

Study Group on Dispute Review Boards

**Dispute Resolution Procedures**

**&**

**DRB Regulations**  
**with accompanying explanatory notes**

March 2004

## Foreword

A Study Group with delegates from the *Stichting Instituut voor Bouwrecht* (the Dutch Institute for Construction Law), the *Nederlands Arbitrage Instituut* (the Dutch Arbitration Institute), the *Nederlands Mediation Instituut* (the Dutch Mediation Institute), the *Raad voor Arbitrage voor de Bouw* (the Arbitration Board for the Construction Industry) and *ACB Conflictmanagement voor het Bedrijfsleven* (ABC Conflict Management for Commerce and Industry), reviewed the different models for dispute resolution in construction projects by means of a Dispute Review Board (also: Dispute Resolution Board or Board of Experts). In a continuation of this review, the desire was expressed for a set of model regulations for the deployment of a DRB, which parties could use when drafting their agreements.

UAV-GC 2000, the legal and administrative framework for integrated forms of contracts, offers the option in the attached Model Basic Agreement for a project to have a Dispute Review Board. The importance of developing model regulations, when introducing these terms and conditions in practice, is recognised. Such a set of regulations promote uniformity in defining duties and procedures and the establishment of DRB's. The Feedback Group makes use of the services of the University of Tilburg to interpret this development.

The UAVgc Feedback Group, responsible for monitoring the implementation of the UAVgc in practice, and the aforementioned Study Group have decided to join forces to prepare a joint proposal for model DRB regulations.

The dispute resolution procedure and regulations herein have developed from the commentary and suggestions of both academia and practice. The outcome of discussions during a meeting of experts held in November 2002 and the extensive commentary on the first draft have been incorporated. Specific choices have been made to create a consistent and correct set of regulations. Our aim is to provide business practice with regulations that, on the one hand, offer scope and flexibility to the parties and DRB members (and substitute members) and on the other hand guarantee the due process of law as far as possible. Explanatory notes have been included to make the regulations more accessible.

This concerted effort materialised in a delegation from the Feedback Group joining the Study Group. At the time of publication of the model regulations, the Study Group comprised the following members:

Dr. M. Chao — Duijvis, Dutch Institute for Construction Law - IBR (Chairperson)

Mr. S. Conway, Dutch Mediation Institute

Mr. J.A.G. van Eimeren, Arbitration Board for the Construction Industry

Mr. Y.P. Kamminga, University of Tilburg

Eng. T.G. van Reeuwijk, CROW, supervision of the UAVgc Feedback Group

Ms. M.A. Schonewille, ACB Director

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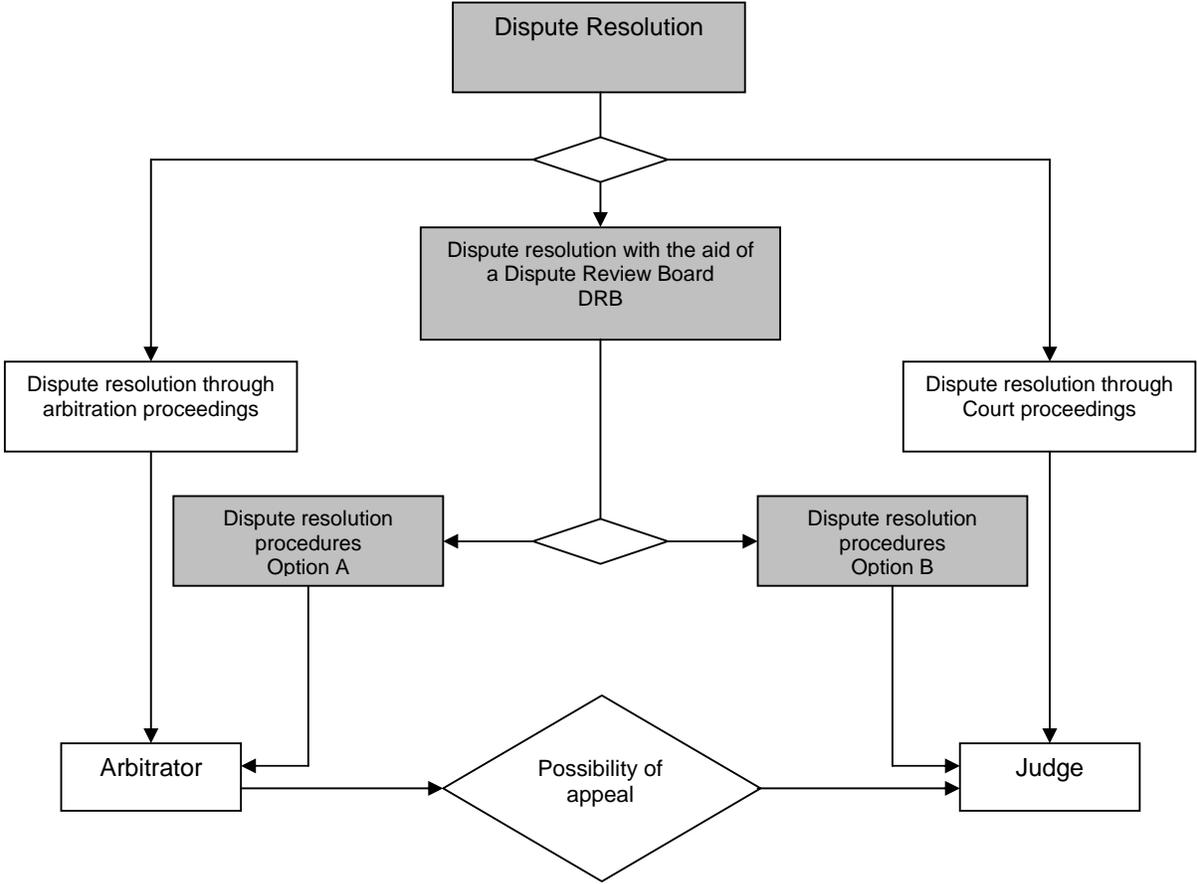
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# Dispute Resolution

