



# Transnational Dispute Management

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ISSN : 1875-4120  
Issue : Vol. 9, issue 7  
Published : December 2012

## Dispute Resolution Under FIDIC - The Parties' Options by P.D. Galloway, L.M. Martinez, Esq. and M.A. Marra

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## Dispute Resolution Under FIDIC-The Parties' Options

The dispute resolution process defined in Clause 20 of the International Federation of Consulting Engineers ("FIDIC") form of contract appears to be a well-defined prescribed process for disputes to be resolved. In the FIDIC Red Book<sup>1</sup>, the traditional "two-tier" approach has been maintained for dispute resolution as was contained in the 1987 FIDIC Red Book, 4<sup>th</sup> edition, except that the role of the engineer as a decider of disputes in the first instance has been replaced by a Dispute Adjudication Board ("DAB"). For the users of the FIDIC form of contract, there has been a long understanding since the 1999 revision that under the FIDIC contract, the DAB<sup>2</sup> is the first step in the dispute resolution process and the final step in the process unless the parties give notice of dissatisfaction after receipt of the DAB's decision.<sup>3</sup> The final step to dispute resolution of the "two-tier" process is international arbitration, which is to be conducted according to the ICC rules. While the FIDIC contract maintains a "two-tier" process to dispute resolution, the question becomes-are the FIDIC provisions so well-defined and prescribed so as to limit the parties' choices they can make in regard to the selection of DAB members and the arbitration rules under which the arbitration will be conducted? This article takes a look at some recent developments in the use of the FIDIC contract in consideration the parties' options for both DAB member selection and selection of the arbitration rules and administration thereof.

### The First Tier Process-DABs

To avoid costly disputes, project stakeholders are looking to innovative dispute resolution techniques. For instance, there's considerably more interest in dispute resolution boards ("DRB") or dispute adjudication boards ("DAB"). Typically made up of a three-person panel, these

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<sup>1</sup> The Red Book is the "Conditions of Contract for Building and Engineering Work Designed by the Employer", (1<sup>st</sup> Ed. 1999) and is globally the most commonly used standard form of Contract for Construction and Engineering works where most or all the works are designed by, or on behalf of, the Employer.

<sup>2</sup> The DAB is appointed in accordance with Clause 20.2 and constituted at the commencement of the contract

<sup>3</sup> The DAB members are appointed by the parties within 28 days after the Commencement Date or if the parties fail to agree, by appointment of the FIDIC President or his nominee by default.

experts become an advisory part of the project team from the very start. They are there to keep the project moving and resolve problems before they can snowball. While DRB's provide non-binding recommendations, DAB's provide interim binding decisions, which will remain binding upon the parties unless a dissatisfaction notice is rendered.

The DAB is similar in nature to the DRB which originated in the United States in the late 1970s. Generally, three independent and qualified individuals meet regularly on site during project execution and make recommendations in relation to any disputes as they arise. Through the 1990s, the use of DRBs was specified for large civil works infrastructure construction projects in the global market, and the success of DRBs and DABs as a dispute resolution technique has historically been positive. The problem with the DRB was that their decisions were not binding, despite the fact that their decision could be used by either party in any subsequent arbitration. Dissatisfied parties could just ignore the DRB's decision and their decision became just another tier of the decision making in the dispute resolution process that was not binding and enforceable. As the 1999 FIDIC revision has been used increasingly on construction in the global market, the DAB is replacing the prior voluntary use of DRBs.<sup>4</sup> For the most part, the Employers and project teams are consistently willing to accept the recommendations or decisions rather than proceed with arbitration. Sometimes, the mere existences of the DAB will bring the parties together—an incentive for speedy resolution of the dispute, and still more cost efficient and timely than proceeding with arbitration.

The 1999 FIDIC procedure for settlement of disputes by a DAB may be broken down into five steps:<sup>5</sup>

1. If a dispute arises out of or in connection with the Contract, the parties may refer the dispute in writing to the DAB under Clause 20.4, with copies to the other party and Engineer.
2. The DAB, which act as a panel of experts and not as arbitrators, must give a written decision of its decision to the parties within 84 days.
3. If either party is dissatisfied with the DAB's decision, then either the Employer or the Contractor must notify the other of its dissatisfaction with 28 days or the decision becomes "final and binding" per Clause 20.7.
4. Where a party has been given a notice of dissatisfaction within the 28 days, both the Employer and the Contractor have 56 days to attempt amicable settlement under Clause 20.5.
5. Where the DAB's decision neither becomes final and binding nor amicably settled, the dispute is finally settled by international arbitration.

