**Legal Review of Modification Proposal 15/19**

**Introduction**

We have been asked by the SEMO Modifications Committee Secretariat to undertake a legal review of Modification 15/19 (Version 2). In particular, we have been asked to consider the following four issues:

* **Transparency and Confidentiality**: Is the addition of the transparency provision in Modification 15/19 regarding publishing details of the dispute resolution board (“**DRB**”) decisions consistent with confidentiality, or would this cause conflict in the future?
* **Primary Role of the DRB**: With regard to the proposed changes to B.19.6.1, how would these changes affect the obligations of the DRB?
* **Fairness and Equity**: With regard to the proposed changes to B.19.5.1, what is the legal impact of the proposed change in wording?
* **Scope of DRB Decisions**: With regard to the proposed changes to B.19.5.1 (d) and B.19.10.1, is there a conflict with either of these, and does it limit the powers of the DRB?

We set out in this note responses to the specific issues raised and additional observations and recommendations arising for our review. Capitalised terms in this note have the meaning given to them in the Trading and Settlement Code.

**Summary**

We understand that the overall objective of Modification 15/19 is to clarify the constitution and role of a DRB under the Code, and to enhance transparency in respect of decisions reached by a DRB. In respect of the four specific issues highlighted by the Modifications Committee, we note the following:

* **Transparency and Confidentiality**: We do not see any legal issue with the decisions of a DRB being made available to the public, particularly where a DRB’s findings relate to the interpretation and application of the provisions of the Code. That said, in our view the changes proposed in Modification 15/19 give rise to an internal inconsistency in the template Dispute Resolution Agreement and impose potentially conflicting obligations on the DRB. We recommend that this inconsistency be resolved.
* **Primary Role of the DRB**: In our view, the proposed changes to B.19.6.1 introduce a degree of uncertainty in relation to the role of the DRB, and may leave the DRB in a situation where their obligations are not clear. We have set out our concerns in more detail in part 2 of the analysis below as well as an alternative approach for the Modifications Committee to consider.
* **Fairness and Equity**: The proposed amendments to B.19.5.1 appear to recast six procedural elements that should be present in respect of a Dispute Resolution Process as six relevant considerations that the DRB is required to take into account when resolving a Dispute, although the precise intent of this revised drafting is somewhat unclear. We recommend that the Modifications Committee further consider the intention here. In our view, there appears to be a degree of overlap between B.19.5.1 and B.19.6.1. Please see part 3 of the analysis below and the proposed drafting in Table 2
* **Scope of DRB Decisions**: We agree with the policy objective that the DRB should ensure, to the extent possible, that the Dispute Resolution Process is fair. Please see our query above in respect of the intended objective of paragraph B.19.5.1, and the proposed drafting set out in Table 2. In order to ensure that paragraph B.19.10.1 is not in conflict with paragraph B.19.5.1, we would recommend deleting any inference that the DRB may have regard to broader principles of equity in reaching a decision so that the DRB is not left in an invidious position where they have competing and conflicting obligations. Furthermore, the proposed drafting of paragraph B.19.5.1 (d) implies that the DRB has the power to grant a remedy that may not otherwise be contemplated in the Code. A decision by the DRB which purports to amend or supplement the Code encroaches on the statutory functions of the the Commission for Regulation of Utilities and the Utility Regulator (together, the “**Regulatory Authorities**”) in respect of the Code, as well as being inconsistent with the formal Modifications process. With regard to the remedies available to the DRB in paragraph B.19.10.1, we recommend deleting any references to Decisions being made in accordance with the Code, as this overlaps with the overall role of the DRB (which we recommend is addressed in paragraph B.19.5.1 only).

A high level overview of the regulatory framework of a DRB is set out at **Schedule 1**. A consolidated mark up of section B.19 of the Code, incorporating the recommendations set out in this note is set out at **Schedule 2**. Finally, a consolidated mark up of Appendix B: Template Dispute Resolution Agreement incorporating the recommendations set out in this note, is included at **Schedule 3**.