*the different options*



## Dispute Resolution Procedures, Option A - Arbitration

- 1 All disputes that arise from an agreement which include these dispute resolution procedures, or from further agreements arising therefrom, shall be settled by arbitration according to the arbitration rules made applicable in the agreement and with due observance of the provisions in the following paragraphs.
- 2 The arbitration tribunal shall declare the claimant's claim to be non-admissible if:
  - a. the dispute in question has not first been submitted to the Dispute Review Board — hereinafter referred to as the DRB — in accordance with the attached DRB regulationsand
  - b.
    - (1) one of the parties does not give notice within four weeks of the opinion issued under the DRB regulations that it does not agree therewith, or
    - (2) once it is established under Article 25 of the DRB regulations that the dispute is not resolved according to the DRB regulations.
- 3 The arbitration tribunal shall further declare the claimant's claim as non-admissible if a period of more than one year has elapsed between the notice (1) or the DRB ruling (2) as referred to in the previous paragraph and the submission of an application for arbitration for the same dispute.
- 4 The provisions of paragraphs 2 (b) and 3 shall not apply if the arbitration is exclusively for the purpose of complying with the opinion.
- 5 The procedural report as referred to in Article 19 of the DRB regulations forms part of the opinion as referred to under Article 2 (b) (1), once the opinion has been issued.
- 6 If the ruling of an arbitration tribunal, as referred to in paragraph 1, is declared wholly or partially invalid by a judgement of the Court, each of the parties is entitled to have the dispute reconsidered - to the extent that it has consequently remained unsettled – according to the procedure as laid down in paragraph 1. This right applies only and to the extent that the regulations of the arbitration institute as referred to in paragraph 1 do not provide otherwise. Such a claim is only admissible if it is instituted within three months of the judgement of the Court becoming final and binding (*res judicata*). Anyone who acted as an arbitrator or secretary in respect of the invalid ruling is excluded from acting in the new arbitration proceedings.
- 7 Provided an arbitration ruling has not been made in accordance with paragraph 1, the parties undertake to observe an opinion given under the DRB regulations, unless the arbitration tribunal as appointed determines otherwise by means of an interim ruling.
- 8 If the arbitration rules referred to in paragraph 1 do not provide therefor, the parties agree, also in view of the provisions of paragraph 3, that the arbitration

tribunal will be authorised to grant its ruling in interlocutory proceedings under Article 1051 of the Dutch Civil Procedure Code.

## **Dispute Resolution Rules, Option B — Ordinary Court**

1. The Court of the judicial district specified in the agreement holds jurisdiction to determine all disputes arising from the agreement, or further agreements arising therefrom.

2. The Court shall declare the claimant's claim to be non-admissible, if:

a. the dispute in question has not first been submitted to the Dispute Review Board — hereinafter referred to as the DRB — in accordance with the attached DRB regulations;

and

b.

(1) one of the parties does not give notice in writing to the other party and the DRB within four weeks of the opinion issued under the DRB regulations that it does not agree therewith, or

(2) once it is established under Article 25 of the DRB regulations that the dispute is not resolved according to the DRB regulations.

3. The claimant's claim shall also be non-admissible if a period of more than one year has elapsed between the notice (1) or the DRB ruling (2) as referred to in the previous paragraph and the claim in relation to the dispute being instituted.

4. The procedural report as referred to in Article 19 of the DRB regulations forms part of the opinion as referred to under Article 2 (b) (1), once the opinion has been issued.

5. Provided a judgement has not been made in accordance with paragraph 1, the parties undertake to comply with an opinion given under the DRB regulations, unless the court holding jurisdiction determines otherwise in interlocutory proceedings as referred to in Article 254 et seq. of the Dutch Civil Procedure Code.

## **DRB Regulations**

### **GENERAL**

#### **1. Purpose of the DRB**

The purpose of the Dispute Review Board — hereinafter referred to as the DRB – is to aid parties in resolving disputes arising from their interpretation of the agreement, or further agreements which may ensue therefrom between the parties, and to facilitate the settlement of such disputes as quickly as possible through the conclusion of a settlement agreement, as provided for in Article 7:900 of the Dutch Civil Code (BW).

#### **2. Nomination of the members**

The parties shall nominate the members and, if relevant, the substitute members of the DRB as soon as possible after signing the agreement.

#### **3. Basic premises regarding nominations**

a. The DRB shall comprise an uneven number of members. The parties may decide to nominate substitute members. Members and substitute members shall be natural persons.

b. The parties shall agree on the number of members and substitute members to be nominated. The number shall depend on the nature and scope of the performances to be delivered under the agreement and/or the project described therein, with particular reference to the complexity and duration of the project, the disciplines relevant thereto and the expertise required for its assessment.

c. Members and substitute members shall be independent from the parties and furthermore impartial.

d. Members and substitute members shall be adequately available to perform their duties.

e. Members and substitute members may not be appointed as arbitrators or judges in disputes relating to the same project.

f. Members and substitute members shall have a reasonable written and verbal command of the language or languages in which the agreement is drafted.

#### **4. Secretary**

a. An official secretary may be appointed to the DRB at its initiative or on application of the parties. The DRB shall appoint the secretary, after consultation with the parties.

b. The secretary shall be independent from the parties and impartial.

c. The DRB shall determine the secretary's duties.

#### **5. Nomination procedure**

a. Each party shall provide their list of candidate members in principle within one month after signing the agreement and with due observance of the provisions of Article 3. The other party shall then choose the number of members specified in the agreement within 14 days from this list. If an insufficient number of acceptable candidates appear on the list, which the party so alleging must substantiate with reasons, the other party shall prepare a new

nomination list comprising a maximum of twice the number of outstanding candidates. If none of the candidates thereon are acceptable once again, the chairperson of the Arbitration Institute which holds jurisdiction under the Dispute Resolution Procedures or the Judge-President of the Court specified therein may stipulate a binding list of candidates from which the party in question must make a choice. The parties can also nominate substitute members in the same manner.

b. The members appointed by the parties shall jointly nominate a chairperson to the parties, who need not be from among their ranks, who the parties shall then appoint. If this chairperson is not acceptable to one of the parties, the DRB shall make a further nomination. If this candidate chairperson is also unacceptable to one of the parties, the chairperson of the Arbitration Institute which holds jurisdiction under the Dispute Resolution Procedures or the Judge-President of the Court as specified therein shall make the appointment.

**6. Mandate agreement with members and substitute members**

Members and substitute members shall each enter into a separate mandate agreement with the parties jointly, which shall refer to the agreement and these DRB Regulations. Among other things, the mandate agreement shall govern the remuneration of members and substitute members, the reimbursement of their expenses and the detailed arrangements between members/substitute members and the parties jointly.

**7. Term of the appointment**

The agreement as referred to in Article 6 shall specify the term of the mandate.

**8. Termination of the mandate agreement**

a. Members and substitute members may individually and unilaterally terminate the mandate agreement that they have each separately concluded with the parties without giving reasons.

b. The parties may jointly terminate the mandate agreement with a member or substitute member.

c. If the parties engage in a dispute over the intended termination by one of the parties, — contrary to the agreement — the chairperson of the Arbitration Institute which holds jurisdiction under the Dispute Resolution Procedures or the Judge-President of the Court as specified therein shall be authorised to rule thereon.

d. The agreement shall be automatically terminated if a member or substitute member is declared bankrupt or is placed under curatorship or administration.

e. The agreement shall also be automatically terminated upon the death of a member or substitute member.