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<sup>4</sup> Kris Nielsen, "Practical Thoughts Regarding International Arbitrations" [October 2007] *Communiqué*, Vol. 2.0

<sup>5</sup> Kris Nielsen, "Practical Thoughts Regarding International Arbitrations" [October 2007] *Communiqué*, Vol. 2.0

However, this five-step process needs to be better understood regarding its impact to arbitration, the final step of the “two-tier” process. The FIDIC contract inherently imposes a process upon the parties to amicably resolve their dispute by having to follow an extensive timeline that must be followed before a party ever engages in arbitration. The irony of the DAB provision of the 1999 FIDIC Red Book is that a Contractor may miss the right to file a claim if the Contractor maintains a mindset of “cooperation” vs. litigation.<sup>6</sup> Revisiting the five steps above, the timeline that must be followed, in calendar days is as follows:<sup>7</sup>

- Notice of Claim by Contractor, under Clause 20.1 to Engineer within 28 days after Contractor became (or should of become) aware of the event or circumstance.
- Fully detailed claim within 42 days after Contractor became aware of the event or circumstance.
- Submission of a claim to the Engineer, under Clause 20.1 for decision within 42 days after receiving claim (14 days if the Employer believes it is entitled to payment from the Contractor).
- Determination by the Engineer in accordance with Clause 3.5 within a reasonable time. The anticipation is that the Engineer will side with the Employer, so there is nothing gained from delay. Thus, an estimated 28 days could be applied here, or from the time a claim arises until the Engineer’s determination-72 days.
- If Contractor disagrees with the Engineer’s determination, written referral made to the DAB under Clause 20.4 for a decision within 28 days of the Engineer’s determination.
- DAB’s written decision on the claim must be rendered within 84 days of filing with the DAB.
- Either party may make a written dissatisfaction of the DAB decision within 28 days of the DAB decision and make a written demand for arbitration under Clause 20.6. Note-the DAB decision is final under Clause 20.7 if no written dissatisfaction is filed.
- The parties must attempt “bona-fide” amicable negotiation for a period of 56 days under Clause 20.5, and if no settlement is reached, the written demand for arbitration is effective, thus starting the “arbitration” timeline. So, at least 238 days from arising of a claim and a maximum of 168 days after the claim decision by the Engineer.

Given the importance of the DAB process, parties need to carefully “choose” the DAB members. The DAB members should be experienced and have the respect of the parties in order to fulfill their obligations. While the DAB does not constitute an “arbitration panel”, the fact that their

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<sup>6</sup> Dr. R. Niraula, Dr. S. Kusayanagi, “Contract Administration for a Construction Project Under FIDIC Redbook Contract in Asian Developing Countries”, [management.kochi-tech.ac.jp/ssms\\_papers/sms11-8874\\_26c77ee7398a284f7160e5ef1a6f075e.pdf](http://management.kochi-tech.ac.jp/ssms_papers/sms11-8874_26c77ee7398a284f7160e5ef1a6f075e.pdf)

<sup>7</sup> Kris Nielsen, “Practical Thoughts Regarding International Arbitrations” [October 2007] *Communiqué*, Vol. 2.0

decision may well become final and binding upon the parties gives rise to the importance of the member selection.

The FIDIC contract provides the appointment of the DAB members in accordance with Clause 20.2. It could comprise individuals that have been named in the contract. However, if not named, the parties have 28 days after the Commencement Date to jointly appoint the DAB. Per Clause 20.2, a member can only be terminated by mutual agreement of both parties. Once constituted, the principle obligation of the DAB is to make binding decisions.<sup>8</sup>

In the event the parties cannot agree to DAB nominations, Clause 20.3 provides that the parties agree that the appointing entity named in the appendix (The FIDIC President or his nominee by default) may appoint members to the DAB if the parties fail to agree within 28 days after the Commencement Date, or fail to agree to the identity of the third member (Chair), or fail to agree on a replacement member within 42 days after the date on which the sole member declined or became unable to act. This is where the parties have options.

Where does a party look when identifying potential candidates for the DAB? How do the parties decide who should choose the DAB member(s) should they not be able to agree amongst themselves? There are a number of options parties can choose including lists from various institutions, known individuals, and default appointments.