**Analysis**

1. Clause 5 of the Dispute Resolution Agreement: Transparency and Confidentiality
   1. Modification 15/19 proposes inserting a new clause titled “Transparency of the DRB process” into the dispute resolution agreement template set out in Appendix B of the Code. We have been asked to advise whether the addition of the transparency provision in Modification 15/19 regarding publishing details of the DRB decisions is consistent with confidentiality, or whether this would cause conflict in the future.
   2. This proposed clause places an obligation on a DRB “*to issue a summary of its decision via the SEMO Secretariat for publication in a timely and accessible manner following consultation with the Disputing Parties*”. In discharging that obligation, a DRB “*must maintain the confidentiality of the Disputing Parties and have regard to the General Obligations on Members under Appendix B”*.
   3. It appears that there are two relevant sets of confidentiality obligations which may be relevant to this question:
      1. The general confidentiality obligations are set out in section B.29 of the Code. Paragraph B.29.3.1 (f) provides that “*Nothing in [the Confidentiality Clause] shall prevent the disclosure of Confidential Information by a Recipient Party… as may be required by the DRB*”. There is therefore no conflict between the general confidentiality obligations in section B.29 and the proposed changes in Modification 15/19 as any disclosure that the DRB is required or permitted to make is a Permitted Disclosure under section B.29; and
      2. the template dispute resolution agreement (Appendix B of the Code) which includes an obligation on each Member of the DRB to “…*treat the details of the DRB’s activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Disputing Parties and the other Members*”. The obligation to maintain confidentiality of the DRB’s activities and hearings unless prior written consent is obtained is inconsistent with Modification 15/19, which proposes that a DRB may publish a summary of the decision following consultation with the Disputing Parties.
   4. We do not see any legal issue with the objective of promoting greater transparency in respect of a DRB’s decisions and can see sound policy reasons for requiring this. We are of the view that this objective can be achieved in a way that ensures that the Code (including the template dispute resolution agreement) are internally consistent and, if so desired, that preserves the confidentiality of the Disputing Parties. The Code objectives include providing transparency in the operation of the Single Electricity Market, and to ensure that there is no undue discrimination between persons who are parties to the Code. Where the DRB makes a finding as to the interpretation of the Code in the context of a Dispute, the market participants who are a party to the Dispute and are privy to a DRB’s conclusion may, as a result, be in a more advantageous position compared to other market participants who are not aware of a DRB’s decision. In our view there are sound policy reasons why this information should be available to all market participants, and not just the parties to a Dispute. The publication of a DRB’s findings would put all market participants on an equal footing and may increase the overall efficiency of the administration of the Code by reducing the number of Disputes referred to a DRB in respect of the same issue.

**Recommendation: Modifications Committee to consider a further amendment to the template dispute resolution agreement to permit the DRB to publish its decisions following a consultation with the Disputing Parties and having regard to confidentiality, but not obliged to seek the Disputing Parties’ prior written consent. The numbering of the amended template dispute resolution agreement will also need to be updated.**

* 1. In addition to agreeing that the addition of the transparency provision in Modification 15/19 regarding publishing details of the DRB decisions is inconsistent with the confidentiality obligations in the template dispute resolution agreement, we note the following additional concerns with the proposed transparency drafting of Modification 15/19:
     1. **Timing**: It is not clear when a DRB must discharge its obligation. Clause 5.1 states that this (1) occurs “*following any DRB decision being issued*”; (2) and “*the period of appeal having passed*”, and (3) must be published in “*timely and accessible manner*”; and (4) *“following consultation with the Disputing Parties*”. This is an open-ended obligation to be discharged by a DRB, with no timeframe, indicative or otherwise, to ensure publication of a summary of the decision. It is also not clear what information, if any, a DRB is required to publish in the event that one of the Disputing Parties decides to appeal the DRB’s decision.