**9. Consequences of the termination of the mandate agreement**

In the event the mandate agreement is terminated with one or more members, the remaining members shall make recommendations to the parties - with due observance of the provisions of Article 3 - on how the resultant vacancy or vacancies should be filled. Such a recommendation is binding in nature; however the parties may jointly from their side request to occupy the vacancy or vacancies. If the vacancy or vacancies have to be filled, the remaining member

shall nominate one or more substitute members. The parties shall make the formal appointment according to the provisions of Article 5.

**10. Costs**

a. Unless the parties determine otherwise by separate arrangement, the DRB costs shall be borne by them equally. The parties shall designate a joint debtor in this regard.

b. The DRB shall decide on the allocation of any costs that it or the parties incur over and above those already related to the DRB's handling of the dispute.

**11. Liability**

a. Members and substitute members shall not be liable for the consequences arising from opinions issued by the DRB.

b. The parties shall indemnify the members and substitute members against third party claims for damages arising from opinions issued by the DRB.

**12. Providing information / Confidentiality**

a. The parties shall ensure that the DRB receives all the information it requires to carry out its activities punctually and regularly.

b. By means of further consultation, the parties shall regularly enable the DRB to keep itself updated on progress with the performance of the agreement.

c. The DRB is authorised to instruct the parties to submit documents that, in its opinion, are necessary for the proper performance of its activities. This shall take place in the form of a procedural instruction as referred to in Article 20.

d. Members and substitute members are obliged to observe the confidentiality of information made available to them in the context of their activities and may not make any disclosures to third parties without the consent of the parties and the DRB.

**13. Progress meetings**

The parties shall periodically, and at least four times per year, hold progress meetings with the DRB, preferably close to the site or sites where the activities under the agreement are being carried out. The parties shall at all times attend such a meeting at the DRB's first request.

**DISPUTE HANDLING**

**14. Dispute resolution methods**

a. The handling of all disputes shall commence with an application as referred to in Article 16.

b. The parties may make use of the following methods in order to resolve their disputes:

- Mediation (Article 21)

- Expert's report (Article 22)

- DRB opinion, which may be preceded by an interim opinion (Article 23)

- Other methods to be determined (Article 24).

c. The choice of a specific method shall be made during or shortly after the procedural meeting referred to in Article 18 and recorded in the report referred to in Article 19.

d. The parties may at all times jointly withdraw the dispute and must inform the DRB hereof immediately.

**15. Exchange of documentation and correspondence**

a. All documents that are exchanged within the context of the dispute handling procedure must be sent as soon as possible to the other party/parties and the DRB.

b. The party sending the documentation carries the risk of non-receipt.

c. The chairperson of the DRB or otherwise the secretary - if one is appointed - shall ensure that the other members and substitute members receive these documents.

**16. Application**

a. either party ('the Applicant') may bring a dispute before the DRB by submitting a concise document ('the application') in the manner as referred to in Article 15. This document shall set out the dispute on an item-by-item basis. The application shall include a summary description of the facts and circumstances that underlie the dispute / individual items ('the grounds').

b. The DRB chairperson or the secretary shall immediately confirm receipt of the application to the parties.

**17. Answer**

a. Within two weeks of the date of acknowledgement of receipt referred to in Article 16(b), the opposing party shall send its answer, in the manner referred to in Article 15, which shall comprise a concise document ('the answer') with a reaction to the grounds advanced by the Applicant, and may include supplementary grounds.

b. The DRB chairperson or secretary shall immediately confirm receipt of the answer to the parties.

c. The provisions of this article shall not apply if, and to the extent that the application referred to in Article 16 is submitted jointly.

**18. Procedural meeting**

Within two weeks of the date of acknowledgement of the application, the DRB chairperson shall, in consultation with the parties, determine a venue and place for a procedural meeting to be held between them. The purpose of this meeting is - as far as possible by way of mutual deliberation but in the absence thereof by the DRB - to determine the following, to the extent it is possible at that stage of the dispute:

(I) The undisputed facts between the parties.

(II) The facts that still have to be established further.

(III) The dispute resolution method to be used and the period required therefor. In the absence of an agreed term this shall automatically be three months.

(IV) The questions that the DRB must answer in any opinion it is called upon to provide.

(V) Whether, and if so which, experts should be engaged by the parties or the DRB.

(VI) Which people should possibly be examined to provide clarification on facts that need to be established further.

(VII) Any other necessary procedural steps.

(VIII) A schedule within the framework of the chosen procedure for the submission of documents, the examination of witnesses, the issuing of expert opinions, including a hearing date for the dispute.

(IX) Which members or substitute members of the DRB shall attend the hearing or otherwise be involved with the preparatory procedural steps. The number of members must be uneven at all times.

(X) Everything else which, in the opinion of the DRB, is otherwise important for the thorough settlement of the dispute.

The DRB shall provide a report of the procedural meeting stating whether and to what extent the parties have reached agreement on the matters placed on the agenda or otherwise to what extent the DRB has decided on these items.

b. The parties are obliged to observe the procedural report during the further handling of the dispute.

c. No additional grounds or changes to the requested opinion may be introduced once the procedural report has been adopted, unless the DRB consents thereto after consultation with both parties.

d. The procedural report shall be regarded as an opinion for the purposes of Article 2 of the Dispute Resolution Procedure.

## 20. **Procedural instructions**

a. The DRB is authorised to give procedural instructions that may relate to any aspect that is important for a thorough and swift resolution of the dispute.

b. Such instructions shall at all times be given in the form of a document to be signed by the DRB chairperson. If the DRB has an official secretary, he/she may be authorised by the chairperson to sign on his/her behalf.

c. The parties shall be obliged to observe such procedural instructions. If the parties fail to follow these instructions, the DRB shall be entitled to draw such conclusions as it deems proper.

## **METHODS**

### 21. **Mediation**

a. If so agreed in the procedural meeting, the parties may endeavour to resolve their dispute by way of mediation in accordance with the rules specified in the agreement.

b. The mediator(s) shall be nominated in accordance with the rules referred to in paragraph a. A member or substitute member who is also registered as a mediator may be nominated as a mediator.

c. Members or substitute members who are involved in mediation may not be appointed if the parties thereafter request the DRB for an opinion in the same dispute.

d. If the mediation does not result in a settlement agreement, either party may initiate the dispute again by way of application or under Article 25.

**22. Expert's report**

a. If so agreed in the procedural meeting, the DRB may appoint one or more experts, who need not come from its ranks, to answer questions it has formulated in consultation with the parties.

b. An expert's report may be used (1) of its own accord or (2) as information by the DRB in an opinion procedure. The purpose of the expert's report in the first case is to assist the parties in concluding a settlement agreement, irrespective of whether consultation takes place with the members or substitute members designated for this purpose.

c. When appointing the expert(s), the DRB shall specify the deadline for the issuing of the expert's report, which procedure is to be followed, as well as who shall pay the costs of the expert(s).

d. If the expert's report as referred to under paragraph b (1) does not result in a settlement agreement, either party can initiate the dispute again by way of application or under Article 25.

