

# Draft CI Arb Dispute Board Rules

## Introduction

Dispute boards are created by contract and aid the parties in resolving their disagreements. In the last twenty years there has been an increasing demand for less adversarial dispute resolution methods such as mediation, conciliation and dispute boards. The great benefit of using a standing dispute board is that its members may be called upon as soon as a problem arises and help the parties resolve their differences before they become polarised in their views.

The dispute avoidance role of the standing board should be emphasised: the dispute board encourages the parties to solve their own problems, creating an atmosphere where the parties communicate and recourse to the advisory role of the board. Resolving conflicts at an early stage, or even before they arise, is an obvious benefit that greatly reduces costs such as legal fees, and reduces loss of productive time and goodwill between the parties.

Dispute boards should be set up at the outset of a contract and remain in place throughout its duration. Thus the dispute board members will be familiar with the contract and its performance, and also be acquainted with the parties, making the board an effective dispute resolution mechanism with “real-time” value. Ideally, the dispute board members become part of the project team and are trusted to be fair and impartial, so that their advice will be readily accepted by all parties.

The need for prompt, cost-effective and impartial dispute resolution can be found in many contractual relationships in several industries. In order to meet this need, the Chartered Institute of Arbitrators (the “CI Arb”) offers the international business community the CI Arb Dispute Board Rules, which cater to any medium or long-term project, whether construction, IT, commercial or otherwise.

## Article 1

### Definitions

“**Applicable Law**” means the law applicable to the Contract.

“**Contract**” means the agreement of the Parties that contains provisions for establishing a Dispute Board under these Rules.

“**Decision**” means a binding decision issued in writing by a Dispute Adjudication Board.

“**Determination**” means either a Recommendation or a Decision issued by the Dispute Board as described in the Rules.

“**Dispute**” means a disagreement (of any kind whatsoever) between the Parties arising out of, under or in connection with the Contract.

“**Dispute Board**” (also referred to as “**DB**”) means a Dispute Review Board (“**DRB**”) or a Dispute Adjudication Board (“**DAB**”), composed of one or three Dispute Board members (“**Members**” or “**DB Members**”).

**“Dispute Board Clause(s)”** means the standard CI Arb Dispute Board clauses which consist of two alternatives: a clause for DRBs and a clause for DABs. The Parties may choose to incorporate one of the standard CI Arb clauses in their Contract, depending on which kind of Dispute Board is most appropriate for them.

**“Party”** or **“Parties”** means the parties to the Contract.

**“Position Statement”** means a written statement of case produced by either Party for the purpose of referring a Dispute to the DB.

**“Recommendation”** means a formal report issued in writing by a Dispute Review Board, which is not binding on the Parties.

**“Response”** means a written statement of case in response to a Position Statement.

**“Rules”** means the CI Arb Dispute Board Rules.

**“Tripartite Agreement”** means the Model CI Arb Dispute Board Tripartite Agreement between the Parties and each of the DB Members.

## **Article 2**

### **Dispute Board Documents and Standard Clauses**

- 1 The framework for the establishment and operation of Dispute Boards comprises:
  - the CI Arb Rules;
  - the CI Arb Tripartite Agreement; and
  - the CI Arb Dispute Board Clauses.
- 2 The Parties and the DB Members may amend the Tripartite Agreement as they may all agree, and as may be necessary for the enforceability of the Tripartite Agreement under Applicable Law.
- 3 The Rules provide for two types of Dispute Boards: Dispute Review Boards and Dispute Adjudication Boards. The Parties shall elect which alternative they favour and incorporate the corresponding Dispute Board Clause into their Contract: clause a) if they choose to have a DRB, and clause b) if they choose to have a DAB. The Parties should adapt the chosen clause to suit their needs and verify that it is enforceable under Applicable Law. The Dispute Board Clause does not in itself provide for arbitration. If the parties wish to provide for arbitration they should ensure they have inserted the relevant provisions into their Contract as required under the Applicable Law.

#### **a) Dispute Board Clause for DRBs**

The Parties hereby agree to establish a Dispute Review Board (“DRB”) in accordance with the Dispute Board Rules of the Chartered Institute of Arbitrators (the “Rules”). The DRB shall have [*one/three*] member[s] appointed in accordance with the Rules, which are incorporated herein by reference.