**Recommendation: Modifications Committee to consider an indicative timeframe for publication of the DRB’s findings**. **We suggest that the DRB sends its decision to the Secretariat within thirty (30) days of the date of the Decision. Note also our recommendation below in relation to consultation with the disputing parties.**

* + 1. **Responsibility**: Publication of the summary of the decision *“is the responsibility of the DRB*”. Clause 5.1 goes on to say that the summary of the decision is to be issued “*via the SEMO Secretariat”*. It is not clear if the SEMO Secretariat’s role is limited to simply publishing the DRB’s summary as received by it. It is also not clear when the SEMO Secretariat must publish the summary, save that publication must be in a “*timely and accessible manner”.*

**Recommendation**: **Modifications Committee to consider placing an obligation on the Secretariat in the Code to publish the DRB’s findings on SEMO’s website (or such other platform as directed by the Regulatory Authorities) within a specified number of days from the date of the Decision. We have suggested below that the decision is published the next working day after receipt from the DRB (Table 1.2)**

* + 1. **Content of the published decision**: Clause 5.1 proposes that a DRB issues “*a summary of its decision”*. As noted above, we are of the view that there are sound policy reasons why all market participants have equal access to information insofar as it relates to the interpretation of the provisions of the Code. It is not clear to what extent a DRB is required to summarise its decision or what it is required to include. For example, this could be interpreted as a summary of its conclusion, a summary of the remedy, a summary of any findings of law or interpretation of the Code or a summary of the issues as they apply to the Disputing Parties only. It is not clear if a DRB is required to publish its interpretation of the relevant provisions of the Code which may have a wider application.

**Recommendation**: **Modifications Committee to consider precisely what is required to be published by the DRB and specify this. Consideration may be given to whether it may be appropriate to publish the DRB’s written decisions in their entirety, save for commercially sensitive information in relation to the parties which should be redacted.**

* + 1. **Objectives:** We recommend deleting clause 5.2 setting out the objectives of issuing DRB decisions and recommendations. This clause is not necessary as long as (i) the obligations of the DRB to publish its decisions are clear; and (ii) the role of the DRB is sufficiently outlined elsewhere in section B.19 of the Code. See part 2 and Table 2 below.

**Recommendation: Modifications Committee to consider deletion of objectives set out in clause 5.2**

* + 1. **Code / Dispute Resolution Agreement**: On the basis that these are obligations placed on the DRB and the Secretariat, we recommend that publication of the DRB decision is also provided for in section B.19 of the Code as well as reflected in the template dispute resolution agreement.

**Recommendation: Modifications Committee to consider setting out the obligations to publish in both the Code and in the template dispute resolution agreement.**

* 1. **Alternative Drafting**

In **Table 1.1** below, the current proposal for clause 5 of the template dispute resolution agreement as set out in Modification 15/19 (Version 2) is shown in red. The text highlighted in yellow is the drafting proposed by us to support the recommendations outlined above. As noted in paragraph 1.5(e) above, we recommend this text is included in section B.19 of the Code as well. See **Table 1.2** below.

**Table 1.1 Transparency and Confidentiality: Proposed Drafting for new Clause 4A of the template Dispute Resolution Agreement**

|  |
| --- |
| **New Clause 4A**  ~~5~~4A. ~~Transparency of the DRB process~~ Publication of the DRB’s decision  ~~5.1~~4A.1 Subject to Clause 4A.2, the DRB shall send a copy of its decision to the Secretariat no later than [thirty (30) days] from the date that the DRB issued its decision to the Disputing Parties, for publication on the Market Operator’s website (or such other forum for publication as directed by the Regulatory Authorities) in accordance with the Code.  4A.2 ~~Following any DRB decision being issued and the period of appeal having passed, it is the responsibility of the DRB to issue a summary of its decision via the SEMO Secretariat for publication, in a timely and accessible manner following consultation with the Disputing Parties. This must~~ The DRB shall:  (a) maintain the confidentiality of the Disputing Parties;  (b) prior to sending a copy of its written decision to the Secretariat for publication, redact the identity of the Disputing Parties and any commercially sensitive information;  (c) prior to sending a copy of its written decision to the Secretariat for publication, consult with the Disputing Parties in respect of the information to be redacted from the written decision for publication, and have due regard to the Disputing Parties’ view of what information the DRB should designate as commercially sensitive; and  (d) have due regard to the General Obligations on Members set out in Clause 5 of the Dispute Resolution Agreement ~~under Appendix B.~~  ~~5.2 The objectives of issuing DRB decisions and recommendations into the public domain are to~~  ~~1. Provide market confidence in the dispute resolution process~~  ~~2. Encourage continuous improvement in the Code and its provisions, as may be furthered through dispute resolution and decisions made within that process~~ |