The first, of course, centers around lists that can be obtained and which have been vetted from the institution supplying the lists. For example, the American Arbitration Association (“AAA”) has trained and vetted members from whom DAB members could be chosen. Its listed members are typically “muddy boots” specialists, but typically do add the contractual consideration experience since they are also trained arbitrators with experience issuing final and binding awards. Another organization is the Dispute Resolution Board Foundation (“DRBF”), which had its roots originally in the United States but is now a world-wide organization, has members who have been trained as DRB members and who have experience with DRBs and DABs.

The second option is individuals with whom counsel or the ultimate client has worked with in the past and has knowledge relative to an individual’s expertise and experience. However, given that the DAB decision is again binding, parties should consider whether the DAB member has formal dispute adjudication training and assessment experience in the discipline of the Works, and whether the person has the ability to consider the *contractual* conditions under which both parties mutually agreed to execute the Works. An understanding of the rights, obligations and liabilities of the parties is of fundamental importance for DAB members.<sup>9</sup> Past examples of

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<sup>8</sup> Nicholas Gould, “Recent Developments: Domestic and International” [8 November 2004] a paper given at the 10<sup>th</sup> Adjudication Update Seminar

<sup>9</sup> Gwyn Owen, “The Working of the Dispute Adjudication Board (DAB) Under New FIDIC 1999 (New Red Book)” [June 2003] [www.gwynowen.com/DAB.pdf](http://www.gwynowen.com/DAB.pdf)

dissatisfaction with DAB decisions have their roots in this particular “gap” in the DAB’s background. Muddy boots and practical experience may be great for understanding the technical aspects of the dispute, but may not be sufficient to understand how those facts dovetail with the conditions of contract under which the facts have been executed.

Finally, the third option is the default nominating body. While the FIDIC contract provides the President of FIDIC or his designee, this is not a mandatory requirement and any institution, such as the AAA or the DRBF could be substituted as the default nominating organization. Thus, the parties do have a choice and should choose wisely considering the consequences a final and binding decision may have should a dispute arise on the project.

### **The Second Tier Process-Arbitration**

It has long been established that the FIDIC form of contract provides for arbitration under the ICC rules. However, recent developments are showing that parties have the right to choose other forums and rules under which their dispute will be resolved should the parties disagree with the DAB’s decision. For example, the World Bank 2000 started the process of looking towards other options for arbitration. In its Trial Edition of the sample bidding documents for the Procurement of Simple Works the Preface notes that the General Conditions of Contract (“GCC”) are based on the 1<sup>st</sup> edition, 1999 of the FIDIC “Short Form of Contract” and the balance of the document on the bank’s experience.<sup>10</sup> However, under Resolution of Disputes, Clause 15.3:

*Arbitration may not be commenced unless the dispute has first been the subject of an adjudication. The Rules of arbitration should be stipulated in the Appendix. The UNCITRAL [United Nations Commission on International Trade Law] Rules are recommended. However, if administered arbitration is required, that is arbitration overseen and administered by an arbitral institution; the ICC Rules could be specified....”*

Thus, neither the World Bank nor the Multilateral Development Banks and International Financial Institutions have considered ICC to be the mandated administering agency and other arbitral institutions can be considered.

The U.S. Millennium Challenge Corporation (“MCC”) Standard Bidding Documents for the Procurement of Large Works (USD 10 million or greater) uses the FIDIC General Conditions of Contract, but amended Clause 20.6 by replacing the first paragraph with the following:<sup>11</sup>

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<sup>10</sup> The World Bank, Washington DC., Sample Bidding Documents, Procurement of Simple Works, Trial Edition, Second Draft [September 2000]

<sup>11</sup> Standard Bidding Documents Procurement of Large Works, The U.S. Millennium Challenge Corporation (MCC), [www.mcc.gov/documents/guidance/sbd-largeworks.doc](http://www.mcc.gov/documents/guidance/sbd-largeworks.doc) [last revised September 2012]

*“Any dispute not settled amicably and in respect of which the DAB’s decision (if any) has not become final and binding shall be finally decided by arbitration. Unless otherwise agreed by both parties:*

*(a) For contracts with foreign contractors,*

*(i) international arbitrations shall be conducted with proceedings administered by the international institution appointed in the Appendix to Tender, in accordance with the rules of arbitration of the appointed institution, if any, in accordance with UNCITRAL arbitration rules, at the choice of the appointed institution.”*