Any disputes between the Parties arising out of or in connection with this Contract shall be submitted to the DRB pursuant to the Rules. If the DRB issues a Recommendation and one of the Parties rejects it, either Party may submit the dispute to arbitration, if the Parties have so agreed, or to the courts. Pending a ruling by the arbitral tribunal or the court, the Parties may voluntarily comply with the Recommendation.

**b) Dispute Board Clause for DABs**

The Parties hereby agree to establish a Dispute Adjudication Board (“**DAB**”) in accordance with the Dispute Board Rules of the Chartered Institute of Arbitrators (the “**Rules**”). The DAB shall have [*one/three*] member[s] appointed in accordance with the Rules, which are incorporated herein by reference.

Any disputes between the Parties arising out of or in connection with this Contract shall be submitted to the DAB pursuant to the Rules. If the DAB issues a Decision and one of the Parties rejects it, either Party may submit the dispute to arbitration, if the Parties have so agreed, or to the courts. Pending a ruling by the arbitral tribunal or the court, the Parties must comply with the DAB’s Decision.

**Article 3**

**Dispute Review Boards**

- 1 If the Parties have chosen the implementation of a DRB, they are not bound by the DRB’s Recommendations.
- 2 The DRB shall assist the Parties in the avoidance of Disputes and the timely resolution of Disputes. Any matter or disagreement arising under the Contract may be referred to the DRB by either Party.
- 3 The Parties shall duly consider each Recommendation, which carries great weight albeit it is non-binding.
- 4 If the DRB has issued a Recommendation in accordance with Article 15, each Party shall submit its written acceptance or rejection of the Recommendation to the other Party and the DRB within 21 days of receipt of the Recommendation.
- 5 If one Party rejects the Recommendation, either Party may submit the Dispute to arbitration, if the Parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the Parties may voluntarily comply with the Recommendation.
- 6 Recommendations shall be admissible in any subsequent arbitral or judicial proceedings.

**Article 4**

**Dispute Adjudication Boards**

- 1 If the Parties have chosen the implementation of a DAB, they are bound by the DAB’s Decisions.

- 2 The DAB shall assist the Parties in the avoidance of Disputes and the timely resolution of Disputes. Any matter or disagreement arising under the Contract may be referred to the DAB by either Party.
- 3 A Decision is binding on the Parties upon its receipt and the Parties shall comply with it without delay. The Decision shall be enforceable and will stand unless superseded by agreement, arbitration or a judgment by the courts.
- 4 If the DAB has issued a Decision in accordance with Article 15, each Party shall submit its written acceptance or rejection of the Decision to the other Party and the DRB within 21 days of receipt of the Decision.
- 5 If one Party rejects the Decision, either Party may submit the Dispute to arbitration, if the Parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the Parties must comply with the Decision.
- 6 Decisions shall be admissible in any subsequent arbitral or judicial proceedings.

#### **Article 5**

##### **Scope of the Rules**

- 1 The Rules equally apply to both types of Dispute Board procedures. The only difference arising from the Parties' choice of a DRB or a DAB is that DRBs issue non-binding Recommendations as described in Article 3, whereas DABs issue binding Decisions as described in Article 4.

#### **Article 6**

##### **Appointment of the Dispute Board (DB)**

- 1 The DB shall comprise either one or three suitably qualified DB Members. If the number is not stated in the Contract and the Parties do not agree otherwise, the DB shall comprise three persons.
- 2 If the Parties agree to have a sole DB Member, they shall jointly appoint the sole Member by the date stated in the Contract or, where the Contract is silent, within 28 days of the effective date of the Contract.
- 3 If the DB is to comprise three Members, each Party shall nominate one Member for approval by the other Party. These two selected Members then select the third Member, who, with the approval of the Parties, shall act as chairperson. The DB composed of three Members must be established by the date stated in the Contract or, where the Contract is silent, within 28 days of the effective date of the Contract.
- 4 The appointment of a DB Member may be terminated by mutual agreement of both Parties, but not by either of the Parties acting alone. When a DB Member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment, the Parties shall appoint a suitably qualified person to replace the DB

Member. The new DB Member shall be appointed in the same manner as the replaced Member was required to have been appointed.