**23. Opinion procedure**

If so agreed in the procedural meeting, the DRB may resolve the dispute by means of an opinion. An expert's report as referred to in Article 22 (b) (II) and/or a hearing may be used in the procedure for this purpose before an opinion, provisional or otherwise, is issued.

**I. Hearing.**

a. A hearing shall take place at the request of the parties or at the DRB's initiative at a venue and time to be determined by the DSB.

b. The chairperson shall be entitled to summons people to appear at the hearing by means of procedural instruction, as referred to in Article 20, or otherwise not to admit people who do attend the hearing, if and to the extent their attendance cannot be adequately motivated.

c. The chairperson shall determine the rules of the proceedings and notify the parties hereof in advance. The chairperson is further responsible for maintaining these rules and during the hearing may give the instructions and rulings necessary for this purpose.

d. In principle, the parties each have two opportunities to clearly and concisely explain their positions and points of view.

e. The parties may have external representatives speak on their behalf, provided they give notice thereof in advance and the opposing party is informed in due time.

**II. Preliminary opinion**

- a. If one of the parties have so requested and/or the DRB deems it appropriate, it may — if possible — issue a verbal interim opinion immediately after the hearing, or otherwise at any other stage of the dispute (at least after both parties have been heard).
- b. The DRB may never be bound by its interim opinion. An interim opinion is only indicative and not binding.
- c. An interim opinion shall always be followed by an opinion, as referred to under III, paragraph a.

### III. Opinion

- a. The DRB shall issue its opinion within the period referred to in Article 18 (a) (III).
- b. If this does not appear possible and the DRB holds the same view, it shall advise the parties thereof as quickly as possible. The DRB shall further indicate:
  - I. by which date its opinion will be issued, or
  - II. which additional procedural steps are necessary to be able to issue an opinion.
- c. The DRB shall endeavour to reach consensus, failing which its decisions shall be taken on a majority of votes.
- d. The opinion shall be given in writing, dated and signed by the DRB members involved. The opinion shall be sent to the parties as quickly as possible.
- e. The parties may request the DRB to correct obvious mistakes, contradictions or omissions in the opinion within two weeks of the issuing thereof. The DRB shall inform the parties of its decision in this regard as soon as possible and after having given the other party the opportunity to respond thereto.

## 24. **Other methods of dispute resolution**

- a. Following the procedural meeting, the DRB may decide in consultation with the parties to resolve the dispute by using methods other than those specified in the regulations.
- b. If the decision under paragraph a does not result in a settlement agreement, either party may initiate the dispute again by way of application or under Article 25.

## 25. **No settlement agreement**

If no settlement agreement is concluded in the event of mediation (Article 21), an expert's report (Article 22) or another method of dispute resolution (Article 24) within the period stipulated in Article 18 III, or if it already becomes evident during such period that a settlement agreement will not be reached, the DRB shall declare by way of opinion on application of either party that the dispute has not been settled under the DRB regulations. The opinion shall be deemed to have been issued, if this does not occur within two weeks of such an application.

## **DEVIATIONS FROM THE DRB REGULATIONS**

26. **Deviations**

The DRB shall be authorised — after taking all the interests of the parties involved, as well as the facts and circumstances into account – to deviate from these regulations on request of one of the parties or at its own initiative. The DRB shall not proceed to do so until it has consulted the parties in this regard.

## **Explanatory Notes on the Dispute Resolution Procedures and the DRB Regulations**

These explanatory notes have been prepared to make the Dispute Resolution Procedures and DRB Regulations more accessible and simpler to use. Where necessary and expedient, these notes state briefly what the intention of an article (or part thereof) is. In a number of cases, examples are used to further illustrate this intention.

The purpose of these explanatory notes is merely and only to clarify the Dispute Resolution Procedures and the DRB Regulations and accordingly is not intended as an extension thereof. The explanatory notes can only serve as guidance in answering questions on the interpretation of the Dispute Resolution Procedures and the DRB Regulations and have the status of a supplementary source of information.

The explanatory notes are based on the assumption that a main agreement has been concluded between two parties and the Dispute Resolution Procedures and the DRB Regulations have been made applicable therein. The procedures may also be used in the case of multiple party contracts.

In a number of places, the DRB Regulations provide examples on what time periods should be followed. The parties can obviously freely agree to deviate from these suggestions. These explanatory notes also set out the possible different choices that can be made with regards to a number of these provisions. In each case, this serves only as further clarification of the provision in question.

The provisions relating to the handling of disputes are also included in a diagram that sets out the options for dispute resolution. The diagram follows these explanatory notes.

## Explanatory Notes on Dispute Resolution Procedures

The provisions in the Dispute Resolution Procedures, Option A (Arbitration) and Option B (Ordinary Court), make provision for instituting an appeal once the procedure under the DRB Regulation is finalised. The main agreement concluded between the parties must include this and stipulate which institution can hear the appeal and so test the opinion issued by the DRB.

The principle agreement between the parties must indicate which dispute resolution procedure they have chosen and also determine a number of other items in greater detail. This is achieved by including the following provisions in the main agreement.

### Settlement of disputes – the Dispute Review Board

1 The parties shall refer their disputes to the Dispute Review Board, in accordance with the 'Dispute Resolution Procedures and DRB Regulations, March 2004', issued by ACB/CROW/IBR. The dispute resolution procedures shall be in accordance with Option A, Arbitration [*arbitration rules shall apply*].

or

The parties shall refer their disputes to the Dispute Review Board, in accordance with the 'Dispute Resolution Procedures and the DRB Regulations, March 2004', issued by ACB/CROW/IBR. The dispute resolution procedure shall be in accordance with Option B, Ordinary Court in the judicial district [*place*]

2 Under the provisions of Article 5 (a) of the DRB Regulations, each party must appoint members from the candidates nominated by the other party. For this purpose, each party must nominate no fewer than [*number*] and no more than [*number*] candidate members.

3 If the parties opt for mediation as referred to in Article 14 (b) to settle their disputes, this shall take place according to the [*ACB regulations*] / [*NMI-regulations*].

## Dispute Resolution Procedures Option A, Arbitration

### Paragraph 1: Appeal to arbitration institutes and arbitration regulations

Dispute Resolution Procedures, Option A provides for an arbitration institute of appeal. The parties may have recourse thereto if a dispute – ensuing from the main agreement of which this procedure forms part – has arisen between them and has not been resolved by fully following one of the procedures referred to in Article 14 of the DRB Regulations.