Further, while the 1999 FIDIC documents refer to the ICC, the MDB harmonized edition 2010 of the FIDIC Red Book currently refers to UNCITRAL arbitration rules. By June 2008, the Master Document for Procurement of Works<sup>12</sup> uses the General Conditions of the Bank Harmonized Edition of FIDIC form of Contract. Section VII of the General Conditions Clause 20.6 reads:<sup>13</sup>

*“Unless indicated otherwise in the Particular Conditions, any dispute not settled amicably and in respect of which the DB’s decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both parties:*

*(a) For contracts with foreign contractors, international arbitrators with proceeding administered by the institution appointed in the Contract Data, conducted in accordance with the rules of arbitration of the appointed institution, if any, or in accordance with UNCITRAL arbitration rules, at the choice of the appointed institution,”...*

This is further seen and discussed in the European International Contractors (“EIC”) Contractor’s Guides on the FIDIC “New Books,” which were produced between 2000 and 2003 and the EIC Guide on the DBO Contract in 2009. The EIC Guide on the “MDB Harmonized Construction Contract” was published in April 2011.<sup>14</sup> In an EIC presentation on the EIC Guides given in Brussels in January 2011, Mr. Kehlenbach noted the selected deviations between the FIDIC MDB 2010 and the World Bank’s GCC 2010 regarding sub-clause 20.6 [arbitration], that: “FIDIC-MDB refers to the ICC Rules as the 3<sup>rd</sup> and last option, WB-GCC only refers to Contract

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<sup>12</sup> The Master document was prepared through the joint efforts of the Multilateral Development Banks (MDB) and International financial Institutions (IFI), Namely: the Asian Development Bank, African Development Bank (AFDB), Black Sea Trade and Development Bank (BSTDB), Caribbean Development Bank (CDB), Commission of the European Communities (CEC), Evergreen Bank for Reconstruction and Development (EBRD), European Investment Bank (EIB), Inter-American Development Bank (IDB), International Bank for Reconstruction and Development (IBRD), Nordic Development Fund (NDF), North American Development Bank (NADB), and the United Nations Development Programme (UNDP)

<sup>13</sup> Master Procurement Documents, Master Document for Procurement of Works [June 2008] Section VII, General Conditions, p. 3-14, copyright FIDIC

<sup>14</sup> F. Kehlenbach, Director of the EIC, Presentation, “An Introduction to the MDB Contract”, [27 January 2011] FIDIC MDB Harmonized Major Works Contract Conference 2011, Brussels,

Data as 1<sup>st</sup> option and UNCITRAL Rules as 2<sup>nd</sup> option.” In the June 2012 FIDIC MDB Harmonized Construction Contract Conference, the Director of the EIC acknowledged that there were no more deviations between the FIDIC MDB 2010 and the World Bank’s GCC March 2012, and the ICC remained a third option. As will be discussed later, parties have the option under a World Bank contract to choose the International Center for Dispute Resolution (“ICDR”) for institutional administration of a dispute when using the UNCITRAL rules.

Every year, numerous international construction contracts provide for mediation and arbitration as well as other alternative dispute resolution mechanisms as agreed to by the parties in an effort to resolve any disputes as quickly as possible and to enhance their predictability. Thus, we are now beginning to see shifts away from the ICC with other options being considered. Much of the new interest in choosing between other arbitration rules options is simply the cost and time that ICC arbitrations have recently been taking over other arbitral institutions. Why is that? One primary reason is that international projects are becoming so large that not only are disputes inevitable, the fact that they are so large create complexity and increased costs. As noted in *Managing Gigaprojects-Advice From Those That Have Been, There Done That*, published in October 2012 by ASCE Press:<sup>15</sup>

*Generally, a gigaproject is a project with a cost of at least US\$10 billion. In 2012, we have already seen projects near the US\$40 billion mark. These gigaprojects take a minimum of 10 years to complete and frequently include multinational stakeholders. The projects are typically so large that no one company can provide the sufficient personnel for all aspects of the project. Nor can it afford to finance or absorb all the risks associated with the physical project magnitude or extended time periods over which most megaprojects and gigaprojects operate. Considering the financial constraints, inherent risks, and extended performance period involved with executing these projects, why are megaprojects evolving into gigaprojects and becoming larger and more prevalent as we move into the 21st century? Is it the result of the increasing supply of the world’s aging infrastructure and the need to replace that infrastructure on larger scales? Are they implemented by some governments seeking to demonstrate their ability to be top players in the world’s markets? Some observe that to satisfy demand, whether demand for increased power availability or quicker, more available mobility, a modern project has to serve so many people on such a vast scale that it becomes a megaproject or gigaproject because of circumstances rather than specific merit.*