- 5 If the Parties fail to establish a DB in accordance with paragraphs 2 or 3 of this Article 6, or if the Parties fail to agree on a replacement Member as described in paragraph 4 of this Article 6, then the CI Arb shall, after due consultation with the Parties, appoint the DB Member or Members, or the whole DB if needed, within 28 days of the written request of one or both Parties. This appointment shall be final and conclusive.
- 6 When appointing a DB Member, the prospective Member's qualifications relevant to the circumstances, nationality and relevant language skills should be considered, as well as any observations, comments or requests made by the Parties. It is recommended that the Parties co-ordinate their selection of DB Members and chairperson in such a way as to provide the maximum of appropriate skills for the project. The Members must confirm that they will be sufficiently available for the duration of the project.

#### **Article 7**

##### **DB Member's Qualifications and Obligations**

- 1 DB Members shall have expertise in the type of work or services to be performed under the Contract and be able to understand and interpret its contractual provisions. DB Members should have excellent management and communication skills and be fluent in the language for communications as defined in the Contract or as agreed by the Parties.
- 2 All information provided to the DB during the course of its service shall be treated as confidential and used only for the avoidance and settlement of Disputes, unless otherwise agreed by the Parties or required by Applicable Law.
- 3 The DB Members shall adhere to the ethical obligations set forth in the Rules and in the Tripartite Agreement.

#### **Article 8**

##### **Impartiality and Independence**

- 1 Every DB Member shall be impartial and independent of the Parties at the time of accepting an appointment to serve and must remain so until his or her appointment is terminated.
- 2 At the time of accepting an appointment to act as DB Member, he or she shall provide a written declaration that there is no conflict of interest and disclose any facts or circumstances which in the eyes of the Parties may give rise to justifiable doubts as to the Member's impartiality or independence. If the CI Arb is to appoint a DB Member, the potential Member shall submit such written declaration of impartiality and independence to the CI Arb.
- 3 DB Members must remain without any conflicts of interest and must also be seen to be acting impartially when a Determination is made. If facts or circumstances have arisen since the appointment that from a reasonable third person's point of view could be

perceived as a conflict of interest, the Member shall promptly disclose such facts or circumstances.

- 4 Any doubt as to whether a Member should disclose certain facts or circumstances should be resolved in favour of disclosure. Disclosure is not an admission of a conflict of interest. A DB Member who makes a disclosure to the Parties must consider himself or herself to be impartial and independent of the Parties despite the disclosed facts or circumstances, or else the Member must decline the appointment or resign.
- 5 Deriving from the principle that no person can be his or her own judge, the following situations preclude a person from serving as DB Member:
  - a) There is an identity between a Party and the prospective Member, or the prospective Member is a legal representative of one of the Parties.
  - b) The prospective Member is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the Parties.
  - c) The prospective Member has a significant financial or personal interest in one of the Parties or in the matter at stake.
  - d) The prospective Member regularly advises one of the Parties or an affiliate of one of the Parties, and the prospective Member or his or her firm derives a significant financial income therefrom.

The situations listed in this clause are non-exhaustive examples of specific situations which give rise to justifiable doubts as to a person's impartiality and independence. Disclosure of any of these situations cannot cure the objective conflict of interest.

- 6 If within 21 days after the receipt of a disclosure by a DB Member or after a Party learns of facts that could constitute a potential conflict of interest for a DB Member, a Party does not raise an express objection with regard to that Member, the Party is deemed to have waived any potential conflict of interest based on such facts and may not raise any objection to such facts at a later stage, provided that the disclosed or discovered facts do not constitute one of the situations listed in Article 8, paragraphs 5 a) to d) above. Any waiver by a Party of the conflicts of interest described in paragraphs a), b), c) or d) of this Article 8, paragraph 5 shall be regarded as invalid.

## **Article 9**

### **Tripartite Agreement**

- 1 Prior to commencing DB activities, each DB Member shall sign a Tripartite Agreement with all of the Parties. If there are three DB Members, the substantive terms of their respective Tripartite Agreements shall be identical, unless otherwise agreed by all DB Members.
- 2 The date of the Tripartite Agreement shall be the date of the DB Member's appointment.

- 3 If the CI Arb appoints a DB Member in accordance with Article 6, the Parties and the Member are bound by the Rules and the terms of the Tripartite Agreement as if the Parties had appointed the DB Member.
- 4 The Parties may at any time agree to terminate a DB Member's appointment without cause by giving at least two months written notice to the Member, but must act jointly if they decide to terminate the appointment of a DB Member.
- 5 Each DB Member may at any time terminate its Tripartite Agreement by giving at least two months written notice to the Parties, unless otherwise agreed by the Parties and the DB Member concerned.