In the agreement, the parties also declare which arbitration institute shall hold jurisdiction to determine their disputes. This may be the *Nederlands Arbitrage Instituut* (Dutch Arbitration Institute), the *Raad van Arbitrage voor de Bouw* (the Arbitration Board for the Construction Industry) or another arbitration institute. The regulations of the arbitration institute before which the dispute is brought shall then

apply. Some of these regulations oblige the parties to enter into a separate arrangement for the arbitration venue, the number of arbitrators and the appointment procedure.

## **Paragraph 2: Admissibility of the proceedings at arbitration institutes**

The second paragraph of the procedure sets out the conditions that have to be met to successfully institute an appeal at an arbitration institute against a DRB opinion.

### **Sub-paragraph a**

In all cases, the dispute must first be submitted to the DRB before an appeal can be made to an arbitration institute.

### **Sub-paragraph b**

The party instituting the appeal must give notice thereof to both the DRB and the opposing party in due time, which has been determined as four weeks after receipt of the DRB opinion.

As the DRB Regulations provide for other methods of dispute resolution, it is also determined that appeal by way of arbitration is available if another form of dispute resolution does not result in a settlement agreement within a specific period (also see Article 25).

## **Paragraph 3: Period for instituting a claim**

Claimants must institute their claims within a year after the opinion is issued.

## **Paragraph 5: Procedural report forms part of the opinion**

The procedural report forms part of the opinion. This obliges the party to first follow the opinion since another judicial procedure will not otherwise be available. The parties undertake to do this before there is any question of a dispute. The advantage of this 'compulsion' is that there is a chance of first reaching a settlement using the method that the DRB deems suitable. If one of the parties then still does not view the chosen solution as feasible, it will quickly be confirmed that a settlement agreement cannot be concluded.

## **Paragraph 6: Appeal against the arbitration ruling**

The sixth paragraph deals with the possibilities of appeal against an arbitration ruling, if the ruling is declared wholly or partially invalid. This all depends on whether the arbitration regulations of the specific institute provide for appeal. A period of three months applies for instituting the appeal.

## **Paragraph 7: Observing the DRB opinion**

The seventh paragraph states that the parties must immediately observe a DRB opinion. Instituting an appeal does not suspend the opinion. The arbitration tribunal may determine otherwise by means of an interim ruling.

## **Paragraph 8: Interlocutory proceedings in arbitration**

The eighth paragraph creates the possibility for interlocutory proceedings at an arbitration institute.

## **Dispute Resolution Procedures Option B, Ordinary Court**

### **Paragraph 1: Appeal to the Court**

Dispute Resolution Procedures, Option B provides for a judicial institute of appeal. The parties may have recourse thereto if a dispute – ensuing from the main agreement of which this procedure forms part – has arisen between them and has not been resolved by fully following one of the procedures referred to in Article 14 of the DRB Regulations. The parties must specify in their agreement in which judicial district an appeal may be made to the Courts.

### **Paragraphs 2 and 3: Admissibility of the proceedings at the Courts**

The second and third paragraphs set out the conditions that have to be met to successfully institute an appeal at the Court against a DRB opinion. These conditions are derived from the provisions stated for this purpose which apply if the Dispute Resolution Procedure in the main agreement provides for arbitration.

### **Paragraph 4: Procedural report forms part of the opinion**

The procedural report forms part of the opinion. This obliges the party to first follow the opinion since another judicial procedure will not otherwise be available. The parties undertake to do this before there is any question of a dispute. The advantage of this 'compulsion' is that there is a chance of first reaching a settlement using the method that the DRB deems suitable. If one of the parties then still does not view the chosen solution as feasible, it will quickly be confirmed that a settlement agreement cannot be concluded.

### **Paragraph 5: Observing the DRB opinion**

The fifth paragraph states that the parties must immediately observe a DRB opinion. Instituting an appeal does not suspend the opinion.

# **Explanatory Notes on the DRB Regulations**

## **GENERAL**

### **Article 1: Purpose and functions of the DRB**

The internationally recognised concept DRB stands for Dispute Resolution Board (or Dispute Review Board). For the sake of consistency, the English abbreviation is also used in the Netherlands for the Dutch term *Raad van Beoordelaars*. This provides a clearer description of the Board's role than the other term in use, *Raad van Deskundigen*. (Board of Experts)

The DRB actually has a twofold function. Its role is firstly to prevent disputes and secondly to play either a greater or lesser role in dispute resolution. The DRB performs the first function by keeping itself apprised of progress with the project and going through the relevant documents as described further in Article 12. The second role, being that of adjudicator, is fulfilled by selecting an appropriate dispute resolution procedure for the specific problem with the parties and, if so chosen, playing the role of an independent third party. That may be the role of adviser (see further Article 23), or, for example, that of mediator (see further Article 21).

The DRB's task is, as far as possible, to prevent disputes and projects coming to a standstill as a result and to quickly settle any disputes that do arise. In performing its duties, the DRB takes into account both parties' interests at all times.

In order to prevent disputes and to quickly settle them if they nevertheless do arise, it is imperative that the DRB is kept fully informed. This duty of disclosure rests on the parties who should be aware that the DRB can only function effectively if it is kept fully and accurately informed at all times and about all aspects that may be significant for the performance of its activities. This is the only way in which the DRB can properly perform its duties.

### **Article 2: Nomination of members and substitute members**

The nomination of members and substitute members takes place shortly after the main agreement is concluded. The members and substitute members shall all be natural persons.

The term DRB as employed in the regulations refers to an institute, normally comprising "its members". If provisions of the regulations relate specifically to members and/or substitute members and/or a secretary, this shall be specifically stated.

### **Article 3: Basic premises regarding nominations**

The conditions (a - f) as stated under this provision relate to the nominations and must, among other things, guarantee the flexibility, continuity, feasibility, objectivity and impartiality of the DRB as an institution. With a view to its objectivity and impartiality, the DRB for example may have no financial interest in or together with the parties nor may it have advised the parties earlier on the same matter. Family relationships must also be avoided. The members or substitute members may never have been employed as the parties' technical consultant. Opinions or statements by the DRB may never take the place of the technical advice that the parties have obtained or may need to obtain from experts for the purposes of executing the main agreement. This provision obviously not only pertains to the nomination but for the duration of the main agreement.

#### **Article 4: Official secretary**

An official secretary may be appointed who attends to the correspondence (and other communication) between the parties and the DRB. The appointment may take place in terms of Article 2. The official secretary shall be a natural person.

##### **Sub-paragraph b: Independence and impartiality**

Just as the DRB, the secretary must also be independent from the parties and may therefore not be appointed by one of the parties. The chairperson could, for example, nominate someone, provided there were no objections from the parties and other DRB members.