*One thing is clear: There will be more and more large projects as an emerging middle class in Africa, India, and China begin to demand modern transportation and the basic necessities of a civilized middle class life.*

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<sup>15</sup> P. Galloway, K. Nielsen, J. Dignum, *Managing Gigaprojects-Advice From Those That Have Been There, Done That*, (ASCE Press, Reston, VA, USA, 2012)



As a result of the increases in time in cost, parties are now considering the different options now available on the world market. Parties are now considering what arbitration institution might offer the best forum and rules under which a dispute would be heard. Those considerations often involve time, cost, and arbitration experience. Before finalizing the contract, the parties should seriously review what rules and/or institution for administering the selected rules are best suited for their particular situation. For example, a large number of international contracts now provide for administration by the AAA's International Division, the ICDR, a public-service, not-for-profit international organization offering a broad range of conflict management services globally.

The ICDR, established in 1996, administers hundreds of international cases each year. Establishment in 1996 allowed the ICDR to look at other rules and institutions and see what was working well and what was not working so well. Service and cultural sensitivity form the cornerstone of its international administrative system due to its multilingual staff of administrators and the experience and reliability derived from its role as the international division of the AAA, the world's largest provider of alternative dispute resolution ("ADR") services with over 85 years of conflict-management history.

For more than 40 years, the AAA as the provider of choice for dispute avoidance, conflict management and dispute resolution services has worked closely with the construction industry to develop ways to prevent and manage conflict. In 2008, the AAA established its Construction Division to focus on all of the Association's construction initiatives. The AAA consolidated its construction administrative teams, construction conflict management team and collaborates with the more than 25 associations that make up the National Construction Dispute Resolution Committee ("NCDRC") to develop industry-specific dispute resolution procedures and processes. AAA procedures are designated in standard form industry contracts, including those by the American Institute of Architects ("AIA") and the recently introduced Consensus DOCS.

The ICDR along with the support of the AAA's Construction Division are working together to provide conflict management services to the international construction industry. International construction projects require a broad range of construction industry expertise along with international ADR procedural knowledge and cultural sensitivity. The ICDR offers a full range of procedural options to help avoid disputes and resolve existing conflicts. This includes ADR program design and execution which is particularly important because of the complexity of present day construction projects. Ideally, ICDR involvement comes at the earliest planning stages of a project when bid documents are being developed. At this point, the ICDR can help incorporate into contracts dispute avoidance and resolution processes that have proven to be highly effective including arbitration, mediation, partnering and dispute resolution or adjudication boards, (DRBs, DABs).

While it can't be said with any degree of certainty that the economic crisis is behind us and that the global construction industry can now look forward to a period of growth there are indicators

and projections that may point to at least the potential of an optimistic outlook for 2013 and the next several years. KPMG in its annual survey forecasts growth in the construction industry despite economic uncertainty citing one constant, an insatiable demand for infrastructure projects where worldwide expected costs for these projects is to reach US \$70 trillion in the next 40 years.<sup>16</sup> Thus, as parties look towards drafting their construction contracts, consideration is now being given, including when using the FIDIC form of contract, to what arbitral institution and rules will best serve the parties' needs should disputes arise that are not settled with adjudication.

One of the KMPG findings was that through the economic downturn companies have striven for greater efficiencies and an increasingly sophisticated approach to managing risk. These efficiencies form part of the new reality facing the global construction market with increased competition, fewer projects and lower margins, strict control of all overhead costs and guarding against untimely disputes that may result in additional expenses and costly delays are essential. This reality is not lost on the ICDR and international construction is one of its most important focus areas. International construction cases have accounted for the ICDR's largest caseload for the last four years.<sup>17</sup>

## **The Options**

### **The Use of ICDR**

The ICDR is one option that parties can consider under the FIDIC form of contract. ICDR administers international construction cases pursuant to various sets of rules that the parties may have agreed to in their arbitral agreement. Parties today have an increasing number of options to consider as they draft their dispute resolution agreement for their international construction project.<sup>18</sup> One often selected option is the ICDR's International Dispute Resolution Procedures which include international arbitration and mediation rules. These Rules were specifically designed for international disputes and incorporate the latest provisions that are expected in an international arbitration today. Moreover they provide the arbitrators with the framework to be able to consider different legal traditions and cultural differences along with the ability to move matters forward, control costs and to render awards that will be recognized and enforced pursuant to the enforcement treaties.<sup>19</sup> The ICDR would suggest for an international construction

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<sup>16</sup> The Great Global Infrastructure Opportunity, Global Construction Survey, 2012, [www.KPMG.com](http://www.KPMG.com).