## **Article 10**

### **Periodic Meetings and Site Visits**

- 1 An initial meeting of the DB and the Parties shall be held as soon as practicable after the commencement of the Contract.
- 2 When site visits are relevant to the Contract, the DB will visit the project site every 4 months or as agreed between the Parties and the DB depending on the progress of the work. The timing and schedule of each site visit shall be as agreed jointly by the Parties and the DB, or in the absence of agreement, shall be decided by the DB.
- 3 Regular site visits enable the DB Members to become conversant with the project and to witness the site's conditions and progress of the works. The purpose of site visits and other meetings is also to keep the DB informed of any actual or potential problems or disagreements. Meetings may be held at any location agreed by the Parties and the DB, including via telephone or other communication methods, or in the absence of agreement, venue and timing shall be decided by the DB after consultation with the Parties.
- 4 Site visits shall be attended by the Parties and the DB, who may engage in informal conversations with any of the attendees about the performance of the Contract and any pending claims. If appropriate, site visits may be combined with hearings of Disputes.
- 5 At the conclusion of each site visit or meeting, the DB will prepare a report on the site visit or meeting and send a copy of the report to each Party.

## **Article 11**

### **Information and Communication**

- 1 The Parties shall provide each DB Member with a copy of the Contract documents, and any other documents pertinent to the performance of the Contract which the DB may request, and keep the DB informed of the project's development by furnishing the DB with relevant information such as progress reports.

- 2 The Parties shall communicate relevant information and copy all documents and notifications to all Parties in a timely manner.
- 3 If a Dispute has been referred to the DB for a Determination, the DB may at any time request a Party to submit additional information or allow access to the site to assist the DB in preparing its Determination. The DB shall communicate to the Parties each such request in writing.
- 4 For a DB of three Members, the DB shall be deemed to have received any communication from the Parties, including the formal referral of a Dispute, on the date when it is received by the DB's chairperson.

## **Article 12**

### **Informal Advice**

- 1 The true mission of a Dispute Board is not judicial; rather it is to prevent formal Disputes. The Parties may at any time jointly refer a matter to the DB for it to give an informal advisory opinion as a means of Dispute avoidance. The DB may provide the requested advisory opinion during a conversation with the Parties or in a written note to the Parties, or, with the prior agreement of the Parties, provide informal assistance to resolve a disagreement in any other form.
- 2 The DB may on its own initiative raise an issue with the Parties in order to establish a dialogue between them and to clarify matters in the presence of the DB. The Parties have the right to stop the DB's initiative if they regard it as unnecessary, provided that they notify the DB promptly, jointly and in writing.
- 3 If the DB is later called upon to make a Determination concerning a matter with respect to which it has provided an informal advisory opinion, the DB shall not be bound by any views expressed in such verbal or written advisory opinion.

## **Article 13**

### **Referral to a Dispute Board**

- 1 The Parties shall comply with any contractual pre-review requirements or prior dispute resolution process as provided for by the Contract, as applicable.
- 2 If a Dispute arises, either Party may at any time give notice of its intention to refer the Dispute to the DB by submitting a Position Statement to the other Party or Parties and the DB. The Position Statement shall include a summary of the Dispute, a list of the issues submitted to the DB for a Recommendation or Decision, depending on whether the Parties have chosen a DRB or DAB, and the referring Party's position thereon together with the redress sought, and any evidence supporting the referring Party's position.
- 3 The other Party shall submit a Response to the referring Party and the DB within 28 days of receiving the Position Statement. The Response shall include a summary of the responding Party's position with respect to the Dispute, any evidence supporting the



responding Party's position, and a statement of what the responding Party requests the DB to determine.

- 4 The Parties remain free to settle the Dispute at any time, with or without the DB's assistance.

#### **Article 14**

##### **Conduct of Hearings**

- 1 The Parties and the DB shall meet for a hearing of the Dispute within 21 days of the Response being received by the DB, unless the DB decides otherwise.
- 2 If a Party fails to attend the hearing, the DB may nevertheless proceed with the hearing if the DB is satisfied that the absent Party received notice of the hearing.
- 3 The DB shall act fairly and impartially as between the Parties, giving each of them a reasonable opportunity to present its case. The DB shall not express any opinions during a hearing concerning the merits of arguments put forward by the Parties.
- 4 The DB shall avoid unnecessary delay or expense and adopt procedures suitable to the value, nature and complexity of the Dispute.