##### **Sub-paragraph c: Definition of activities**

The DRB shall decide the ambit of the secretary's duties. This may include the planning and administrative preparation for meetings and sending out invitations to the parties, DRB members and substitute members as well as forwarding information from the parties to the DRB and vice-versa. If a secretary is not appointed, the DRB chairperson shall be deemed to have taken responsibility therefor or to have entrusted same to a DRB member.

#### **Article 5: Nomination procedure**

##### **Sub-paragraphs a and b: Nomination**

Unless contrary procedures have been agreed upon – which often happens if there are more than two parties – the nomination procedure followed shall be the one described in the relevant article in the main agreement concluded between the parties. The number of DRB members to be nominated shall, among other things, depend on the nature and scope of the project. The periods of one month and 14 days, as referred to in the regulations, are optional and the parties may deviate therefrom. The number of DRB members should be determined by the parties in the main agreement. It shall not be compulsory to nominate substitute members, but is advisable from the point of view of continuity within the DRB. It may prevent the situation where none of the members nominated by the parties are acceptable, for example if doubts arise with respect to bias, dependence, independence and expertise. If the parties are unable to reach mutual agreement, the Court shall make a binding appointment. This shall also apply in relation to the appointment of the DRB chairperson.

#### **Article 6: Mandate agreement with members and substitute members**

Arrangements relating to the rights and obligations that the members (and substitute members) and parties have towards each other shall be laid down in a separate agreement concluded between them. This agreement may, for example, govern the extent of remuneration and the extent to which costs made while exercising the role of member (or substitute member) shall be reimbursed.

#### **Article 7: Term of the appointment**

The parties shall decide mutually for how long they wish to appoint a DRB. It is practical for this period to run concurrently with the duration of a project. The number of members may also be changed over the duration of the project. In determining the term of the appointment, the following factors, among others, shall be taken into account: the nature of the project, the intensity of long-term maintenance, the various project phases, any guarantee periods, etc. By determining the term of the

appointment in the mandate agreement with the members individually, the DRB can function for a more flexible period.

For example, the need may arise during a large project for new experts. An appointment for a shorter period, with or without the possibility of an extension, is then advisable.

### **Article 8: Termination of the mandate agreement**

The interim termination of the mandate agreement with a DRB member or substitute member – i.e. before the completion of the project – shall be possible under specific circumstances to ensure the proper functioning of the DRB and to guarantee the parties retain confidence therein.

#### **Sub-paragraph a: Termination by a DRB member or substitute member**

DRB members or substitute members shall be entitled at all times to terminate their mandate agreements, without resulting in any breach of performance.

#### **Sub-paragraph b: Termination by the parties**

If the parties agree on the non-performance of a particular DRB member, substitute member or secretary, the mandate agreement with that specific person may be terminated. This may occur, for example, if the parties have doubts as to the independence, impartiality or expertise of the DRB member or substitute member concerned.

Other grounds for termination include: dissatisfaction as to the manner of performance, the need for new blood or other members of the DRB feeling that a DRB member or substitute member is not performing adequately. In the final example, the DRB usually consults with the parties first and then advises them to terminate the agreement with the particular DRB member or substitute member.

#### **Sub-paragraph c: Termination by arbitrator or judge**

If the parties cannot agree whether an agreement with a DRB member or substitute member should be terminated, the matter shall be submitted for determination - according to the Dispute Resolution Procedure – to the arbitration institute or court holding jurisdiction.

### **Article 9: Consequences of the termination of the mandate agreement**

For the sake of continuity within the DRB, this article provides for the nomination of a new DRB member. The person nominated as a new DRB member may be a substitute member or an outsider. The procedure to nominate a new member may be started at the initiative of either the DRB or the parties. It is moreover not always necessary to fill a vacancy. The parties may agree to a smaller number of DRB members. Article 3 should be consulted in relation to nominations and the number of members.

### **Article 10: Costs**

#### **Sub-paragraph a: Apportionment of costs**

Unless the parties agree otherwise, the costs relating to the functioning of the DRB shall be borne equally. This rule thus applies irrespective of which party brings a dispute or in whose favour the DRB rules. The parties must decide mutually on a specific place of payment so that no misunderstandings can arise in that regard.

### **Sub-paragraph b: Extra costs**

Extra costs that a DRB has to incur shall be charged to the parties. This may, for example, include a specific inquiry that is necessary to settle a dispute, extra travelling and accommodation costs, etc. The reasonableness of these costs may not be contested. The DRB shall decide how these costs are apportioned among the parties.

### **Article 11: Liability**

In order to guarantee that the DRB is not limited in its advisory role by any claims for damages arising therefrom, members and substitute members cannot be held liable by the parties and the parties must also indemnify them against third party claims.

### **Article 12: Providing information /Confidentiality**

In order to duly perform its functions, the DRB should be fully informed about all significant project developments, the dealings between the parties and what phase the project is in. This involves a constant flow of information to the DRB both at the start of and during the project.

#### **Sub-paragraph a: Information to be provided**

The parties should provide the DRB periodically and punctually with all relevant information pertaining to the project, such as the agreement with its accompanying annexures, any further agreed amendments to the agreement (such as period extensions) and reports made by the parties on the progress and performance of the agreement.

The parties are also advised to maintain a summary of items over which there is a difference of opinion (which sets out relevant documentation, status, data, etc.) and to inform the DRB thereof. In this way, the parties encourage each other to keep abreast of possible disputes.

#### **Sub-paragraph b: progress and performance of the agreement**

In order that the DRB can duly perform its duties and to favour a close involvement with the activities, the parties shall, for example, allow the DRB to inspect the works in their presence. It is advised that the parties and the DRB make firm arrangements regarding the frequency and form of these visits. A possible formula is a joint site visit, once every quarter, during which the parties give a detailed account of their activities.

#### **Sub-paragraph c: Duty of disclosure**

If the DRB is of the opinion that additional documents are necessary in order for it to duly perform its duties, it may, if necessary, give a procedural instruction to obtain such information. Such an instruction would, for example, be necessary if a party refused to cooperate and this threatened to delay a dispute resolution procedure.

#### **Sub-paragraph d: Confidentiality**

In order to encourage that DRB members receive information constantly and completely and to protect the interests of the parties, the members are bound to treat all information in confidence. They have a general duty of confidentiality in respect of all information received. Only one exception is possible in this regard: namely when the parties give the DRB express consent to disclose the information to third parties.

### **Article 13: Progress meetings**

Within the context of the parties providing information to the DRB members and substitute members, meetings shall be held at which personal consultations between the parties and the DRB members and substitute members can take place. The parties can provide information directly to the DRB members and substitute members at these meetings. The meetings shall be organised at the initiative of the DRB chairperson. The parties shall both attend and cooperate during such a meeting. The meeting is an ideal opportunity to decide upon the date for a site visit. During such a meeting, the DRB members and substitute members may ask questions on the progress of the project, the cooperation between the parties and any differences of opinion that may possibly lead to a dispute.