<sup>17</sup> In 2011 the ICDR administered 994 cases with 119 cases concerning international construction. The ICDR administered 888 cases in 2010 with 101 cases concerning international construction. In 2009 the ICDR administered 836 cases with 101 international construction cases and in 2008 the ICDR administered 703 cases with 77 international construction cases.

<sup>18</sup> The ICDR can assist the parties in exploring the various rules and procedures and can review and discuss arbitration clauses. For assistance regional ICDR contact information can be found at [www.ICDR.org](http://www.ICDR.org).

<sup>19</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3. As of this writing 145 countries are parties. The Inter-American Convention on International Commercial Arbitration, done at Panama City, January 30, 1975 O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975). As of this writing 18 countries are parties.

contract that the parties consider adding provisions that provide for Consolidation or Joinder as well as Inspection and Investigation as these provisions are not incorporated in the ICDR's International Arbitration Rules.

These Rules have the additional benefit of incorporating a provision that provides the parties with access to an arbitrator who can hear a request for emergency relief at the moment the case is filed and render a decision.<sup>20</sup> The ICDR has also promulgated its Guidelines Concerning Information Exchange. These guidelines are required to be applied by all arbitrators serving on ICDR cases and reflect the institution's policies to reduce the increased costs and time that may be incurred when the parties engage in broad discovery requests which are not typically found in accepted international practice.<sup>21</sup>

### **Mediation**

Parties might wish to consider the possibility of mediation or conciliation. Mediation may be a logical and appropriate step to be taken during the 56-day "cooling off period" per Clause 20.5 of the FIDIC form of contract. This too may be discussed with the ICDR either when the contract is being written or after a dispute arises, for the ICDR is prepared to arrange for mediation or conciliation anywhere in the world. With increases in time and costs international mediation continues to gain in popularity and interest. The ICDR is a proponent of the use of mediation, offering mediation in all its cases while maintaining a refund schedule as an added incentive for the parties to consider mediating their international matters. Parties can agree to mediate in their arbitration agreement by referencing mediation as a condition precedent to the arbitration. The ICDR incorporated international mediation rules to its international arbitration rules in 2003 and they contain the modern provisions that are needed for a cross-border mediation providing the framework for the mediation from initiation to a settlement.

One of the often heard objections to mediation is that it is used to delay the commencement of the arbitration process. Parties have a number of options to counter any possible delays including specifying strict time limits for the mediation to occur or opting for a concurrent mediation. In a concurrent mediation the arbitration and the mediation proceed on a parallel track so the arbitration is not delayed. As the mediator can be appointed quickly and the mediation scheduled shortly thereafter it is possible to complete the mediation before the arbitrators in the parallel arbitration are appointed. It is an understatement to say that a successful mediation is a win-win for all the parties. It is a tremendous savings of time and money and as the parties agree to the settlement they often are able to preserve valuable business relationships.

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<sup>20</sup> See Article 37 of the International Arbitration Rules. To date the ICDR has administered 24 article 37 cases with 11 requests granted (partially or in full), 7 requests were denied, 4 cases settled, 1 request was withdrawn and 1 is pending.

<sup>21</sup> See Guidelines Concerning Information Exchange at [www.ICDR.org](http://www.ICDR.org).

Moreover the dispute is resolved and even in those cases where the parties do not reach the full settlement of all disputed issues the mediator can encourage a settlement of some of the issues and claims which will be of value in the subsequent arbitration where fewer claims result again in a savings of time and money.<sup>22</sup>

The ICDR also administers international construction cases pursuant to the AAA's Construction Industry Arbitration Rules and Mediation Procedures. These Rules which were revised in 2009 are primarily designed for domestic construction cases but can be applied by agreement of the parties in an international case. The ICDR will suggest to the parties that they incorporate certain international practice provisions when selecting these Rules in their arbitration agreement and require a reasoned award to comply with the enforcement treaties.<sup>23</sup>

The following chart illustrates a number of the differences between the ICDR's International Arbitration Rules and the AAA's Construction Rules.