**Table 1.2 Transparency and Confidentiality: Proposed Drafting for the Code**

|  |
| --- |
| **New paragraphs B.19.10.2 and B.19.10.3**  B.19.10.2 Subject to [B.19.10.3], the DRB shall send a copy of its decision to the Secretariat no later than [thirty (30) days] from the date that the DRB issued its decision to the Disputing Parties, and such decision shall be published by the Market Operator on its website (or such other forum for publication as directed by the Regulatory Authorities) no later than the next working day after receipt.  B.19.10.3 The DRB shall:  (a) maintain the confidentiality of the Disputing Parties;  (b) prior to sending a copy of its written decision to the Secretariat for publication, redact the identity of the Disputing Parties and any commercially sensitive information;  (c) prior to sending a copy of its written decision to the Secretariat for publication, consult with the Disputing Parties in respect of the information to be redacted from the written decision for publication, and have due regard to the Disputing Parties’ view of what information the DRB should designate as commercially sensitive; and  (d) have due regard to the General Obligations on Members set out in Clause 5 of the Dispute Resolution Agreement. |

1. **B.19.6.1 A: Primary Role of the DRB** 
   1. The Modifications Committee has queried how the inclusion of B.19.6.1 A would affect the obligations of the DRB. The proposed text is as follows:

“*B.19.6.1 A The primary role of the DRB is to provide an escalation process, investigate and resolve any Dispute and to decide whether or not the Disputing Parties have acted in accordance with the provisions of the Code*”.

* 1. We have two immediate concerns with the proposed drafting:
     1. The provision refers to the “primary” role of the DRB. This implies that the DRB has a secondary role, but this is not articulated anywhere in Modification 15/19 or elsewhere in the Code as currently in force.
     2. On the face of the proposal, the intention is to clarify the first or overall guiding objective or role of the DRB. The provision then goes on to state that the role of the DRB has four components, namely to (1) provide an escalation process; and (2) to investigate any Dispute; and (3) to resolve any Dispute; and (4) to decide whether or not the Disputing Parties have acted in accordance with the Code.
  2. While these four components are not necessarily in conflict with each other, it will not be clear in all cases what the DRB is required to prioritise as its “primary” role. For example, the objective to resolve any Dispute implies that the DRB’s primary role is to achieve resolution of a disputed issue between two Disputing Parties. On the other hand, the objective to decide whether or not the Disputing Parties have acted in accordance with the Code implies that the DRB’s primary role is to oversee compliance with the Code in the context of a Dispute. This subtle distinction could have far reaching consequences for Disputing Parties, and provide scope for one of the Disputing Party’s to appeal the DRB’s decision.

**Recommendation: We recommend that the Modifications Committee consider replacing B.19.6.1 A with a single provision which lists all of the objectives of the DRB so as to ensure that the DRB is clear as to its precise role and the matters to which it is required to have regard. Table 2 below provides a suggested redraft, subject to the Modifications Committee determining that this is consistent with its intentions for the DRB.**

* 1. **Alternative drafting**

**Table 2: Role of the DRB: Proposed Drafting**

|  |
| --- |
| **Replace B.19.5. with the following:**  **B.19.5 Role of the DRB**  B.19.5.1 A DRB shall:  (a) investigate and resolve Disputes referred to it;  (b) encourage resolution of Disputes without formal legal representation or reliance on legal procedures;  (c) to the extent possible, ensure that the Dispute Resolution Process is fair, simple, quick, and inexpensive;  (d) have regard to the provisions of the Code in determining a Dispute referred to it;  (e) have regard to the information submitted by the Disputing Parties in connection with the Dispute in accordance with B.19.9.2; and  (f) issue a Decision in accordance with B.19.10. [[1]](#footnote-1) |