### **HANDLING OF DISPUTES**

If a dispute arises, the DRB steps into its role as adjudicator. In principle, only the DRB, i.e. the members, are actively involved in this regard. Substitute members are however kept informed as to progress with the dispute resolution process and receive copies of the documents exchanged between the DRB and the parties. In this way, a substitute member can stand in if a DRB member is prevented (for valid reasons) from continuing, without any undue delay to the process. A dispute may be handled in various ways. See the flow chart: 'Handling of Disputes' in this regard.

### **Article 14: Methods of dispute resolution**

If a problem arises between the parties, which one or both of the parties regard as a dispute, one of the parties or both of the parties jointly may submit the dispute to the DRB.

#### **Sub-paragraph b: Methods of dispute resolution**

The nature and seriousness of disputes can vary greatly. A specific method of dispute resolution is not equally appropriate for every dispute. The parties may therefore — in consultation with the DRB — make their choice of dispute resolution method from a number of options. The dispute resolution methods referred to in the regulations are, with the exception of the DRB being able to issue an opinion, optional. The procedures summarised under this paragraph give the parties the option of having their dispute settled by the DRB or by third parties (mediators, experts, arbitrators) In addition, use may be made of procedures that are not mentioned in the regulations.

#### **Sub-paragraph c: Procedural meeting**

The choice of dispute resolution method shall be made during the procedural meeting, which is further detailed under Article 18. For this purpose, consultation shall take place between the parties and the DRB (only the members). This meeting shall place after the application and answer referred to respectively in Articles 16 and 17.

#### **Sub-paragraph d: Withdrawal of dispute**

The parties may at all times withdraw the dispute. In this way as much scope as possible is given to the parties to try and reach a settlement by way of negotiation.

## **Article 15: Exchange of documentation and correspondence**

Documents sent within the context of a procedure between the parties and the DRB must be forwarded with the necessary speed to the addressee. Depending on the nature of the document, this may be by post, courier, fax or e-mail. Sending documents to and from the DRB takes place via the DRB chairperson. The chairperson/secretary shall ensure that all DRB members and substitute members duly receive copies of the documents sent by the parties.

## **Article 16: Application**

In order to involve the DRB in a dispute, either party shall send the DRB chairperson a document briefly setting out the details thereof. The parties may also submit a joint application – see Article 17 (c). The purpose of this document is give the DRB the background to the dispute from the applicant's (or the parties') perspective. For this purpose a summary description of the facts and circumstances shall suffice, supplemented as far as possible with:

- The preferred method of dispute resolution
- A specific proposal for a possible opinion to be requested from the DRB
- The periods in which the dispute must be settled according to the preferred method, all with reference to the status of the works and planning and taking into account the other provisions of the regulations.
- References to reports, records and other relevant documents in which the dispute /disputed items between the parties have already been dealt with (without actually being provided to the DRB at that stage).
- Names and addresses, as well as fax, telephone and e-mail details, of the person who shall act as the contact person for the applicant in corresponding with the DRB. The application must be signed by a person who holds authority to do so under the agreement or under a power of attorney. The power of attorney must be submitted by the representative authorised thereunder, including if this representative is a lawyer.
- A statement pertaining to any inability of the applicant to attend the procedural meeting or the hearing.

At this stage, the DRB does not require a plea setting out legal arguments. The preparation of such a document would simply lead to delays and often unnecessarily places too much emphasis on the legal aspects of the relationship between the parties.

## **Article 17: Answer**

### **Sub-paragraph a: Reaction of opposing party**

Once an application is submitted, the opposing party is granted the opportunity to react thereto. The intention is for the DRB to glean an idea of the dispute from the opposing party's perspective. In the reaction, the opposing party can confirm the facts as set out in the applicant's document or propose other alternatives (relating, for example, to the method to be followed, the time period, relevant references, impediments in obtaining the proposed information for the procedural meeting). The opposing party shall also provide the name and address, as well as the fax, telephone and e-mail details of the person who shall act as the contact person in correspondence with the DRB. The answer must be signed by a person who holds authority to do so under the agreement or under a power of attorney. The power of

attorney must be submitted by the representative authorised thereunder, including if this representative is a lawyer.

The DRB likewise does not require the answer to be in the form of a plea setting out legal arguments, for the same reasons as given in the explanation under Article 16.

### **Sub-paragraph c: Joint submission**

It is possible for the parties to file an application jointly. It goes without saying that in this case, the application and answer are in fact one document.

### **Article 18: Procedural meeting**

Both the DRB and the parties shall be present at the procedural meeting. It shall be determined during this meeting which procedural steps will be followed to settle the dispute.

During this meeting, the first step shall be to try and determine the items (I – X) as set out in the article. If the parties cannot reach agreement on a particular item, the DRB shall – as far as possible – resolve the issue. The DRB regards ‘any other necessary procedural steps’ (VII), for example, as preparing a report. If the DRB is of the opinion, based on the application and answer it has received, that a dispute is suited to a speedy settlement – irrespective of whether the parties have requested same – it may decide to hold a hearing on the same day as the procedural meeting. The DRB chairperson shall advise the parties hereof as soon as possible, and in all cases before the procedural meeting, so that they may prepare themselves.

It must be decided at each meeting whether the applicant and the DRB members have had sufficient opportunity to consider the answer. This may lead to a new meeting being held.

### **Article 19: Procedural report**

The report of the procedural meeting shall record the decisions taken in regards to the items set out under Article 18. In this way the document is an account which the parties and the DRB can refer back to if any argument arises as to what the parties procedurally agreed upon or the DRB decided upon. It goes without saying that the report should be available as quickly as possible after the meeting. The time required for this purpose shall partly depend on the nature of the dispute.

### **Sub-paragraph c: Additions to the report**

In principle, once the procedural report has been issued the parties may no longer make any changes to the requested opinion, as referred to in Article 16 and 17. The parties may however approach the DRB to make an exception. For example, an exception could be made if a specific fact, which places the dispute in a fresh light and adds a completely new element to the application or the answer, was unknown at the time of the application or the answer.

### **Sub-paragraph d: Procedural report is an opinion**

The report has the status of an opinion for the purposes of paragraph 2 of the Dispute Resolution Procedures, as included in the main agreement. For this reason, it is a document against which appeal may be noted at an arbitration institute or court as designated in the Dispute Resolution Procedures.

## **Article 20: Procedural instructions**

The DRB may give the parties procedural instructions in addition to the procedural report, referred to under Article 19.