<b>ICDR International Rules</b>	<b>AAA Construction Rules</b>
• International Arbitration Focus	• Domestic Construction Focus
• Tribunal can reconsider ICDR decision regarding place of arbitration decision	• Tribunal can reconsider AAA locale decision – Closest to site criteria
• Opt-Out Emergency Interim Relief Procedures	• No Emergency Interim Relief Procedure
• No Consolidation or Joinder Procedure – No Inspection or Investigation Procedure	• Consolidation or Joinder Procedure Provided – Inspection or Investigation Procedure Provided.
• Guidelines Concerning Exchanges of Information – all cases after May 31, 2008	• Discovery referenced in the Rules.
• No time of award provided – prompt standard	• Award done within 30 Days from close of hearings
• Provides for reasoned award	• Open question for tribunal to consider
• Remedy Scope - International standards - amiable compositeur not permitted without express agreement	• Remedy Scope – “any remedy or relief that the arbitrator deems just and equitable”
• Punitive damages excluded	• No reference to punitive damages

<sup>22</sup> See, A Guide to ICDR Case Management, Part 1, Chapter 1, Luis M. Martinez, ICDR Awards & Commentaries, edited by Grant Hanessian, Juris Publishing, 2012.

<sup>23</sup> Construction Industry Arbitration Rules and Mediation Procedures at [www.adr.org](http://www.adr.org).

## **The UNCITRAL Arbitration Rules**

Another option in international construction disputes is using the UNCITRAL Arbitration Rules. In international construction contracts parties may reference provisions from the FIDIC Contracts Guide. FIDIC provides for the use of the UNCITRAL Arbitration Rules and each year the ICDR provides administrative services pursuant to these Rules.<sup>24</sup>

The UNCITRAL Arbitration Rules were adopted in 1976 by the UN Commission on International Trade Law, a worldwide organization that includes representatives from the various legal, economic, and social systems and geographic regions. In 2010 UNCITRAL revised its Arbitration Rules which are currently in effect. The General Assembly of the United Nations has recommended the UNCITRAL Arbitration Rules for inclusion in international commercial contracts.

Cases under the UNCITRAL Arbitration Rules will proceed more efficiently when parties have named in their contract an experienced, impartial institution to act as the authority to designate arbitrators if the parties do not and to ensure the completion of all administrative steps throughout the process. When properly requested or designated by agreement, the ICDR will act as the appointing authority under the UNCITRAL Arbitration Rules and may provide administrative services for international construction cases pursuant to the UNCITRAL Arbitration Rules.

Recognizing that the UNCITRAL Arbitration Rules were drafted for an ad hoc arbitration process by selecting the ICDR the institution fulfills a number of important tasks that could otherwise in a non-administered case where perhaps one side does not wish to participate, result in a protracted, expensive arbitral process, procedural irregularities, bad faith, dilatory tactics, biased or unqualified arbitrators.<sup>25</sup>

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<sup>24</sup> In 2010 the ICDR administered 71 cases pursuant to the UNCITRAL Arbitration Rules.

<sup>25</sup> Arbitrations that are not managed by an arbitral institution are called ad hoc arbitrations. Some argue that ad hoc arbitration is less expensive because the parties do not have to pay administrative fees to an administering institution. However, others recognize that these savings are illusory since the administrative work has to be done by the arbitrator or by a person on either the arbitrator's staff or a third-party hired for the case. Neither arbitrators nor party staff can provide the experienced independent oversight of a respected arbitral institution and consistent interpretations of their arbitral rules as well as the implementation of the institution's policies that protect the arbitral process. For an example of a protective policy, the ICDR requires the implementation of its Consumer Due Process Protocol in all cases where a consumer is a party. See, Martinez, supra note 14 at 6.

In an international construction contract pursuant to the UNCITRAL Arbitration Rules the ICDR would assist or complete a number of important tasks, for example;

- The initiation of the case;
- Composition of the arbitral tribunal including the appointment of a sole or presiding arbitrator, the appointment of the second arbitrator in tri-partite panel cases and assisting the parties in multiparty cases;
- Decisions on challenges to arbitrators;
- Appointment of substitute arbitrators;
- Coordination of the case calendar, files and financials;
- The use of the ICDR/AAA lists of construction industry professionals; and
- Consultation on fees of arbitrators

Moreover the ICDR in working with the parties on the composition of the tribunal will draw from its panels of leading construction arbitrators. The panel includes qualified persons of many different nationalities having varied professional and business backgrounds from all aspects of the construction industry.