1. B.19.5.1: Fairness and Equity
   1. We have been asked to advise on the legal impact of the proposed change in wording in paragraph B.19.5.1. Paragraph B.19.5.1 of the Code, as currently in force, is a statement of general intent as to how the Dispute Resolution Process should be administered. It lists six elements that should “*to the extent possible*” be present in respect of a Dispute Resolution Process. It is not clear who is responsible for ensuring that the Dispute Resolution Process complies with paragraph B.19.5.1.
   2. Modification 15/19 proposes replacing “…*to the extent possible…*” with “…*have consideration for each of the following when making a decision…*”. Although there is no express reference to the DRB in either the current or the revised paragraph, the proposed amendment appears to recast the six procedural elements that should be present in respect of a Dispute Resolution Process as six relevant factors that the DRB should “…*have consideration for… when making a decision”*. The proposed revised wording is as follows:

B.19.5.1 *It is intended that the Dispute Resolution Process set out in or implemented in compliance with the Code and described in detail in the following paragraphs should ~~to the extent possible~~ have consideration for each of the following when making a decision:*

*(a)* *be simple, quick and inexpensive;*

*(b)* *preserve or enhance the relationship between the Disputing Parties;*

*(c)* *resolve and allow for the continuing and proper operation of the Code having regard to the Code Objectives;*

*(d)* *resolve Disputes ~~on an equitable basis~~ in accordance with the provisions of the Code having regard to the Code Objectives and broader principles of fairness and equity;*

*(e)* *take account of the skills and knowledge that are required for the relevant procedure; and*

*(f)* *encourage resolution of Disputes without formal legal representation or reliance on legal procedures.*

* 1. We have the following specific concerns in relation to the proposed changes:
     1. **procedural issues v. relevant considerations**: It is not clear if the intention of paragraph B.19.5.1 is (1) to list the procedural characteristics of a Dispute Resolution Process; or (2) to list the relevant considerations that the DRB must have regard to in reaching a decision in respect of a Dispute**.**

**Recommendation**: **Modifications Committee to consider what they wish to achieve in paragraph B.19.5.1 and clarify the wording accordingly**.

* + 1. **Procedural Issues:** If the intent of paragraph B.19.5.1 is to list the procedural requirements to be applied in the case of a Dispute, we suggest that this is recast as the responsibility of the DRB to ensure that it is clear who has the responsibility to ensure that these obligations are complied with.

**Recommendation: See Table 2 above for suggested drafting.**

* + 1. **Relevant Considerations:** If the intent of paragraph B.19.5.1 is to list the relevant considerations that the DRB must have regard to in determining a Dispute, we suggest deleting any reference to the DRB having regard to the principles of equity. We agree that the DRB should be required to treat Disputing Parties fairly in respect of the process. This means that the DRB must afford each party procedural fairness and not be biased in favour of one Disputing Party over another during the dispute resolution process, e.g. the DRB should give each Disputing Party a reasonable opportunity to present its case. This is consistent with the Code objective of non-discrimination between Parties. However, notwithstanding the paragraph to resolve Disputes “*in accordance with the Code and having regard to the Code Objectives* …” the reference to “*principles of … equity*” arguably broadens the DRB’s remit beyond the “four corners” of the Code. There is a risk that a DRB convened to resolve a Dispute could grant a remedy that is equitable, but which is not necessarily grounded in the existing provisions of the Code. The Code is approved by the Regulatory Authorities pursuant to the Electricity Regulation Act, 1999 and the Northern Ireland (Miscellaneous Provisions) Act 2006. Any decision of DRB that purports to amend or supplement the Code could be challenged in court on the grounds of *ultra vires*.

**Recommendation: See Table 2 above for suggested drafting, addressing the obligations of a DRB, i.e. its role, and the relevant considerations it should take into account when determining a Dispute.**

