as below -
 - a) The conduct of each of the Board members shall be above reproach. Even the appearance of a conflict of interest shall be avoided.
 - b) Not accept, being ineligible, to be a Board member in case of existence of any of the relationships with the parties or counsel and/or with the dispute or the existence of a direct or indirect interest in the dispute, as listed at Appendix-E.
 - c) Be available for the meetings at short notice; and find time for visits to the project site as well as for the meetings of DB with the parties or among DB members themselves.
 - d) Board members must avoid giving any appearance of impropriety in communications with the parties and to abstain from any ex parte communications. (Board members must be sensitive to the possibility that

even the most innocent of comments can be perceived by a party as an indication of bias. Comments at a DB meeting such as, "I have known the contractor's project manager for years, and he knows what he is talking about," do not instill trust and confidence in the process from the perspective of the employer's representatives. Board members are appointed to undertake a serious task: to render reports on issues that may have important consequences for either or both parties.)

- e) It is essential that the members of DB behave in a serious and professional manner in all dealings with the parties. Accordingly, Board members must refrain from private conduct that might give rise to doubts regarding their capability to discharge the task of serving on a DB.
- f) When in surroundings where a member is likely to be known by others in addition to the parties, a Board member must behave with discretion and in a manner befitting a person to whom the parties have committed in confidence matters of importance.

TENET 3:

To follow the DB operating procedures faithfully and conscientiously in discharge of the functions and to refrain from any of the undesirable acts of commissions and omissions to uphold the individual as well as the collective dignity and honour of DB members, during the entire life of a DB.

1. The Board Members' commitment to follow the laid down DB operating procedures will be greatly helpful in creating an atmosphere of confidence.
2. Board members shall conduct meetings and hearings in an expeditious, diligent, orderly and impartial manner. When appropriate during the hearing, questions may be asked where further explanation, information and clarifications are necessary. The DB must ensure that each party is permitted a reasonable opportunity for fully presenting its case and in responding to the opposing party's case. The goal of the hearing is to provide a forum for a full, impartial and complete discussion of the dispute.
3. The DB shall impartially consider all disputes referred to it. Reports shall be based solely on the provisions of the contract documents, the facts of the dispute and prevailing law. This also requires that members act without favor to either party to the dispute. The report needs to be professional, objective and impersonal.

(Criticising a party's actions, personnel or procedures has no place in a DB report, and will only lead to feelings that the DB is biased against the recipient of such criticism.)

4. Members must make every effort to achieve unanimity of opinion with the other members regarding disputes referred to the DB.
5. The DB should adhere to the time period stipulated in the contract in which the DB is to render its decision. However, extensions may be sought exceptionally in very complicated disputes and referrals.
6. The Board Members will be discrete so as to avoid any impropriety like:
 - a) Ex parte communication with the parties except as provided for in the DB's Operating Procedures.
 - b) Private meetings or other private communications with one of the contracting parties.
 - c) Giving advice on construction means or methods or contract administration.
 - d) Making derogatory comments on the contract, the project, or the actions or inactions of the parties.
 - e) Criticism of the design or constructability of the project.
 - f) Criticism or disparagement of any party or other Board member.
 - g) Prejudging or commenting on the merits of a potential issue.
 - h) Offering legal advice or opinion.
 - i) Discussion of future employment or other business opportunity.
 - j) Acceptance of or giving tangible/significant gifts, including travel, entertainment, even during recognised holidays which feature exchanging of tangible/significant gifts.

TENET 4:

Not to use information acquired during DB activities for personal advantage, or divulge any confidential information to others unless allowed by the parties.

1. The trust reposed by parties in the DB members is to be maintained under all circumstances. In the process of DB, the members come across significant private and confidential information relating to the contract, the contracting parties as well as various others involved in the process of project execution. Board members shall not use such confidential information for personal advantage, or divulge the same to others.
2. A Board member's position of trust must be unassailable. The DB process provides a private and confidential means for parties to settle their contractual disputes. The parties' positions, arguments, and the DB's findings and reports are usually not available to the general public except as may be provided by the parties or by law (e.g. Freedom of Information Acts). This information should not be divulged except as required by law. Board members must respect this confidentiality and treat the contract and any other details of the project disclosed to the DB, as well as all activities as Board members (which are clearly not public knowledge), as confidential among the parties and the members.
3. Except for reporting statistical data for the Institutional Database and listing the project on their resume, a Board member must make no disclosures, oral or written, regarding any matter disclosed during his/her activities on the DB without the prior written consent of the parties. Information gained by a Board member during the DB process must not be used, or passed on to others, with intent that the information be used for such person's personal advantage or gain.

Grounds which may render a prospective Member ineligible for appointment to a Dispute Board:

Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or the contract, falls under any of the categories specified herein below shall be ineligible to be appointed as board member. However, the parties may waive the applicability of this provision by an express agreement in writing.

1. The prospective member is an employee, consultant, advisor or was so in the past three years; or has any other business relationship with a party or had so in the past three years.
2. The prospective member currently represents or advises one of the parties or an affiliate of one of the parties or did so in the past three years.
3. The prospective member is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the Contract.
4. The prospective member's firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties or had so in the past three years.
5. The prospective member regularly advises the appointing party or an affiliate of the appointing party even though neither the prospective member nor his/her firm derives a significant financial income therefrom.
6. The prospective member has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
7. A close family member of the prospective member has a significant financial interest in one of the parties or an affiliate of one of the parties.
8. The prospective member is part of the management, or has a similar controlling influence in one of the parties.
9. The prospective member has a significant financial interest in one of the parties or the Contract.

10. The prospective member regularly advises the appointing party or an affiliate of the appointing party or his/her firm derives a significant financial income therefrom.
11. The prospective member holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
12. A close family member of the prospective member has a significant financial interest in the Contract.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Grounds as may give rise to doubt about Independence and Impartiality of a prospective Member of Dispute Board:

The following grounds/relationships serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of prospective members of a DB, requiring a declaration in advance.

Relationship with the parties

1. The prospective member was an employee, consultant, advisor or had any business relationship with a party in the past.
2. The prospective member had at any time in the past represented or advised one of the parties or an affiliate of one of the parties.
3. The prospective member was a manager, director or part of the management, or had a similar controlling influence in the past in one of the parties or in an affiliate of one of the parties if the affiliate is directly involved in the contract.
4. The prospective member used to regularly advise the appointing party or an affiliate of the appointing party in the past, irrespective whether the prospective member or his/her firm derived any financial income therefrom or not.
5. The prospective member had a significant financial interest in one of the parties.
6. The prospective member holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

Relationship with the Contract

7. The prospective member had any previous involvement or commercial interest in the contract.
8. A close family member of the prospective member has a significant financial interest in the contract.

Relationship between a prospective member and another member.

9. The prospective member was within the past three years a partner of, or otherwise affiliated with, another member.

10. A close family member of the prospective member is a partner or employee of the law firm representing one of the parties, but is not assisting on any matter arising out of the contract.

Other circumstances

11. The prospective member holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.
12. The prospective member holds a position in an institution, which is the appointing authority under the contract.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

BIBLIOGRAPHY

Bibliography of the Standard Operating Procedures for DBs

Several Publications, as considered relevant for the subject were studied. The important ones among them which were helpful in developing the document are listed here under -

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