#### **Article 15**

##### **Recommendations and Decisions**

- 1 For the avoidance of doubt, the procedure of rendering a Recommendation is identical to the procedure of rendering a Decision. The only difference between DRBs and DABs under the Rules concerns the binding nature of their respective Determination: If the Parties have chosen the implementation of a DRB, they are not bound by the DRB's Recommendations (Article 3). If the Parties have chosen the implementation of a DAB, they are contractually bound by the DAB's Decisions (Article 4).
- 2 Following a hearing, the DB shall issue its Recommendation or Decision, as the case may be, promptly after having completed its discussions with the Parties and DB Members. Where possible, the Recommendation or Decision should be given while with the Parties following a meeting or hearing.
- 3 If the Parties wish to agree on a time limit for rendering a Recommendation or Decision, they shall consult with the DB, taking into account the nature and complexity of the Dispute and other relevant circumstances.
- 4 Recommendations and Decisions shall state the DB's findings and the reasons upon which they are based.
- 5 When the DB is composed of three Members, it shall make every effort to achieve unanimity. If this cannot be achieved, a Recommendation or Decision is given by majority vote. If there is no majority, the Recommendation or Decision shall be made by the DB's chairperson alone. Any DB Member who disagrees with the issued

Determination will give the reasons for such disagreement in a separate report that shall not form part of the Determination, but will be communicated to the Parties.

## **Article 16**

### **Powers of the Dispute Board**

- 1 Where the Rules are silent and in the absence of an agreement of the Parties with respect thereto, the DB is empowered to:
  - a) establish the procedure to be applied in making a Determination;
  - b) decide upon the DB's own jurisdiction, and as to the scope of a Dispute referred to it;
  - c) call meetings, site visit and hearings, and conduct hearings as it thinks fit, being bound only by the Rules and the Contract;
  - d) take the initiative in ascertaining the facts, law and documents required for a Determination, and question the Parties, their representatives and any witnesses they may call in the sequence it chooses;
  - e) make use of its own specialist knowledge and determine the language of the proceedings before the DB, taking into account all relevant circumstances including the language of the Contract; and
  - f) take any measures necessary for it to fulfil its function as a DB.
- 2 When the DB is composed of three Members, it shall make every effort to achieve unanimity in deciding which proceedings to follow. If unanimity cannot be achieved, the procedure shall be established by majority vote.

## **Article 17**

### **Remuneration**

- 1 The fees and expenses of the DB Members shall be shared equally by the Parties.
- 2 The terms and rate of remuneration for each of the DB Members shall be mutually agreed upon by the Parties when agreeing the terms of appointment and recorded in the Tripartite Agreement.
- 3 If the Parties and a DB Member fail to agree on the Member's remuneration, or if one Party challenges any part of the DB's remuneration, then the CI Arb shall, after due consultation with the Parties, within 28 days of the written request of one or both Parties, decide what the reasonable remuneration of each DB Member shall be. The CI Arb's decision shall be final and binding on the Parties and DB Members. If the CI Arb decides on a Member's remuneration, the DB Member shall be paid a Retainer Fee and Daily Fee as per Alternative 1 of the Tripartite Agreement.

- 4 In the event that the CI Arb decides on the DB Member's remuneration, the DB shall be a Dispute Adjudication Board in accordance with Article 4 of the Rules.

#### **Article 18**

##### **Administrative expenses of the CI Arb**

- 1 Each request for appointment of a DB Member pursuant to Article 6 (5) of these Rules must be accompanied by the non-refundable amount of US\$ 2,500. This amount shall represent the total cost for the appointment of one DB Member by the CI Arb. The CI Arb shall not proceed with the appointment unless the specified payment has been received.
- 2 Each request for a decision on the remuneration of a DB Member pursuant to Article 17 (3) of these Rules must be accompanied by the non-refundable amount of US\$ 1,500. This amount shall represent the total cost for the decision by the CI Arb. The CI Arb shall not proceed with the decision unless the specified payment has been received.
- 3 The Parties shall equally share the cost of each appointment or decision by the CI Arb.