1. B.19.5.1(d) / B.19.10.1: Scope of DRB Decisions
   1. We have been asked to advise whether there is a conflict between the amended paragraphs B.19.5.1(d) and B.19.10.of the Code and whether paragraph B.19.10.of the Code limits the powers of the DRB.
   2. We understand that the first part of this query relates to the scope of a DRB decision. In other words, what factors can the DRB have regard to when determining a Dispute? As noted above, it is not clear if the intention of the revised version of B.19.5.1 is to list the substantive factors that a DRB must have regard to in reaching a decision, or to list the procedural characteristics of a Dispute Resolution process. As noted above, we agree that the DRB should ensure, to the extent possible, that the Dispute Resolution Process is fair, but we would recommend deleting any inference that the DRB may have regard to broader principles of equity in reaching a decision. In our view this would create a conflict between paragraphs B.19.5.1(d) and B.19.10 of the Code and this should be avoided so that the DRB is not left in an invidious position where they have competing and conflicting obligations. Furthermore, the proposed drafting of paragraph B.19.5.1(d) implies that the DRB has the power to grant a remedy that may not otherwise be contemplated in the Code. A decision by the DRB which purports to amend or supplement the Code encroaches on the Regulatory Authorities’ statutory functions in respect of the Code, as well as being inconsistent with the formal Modifications process.
   3. We note the following specific concerns in relation to the proposed drafting of paragraph B.19.10 of the Code in Modification 15/19:
      1. A DRB may conclude that a Dispute has been wholly or partially upheld, or a Dispute has not been upheld, because a relevant Party did not act in accordance with the provisions of the Code. While we agree with the intended principle to ensure that Decisions are based on the provision of the Code, we do not agree that it is necessary to expressly state this in B.19.10.1 (a)(i) and (ii). As noted above, we suggest that the role of the DRB in determining Disputes is set out clearly in one provision only, and is not repeated or paraphrased elsewhere.

**Recommendation:** Modifications Committee to consider deletion of “…*because a relevant Party did not act in accordance with the provisions of the Code*” in limb (a) and (b) and “*in order to remedy a breach of the provisions of the Code*” in limb (d).

* + 1. We agree that where the DRB cannot grant relief to a Party based on the Code as drafted, or indeed if the Code drafting provides an outcome that is entirely inequitable, the DRB should have the power to recommend that a formal modification to the Code be considered in accordance with the Modification processes under the Code. As drafted, this is limited to circumstances where no provisions of the Code have been breach. There may be other scenarios where there has been a breach of the Code, but relief is still not available or the outcome is inequitable. In those circumstances, we suggest that it still be useful for the DRB to be able to put forward for consideration a modification to the Code.

**Recommendation:**  **Modifications Committee to consider expanding the DRB’s ability to put forward modifications to the Code.**

* 1. Alternative Drafting

In **Table 3** below, the current proposal for B.19.10.1 as set out in Modification 15/19 (Version 2) is shown in red. The text highlighted in yellow is the drafting proposed by us to support the recommendations outlined above.

**Table 3**

|  |
| --- |
| **DRB Decisions: Proposed Drafting**  B.19.10.1 DRB decisions may:  (a) declare that:  (i) the Dispute has been wholly or partially upheld ~~because the relevant Party did not act in accordance with the provisions of the Code~~; or  (ii) the Dispute has not been upheld ~~because the relevant Party has acted in accordance with the provisions of the Code~~; and / or  (b) declare the correct application or interpretation of a provision of the Code; and / or  (c) advise ~~any other~~ the form of relief that may be appropriate in the circumstances; and / or  (d) recommend that a Disputing Party take a specified action within a specified timeframe ~~in order to remedy a breach of the provisions of the Code~~; and / or  (e) ~~advise that no relief is possible as no provisions of the Code have been breached. Where no relief is possible under the current provisions of the Code, the DRB may recommend a possible remedy which may include a Modification to the Code (in accordance with B17).~~ where, in the opinion of the DRB, the Dispute has given rise to issues that may require a Modification to the Code, recommend to the Regulatory Authorities that such a Modification be considered (in accordance with section B.17). |