Given the increased interest in efficiencies parties in drafting their arbitration clauses may wish to consider other ADR options and can decide to customize the process by opting, for example, to have the matter heard by a sole arbitrator based on documents only waiving the need for any oral hearings at all or they may wish to explore the various expedited procedures available for construction disputes including the "Fast-Track" procedures in the AAA's Construction Industry Arbitration Rules along with the ICDR's suggested international practice procedures. Parties may also consider incorporating the aforementioned Dispute Resolution or Adjudication Board or partnering procedure at the start of the project. The ICDR working with the AAA's Construction division offers a range of dispute avoidance and resolution services to meet the diverse needs of the international construction industry.

### **Global Network of Cooperative Agreements**

Another important component of the ICDR system and its ability to provide international construction administrative services is its global network of cooperative agreements. The ICDR currently has 67 Cooperative Agreements in 45 countries, providing local partners throughout the world which gives the ICDR access to additional hearing facilities and infrastructure along with local expertise enhancing its abilities to provide complex international construction arbitration services.

## Sample Clauses

When drafting the arbitral clause within the contract, parties are faced again with a number of choices. One option for consideration is the ICDR Arbitration Model Clause\*

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution (or) American Arbitration Association in accordance with its International Arbitration Rules.*

The parties may wish to consider adding:

- "The number of arbitrators shall be (one or three)";
- "The place of arbitration shall be (city and/or country)"; or
- "The language(s) of the arbitration shall be \_\_\_\_\_."

\* The model arbitration clause above will guide the parties through all the major aspects of international arbitration. Incorporating by reference a modern set of arbitral procedures that meet the expectations of the parties in international arbitration proceedings; the short-form clause serves as an excellent starting point for the drafter, with additional language added only as necessary to address particular needs of the contract. The ICDR will administer the international case when the clause references either the ICDR or the AAA; parties are free to designate either, but the increasing trend is to designate the ICDR. Parties may wish to contact the ICDR to discuss additional clause options for their international construction project.

Parties can arbitrate future international construction disputes pursuant to the UNCITRAL Arbitration Rules by inserting the following clause into their contracts:

*Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration under the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the International Centre for Dispute Resolution. The case shall be administered by the International Centre for Dispute Resolution under its Procedures for Cases under the UNCITRAL Arbitration Rules.*

The parties may wish to consider adding:

- "The number of arbitrators shall be (one or three)";
- "The place of arbitration shall be (city and/or country)"; or
- "The language(s) of the arbitration shall be \_\_\_\_\_."

## **Conclusion**

Parties to any construction contract have various options available to them when drafting arbitral clauses for their contracts, even when using the FIDIC form of contract. Although little consideration has been made in the past to the language to be used in the arbitral clause, defaulting to the FIDIC form of contract language, recent trends demonstrate that parties are in fact considering the options available and modifying the standard default language. Why? Because when disputes arise on a project, regardless of whether the dispute is resolved prior to arbitration, there will be time and cost impacts to the parties to resolve the dispute.

With adjudication now being the preferred first tier step process in dispute resolution, while the DAB members do not serve as arbitrators, the fact that their decision can be final and binding raises new concerns over the member's qualifications and experience to hear disputes as they arise. How those members are chosen is not simply limited to the default provisions in the contract and parties are free to look towards other means of finding DAB members including lists from the AAA and DRBF.

In addition, should adjudication not be the final step because the parties cannot agree to the DAB decision, options are still available to the parties, including mediation, as an interim step before proceeding with arbitration. Should mediation also fail, the final step is international arbitration. However, as with the DAB membership, parties are not limited to the default provisions of the FIDIC form of contract. There are options available such as the use of the ICDR Rules, UNCITRAL Rules, and even the option of choosing the ICDR to administer the UNCITRAL Rules should the UNCITRAL option be selected.

The final point of the article is that the world is not and cannot stop building major infrastructure projects. Some of the world's largest projects are yet to be built and will mirror the size and/or exceed the size of some of the current Gigaprojects such as the London Crossrail or Gorgon Fields Project in Australia. As parties embark on negotiating their arbitral clauses within their construction contracts, consideration is being given to the cost and time dispute resolution will have on the overall cost and execution of those projects. Thus, even given the longstanding perceived provisions of the ICC included in the FIDIC form of contract, parties should determine what their specific needs and goals are and are free to choose alternatives to how DAB members are selected, whether mediation might be a viable option during the "cooling-off" period, and whether alternative governing rules should be applied, such as ICDR or UNCITRAL or whether alternative arbitral institutions should administer the rules agreed.