### **Sub-paragraph a: Thorough and swift resolution**

The DRB may give instructions if it is important for the swift and thorough resolution of the dispute, in the widest sense. For example, a situation may arise in which the DRB members only become aware of new developments in relation to the dispute after the procedural meeting. The dispute may then, for example, be able to be partially settled and a method of dispute resolution, other than the one already chosen, may be better suited to settling the balance of the dispute. The DRB would be able to give instructions in such a case. Another example is when it appears that the periods originally agreed upon are not feasible in practice. The DRB can establish new periods in an instruction.

### **Sub-paragraph b: Signature**

Instructions are signed by the DRB chairperson and sent on his/her behalf to the parties. In this way, the parties and the DRB have a document they can refer back to, if there is any uncertainty about the agreed procedural arrangements.

## **METHODS**

### **Article 21: Mediation**

#### **Sub-paragraph a: Mediation**

If mediation is chosen during the procedural meeting, the mediation regulations of “*ACB Conflictmanagement voor het Bedrijfsleven*” (ACB Conflict Management for Commerce and Industry) or the “*Nederlands Mediation Instituut*” (Dutch Mediation Institute) shall be followed. Further reference will be made to the relevant regulations in this regard, which may be obtained on request.

#### **Sub-paragraph b: DRB member as mediator**

A DRB member (or substitute member) who is registered as a mediator with the *Nederlands Mediation Instituut* (Dutch Mediation Institute), may act as a mediator. The parties must both agree to the appointment of the DRB member or substitute member as mediator.

#### **Sub-paragraph c: Exclusion of DRB members as a party entrusted with giving a binding opinion**

Members (or substitute members) who have acted as mediator may not act as an advisor in the context of an opinion procedure, as referred to in Article 14 (b), in the same dispute. This is aimed at minimising the risk of violating the principles of objectivity and independence and hearing both sides of the argument.

#### *Variant*

The parties may also agree that DRB members (or substitute members) who have been involved once as a mediator in mediation may not generally be involved in any dispute resolution, irrespective of the subject. After all, he/she may have become privy to confidential information about the parties and would no longer be able to act impartially or objectively.

### **Sub-paragraph d: No settlement agreement**

If mediation is halted by one or both parties or if a settlement is not reached for other reasons, a fresh application, as referred to in Article 16, may be submitted. In choosing a dispute resolution method, account must be taken of the provisions of sub-paragraph c. Article 25 also makes it possible to follow the route of arbitration or the ordinary court.

### **Article 22: Expert's report**

#### **Sub-paragraph a: Expert's report as an aid to dispute resolution**

The DRB shall appoint the expert or experts if the parties request an expert's report during the procedural meeting or if the DRB decides on one itself. The basic premise is that the expert(s) must be acceptable to both parties. If the parties cannot reach agreement in this regard, the DRB shall make the decision. Experts do not make any decisions. Their findings, comparable with those of a 'standing expert', may assist the parties in concluding a settlement agreement. Obviously it may also assist the DRB, if required.

#### **Sub-paragraph b: Expert's report need not be part of the opinion procedure**

The expert's report can be followed as a separate procedure or as part of the opinion procedure referred to in Article 14 (b).

#### **Sub-paragraph d: No settlement agreement**

If an expert's report as referred to in sub-paragraph b (1) does not result in a settlement agreement, a fresh application, as referred to in Article 16, can be submitted. Article 25 also makes it possible to follow the route of arbitration or the ordinary court.

### **Article 23: Opinion procedure**

An opinion procedure may comprise different parts including a hearing and an expert's report. The DRB may also issue an interim opinion. An opinion procedure must however always result in the issuing of a final opinion.

#### **I. Hearing**

A hearing may take place at the request of the parties or the DRB's initiative. The DRB shall decide whether a hearing will take place. The DRB may extend or further elaborate on the procedural requirements prior to the hearing. Sub-paragraph c provides this option for the chairperson.

The parties may have external representatives speak on their behalf. It is important that notice hereof is given in advance and also to inform the opposing party, for example by mentioning it in the application or answer. The DRB chairperson must ensure that the parties do not use surprise tactics with each other and that the opposing party has agreed to external representatives being present. The parties must clarify their viewpoints as fully as possible, for example by using written notes or summaries or with the aid of electronic presentations. Copies must be handed to all parties present at the hearing. Experts may also be given an opportunity to address the hearing. The DRB may question all parties present, at its discretion, even if the parties are represented by a lawyer. To ensure the due process of law, the chairperson shall, among other things, uphold the principle of hearing both sides of the argument.

## **II. Preliminary opinion**

If a dispute warrants a very urgent settlement, the DRB may issue an interim opinion. Such an opinion is given at very short notice. The parties may request an interim opinion or the DRB may issue one at its own initiative. For example, an interim opinion may be given when works are at a standstill in the absence of a settlement, which may have serious financial consequences for one or both parties.

An interim opinion is not binding on either the parties or the DRB. The DRB may always deviate from its interim opinion in a later opinion.

## **III. Opinion**

The DRB may opt for the opinion procedure at its own initiative or at the request of the parties.

In this procedure, the DRB issues an opinion which need not necessarily be preceded by an interim opinion.

### **Sub-paragraph b: Exceeding the decision deadline**

The DRB may, with good reason, deviate from the stated deadline. For example, the DRB may first want to visit the site to apprise itself of the technical issue which gave rise to the dispute before issuing its opinion.

### **Sub-paragraph c: Consensus or majority**

The DRB shall endeavour to reach consensus when making its decisions. If this is not possible, decisions shall be made on a majority of votes. Substitute members and the secretary do not have the right to vote.

### **Article 24: Other methods of dispute resolution**

During the procedural meeting, the DRB or the parties or both of them may prefer a particular method that is not included in the DRB regulations. The DRB may then, at its discretion, decide to subject the dispute to another procedure. An example hereof is referring the matter to arbitration.

### **Article 25: No settlement agreement**

If the chosen method of dispute resolution does not lead to a settlement agreement within the period decided on in consultation between the DRB and the parties (or otherwise a period of six months), either party may advise the DRB accordingly. The DRB shall then issue an opinion within two weeks confirming the situation. An appeal may thereafter be noted by way of arbitration or the ordinary court, depending of the provisions of the Dispute Resolution Procedure in the main agreement.

## **DEVIATIONS FROM THE DRB REGULATIONS**

### **Article 26: Deviations**

The DRB is free to deviate from the DRB regulations, irrespective of whether one or both of the parties request same. This may be for the sake of thoroughness, flexibility, for the swift settlement of the dispute or other reasons and shall take place once the parties have been given the opportunity to state their opinions in this regard.

# Flow Chart: 'Handling of disputes'

## Dispute resolution by means of a DRB

(addendum to Articles 14-25 of the DRB Regulations)