**Schedule 1**

**Regulatory Framework of a DRB**

1. Under section 9BA(1) of the Electricity Regulation Act 1999, one of the functions of the Commission for Regulation of Utilities is to take all necessary steps to establish and facilitate the operation of the Single Electricity Market, including a Trading and Settlement Code in relation to that market. The current version of the Code was designated by the CRU pursuant to the Electricity Regulation Act 1999 (Single Electricity Market) (No. 2) Regulations 2017 (S.I. No. 117/2017), as modified from time to time in accordance with the provisions of the Code.
2. Generators and suppliers that participate in the SEM, and SEMO as the licensed Market Operator, are obliged to comply with the provisions of the Code pursuant to the terms of their licence granted by the CRU under to section 14 of the Electricity Regulation Act 1999. In addition to their licence obligations, market participants and SEMO as Market Operator agree to be bound by the provisions of the Code by entering into, or acceding to a Framework Agreement.
3. The CRU does not have a statutory role in determining Disputes (as defined in the Trading and Settlement Code) as between Parties to the Framework Agreement. A Dispute Resolution Board (“**DRB**”) is established pursuant to paragraphs B.19.6 and B.19.7 of the Code. While the Regulatory Authorities are responsible for ultimately approving the Code and are responsible for the appointment of the chairperson (and indirectly, the vice-chairperson) of the panel of DRB members (see below), a DRB, in determining a Dispute in accordance with the Code, does not exercise any delegated statutory authority on behalf of the Regulatory Authorities. A DRB is comparable to an expert appointed by parties to a contract to provide a non-binding determination in respect of a dispute arising from or in connection with that contract.
4. Each DRB is comprised of either a sole member or three members. The members are appointed from a panel of no less than ten (10) available DRB members established and maintained by SEMO, with the prior approval of the Regulatory Authorities. The chairperson of the Panel is nominated by the Regulatory Authorities from time to time. If the Disputing Parties fail to agree the composition of a DRB, the chairperson is responsible for convening the DRB and nominating members from the panel. The appointed members must be independent from any Disputing Party.
5. The chairperson and the vice-chairperson are retained under contract to the Regulatory Authorities. Paragraph B.19.5 of the Code provides that where appropriate and at the sole discretion of the Regulatory Authorities, the contract may include provision for payment of a stipend to the chairperson and vice-chairperson in order to cover the reasonable expenses incurred by that person in connection with carrying out his or her duties under the Code. SEMO is required to indemnify the Regulatory Authorities for any payments made under the contract.
6. The panel of members must include suitably qualified experts from relevant disciplines who: (a) are experienced in and familiar with alternative dispute resolution procedures which do not involve litigation; and/or (b) have an understanding of the electricity industry or have the ability quickly to acquire such an understanding.
7. The Disputing Parties and the members of a DRB are required to enter into a dispute resolution agreement, incorporating the provisions set out in the template dispute resolution agreement in Appendix B of the Code.
8. Proceedings of the DRB:
   1. **Costs:** The DRB may make a decision as to the award of costs in any Dispute which decision shall be binding on the Disputing Parties
   2. **Information:** Disputing Parties shall promptly make available to the DRB all such additional information as they consider appropriate or as the DRB may require for the purposes of making a decision on a Dispute. The DRB may request any information it considers relevant.
   3. **Procedure**: The DRB shall be entitled to determine the applicable procedure including the manner and the timing of any written submissions and any oral hearings. In determining the applicable procedure, the DRB shall have regard to the considerations set out in paragraph B.19.5.1 as well as the number of Disputing Parties. The DRB shall not act as arbitrator and neither the Arbitration Act 2010 (Ireland) nor the Arbitration Act 1996 (United Kingdom) shall apply.
   4. **Decision**: The DRB shall issue a written decision in respect of the Dispute. If the decision is accepted, it is final and binding on the Parties and SEMO. SEMO is required to implement the DRB’s decision as necessary, for example, procuring a Settlement Rerun. A dissatisfied Party is free to initiate proceedings in Court, and adduce evidence and raise arguments not previously put before the DRB.

**Schedule 2**

**Consolidated version of B.19 of the Code**

**(incorporating recommendations)**

**Schedule 3**

**Consolidated version of Appendix B: Template Dispute Resolution Agreement**

**(incorporating recommendations)**

1. Note to draft: Other sections of B.19 require that the DRB members are independent, and have the necessary skills and expertise to determine a Dispute.

   Clause 4 of the Template Dispute Resolution Agreement mirrors the current version of B.19.5.1 of the Code. We suggest this is deleted and replaced with either (1) the new version of B.19.5.1or (2) “Not Used”. [↑](#footnote-ref-1)