



Dispute boards

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DISPUTE BOARDS are an innovative dispute avoidance and dispute resolution procedure that have been around for some time now. They were originally developed in the USA in the mid-1970s for major projects, although as their use has expanded around the world, they have been seen not only as an effective dispute resolution procedure, but also as a way of avoiding disputes. Initially, dispute boards had made recommendations which were non-binding. However, as they have developed, adjudication boards, giving binding decisions, have also become popular internationally.

This article looks at the developments of dispute boards, and then focuses on their categorisation and use and practice. It also looks at the applicable rules available internationally and, in particular, the use of dispute boards in FIDIC. Finally, some current issues are considered such as locating appropriate dispute board members, composition of the dispute board and the enforcement of dispute decisions.

The development of dispute boards

The terms dispute review board, dispute recommendation board (DRB) or dispute adjudication board (DAB) – collectively dispute boards (DB) – are relatively new ones. They are used to describe a dispute resolution procedure that is normally established at the outset of a project and remains in place throughout the project's duration. The board may comprise one or three members who become acquainted with the contract, the project and the individuals involved with the project, in order to provide informal assistance, provide recommendations about how disputes should be resolved and provide binding decisions.

The one-person or three-person DBs are remunerated throughout the project, most usually by way of a monthly retainer. This is supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents, attending hearings and producing written recommendations or decisions if and when appropriate.

More recently, DABs have come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of DRBs, which originally developed in the domestic US major projects market. The use of DRBs has grown steadily in the USA, but they have also been used internationally. However, DRBs predominantly remain the providence of domestic US construction projects. As adjudication developed, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the dispute adjudication board (DAB) was borne from the DRB system; the DRB provides a recommendation that is not binding on the parties.

The use of dispute boards in practices

According to the Dispute Review Board Foundation (DRBF) the first documented use of an informal DRB process was on the Boundary Dam and underground powerhouse project north of Spokane, Washington during the 1960s. Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four-member joint consulting board, in order that the board could provide non-binding suggestions.

Subsequently, the US National Committee and Tunnelling Technology, Standing Sub-committee No. 4 conducted a study and made recommendations for improving contractual methods in the United States¹. Further studies were carried out, and the first official use of a DRB was made by the Colorado Department of Highways on the second bore tunnel of the Eisenhower Tunnel project. This was as a result of the financial disaster encountered in respect of the first tunnel between 1968 and 1974².

More recent statistics have been compiled by the DRBF, and a report by Harman³. DBs have been used on at least 2,150 projects between the DRBF's inception in 1975 and 2010. They have been used on projects for tunnels, highways, rail, light rail, bridges, airports, container ports, buildings, schools, hospitals, sports stadia, metro systems, pipelines, pumping stations, water treatment works, shopping centres, power plants, nuclear power plants, oil platforms, waste facilities





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- **Dispute adjudication board:** The DAB's decision is to be implemented immediately.
- **Combined dispute board (CDB):** This attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests it and the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

In 1999, FIDIC produced its DAB procedure, and introduced the concept of a dispute review expert (DRE) — basically a single-person dispute board. In summary, a DB can comprise one or three members. A three member advisory board (one that does not make binding decisions) is a DRB, while a single member version is a DRE.

and more. This includes not just projects in the USA but worldwide (and therefore DRBs and DABs).

The categorisation of dispute boards

The important distinction then between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions that bind the parties and which must be implemented immediately during the course of the project. The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation. Pierre Michel Genton, adopting the terminology of the International Chamber of Commerce (ICC), describes the DAB approach as a kind of pre-arbitration requiring the immediate implementation of a decision. He goes on to state that:

*"The DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions."*⁴

Building upon this distinction, the ICC has developed three alternative approaches:

- **Dispute review board:** The DRB issues recommendations in line with the traditional approach of DRBs. An apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period then the parties agree to comply with the recommendation. The recommendation therefore becomes binding if the parties do not reject it.

A DB that makes binding decision is a DAB, while a three member board that can, in theory, do both is a CDB.

Applicable rules

The American Arbitration Association (AAA) dispute resolution board guide specification⁵ provides for an independent DRB that *"will assist in and facilitate the timely resolution of disputes."*⁶ The focus of the AAA procedure is on party autonomy. The AAA will help the parties to identify the members for the DRB, but will not appoint them in default. The DRB will assist the parties to resolve their differences. It will not make binding decisions, but will issue written non-binding recommendations.

The ICE *Dispute Resolution Board Procedure* was issued in February 2005. The rules consist of two alternatives:

- Alternative one: For use on international projects and UK contracts which are not subject to the provisions of the UK *Housing Grants, Construction and Regeneration Act 1996* (HGCRA).
- Alternative two: HGCRA compliant.⁷

The procedure also contains a model tripartite agreement to be entered by the contractor, employer and DRB member. Each DRB member will enter into a separate agreement. The parties can agree the identity of the DRB member if there is only one board member. If there are three DRB members, each party may nominate one member for approval by the other party. The parties shall then consult both members and agree upon the third member, who shall be the chairperson.

The ICC issued on 1 September 2004 its dispute board rules, together with standard ICC dispute board clauses and a model dispute board member agreement. The three alternative approaches

of the ICC rules are set out above. The most widely used rules for a DAB are those produced by FIDIC, and they are considered further on.

The FIDIC DAB

The introduction, in the 1970s, of the limited contractual adjudication procedure is perhaps now of historical interest. In the UK, the HGCRA was clearly a major turning point. However, it can certainly no longer be considered merely a domestic UK turning point; it also represents a major international turning point in the area of construction dispute resolution. In the international arena, FIDIC led the way by the introduction of DABs in its 1999 suite of contracts. FIDIC has already introduced a DAB in its orange book in 1995, and in 1996 as an option in the red book, but it was the 1999 suite that put the DAB at the forefront of the FIDIC suite. In respect of the DAB, the red book standard conditions of contract include:

- Clauses 20.2-20.8: The dispute adjudication board.
- Appendix: General conditions of dispute adjudication agreement.
- Annex 1: Procedural rules.
- Dispute adjudication agreement (the tri-party agreement between the employer, contractor and either each of the three-person DAB members or one-person DAB).

Clause 20 of the FIDIC contract deals with claims, disputes and arbitration. Emphasis is placed upon the contractor to make its claims during the course of the works and for disputes to be resolved during the course of the works. Clause 20.1 requires a contractor seeking an extension of time and/or any additional payment to give notice to the engineer as soon as practicable, and not later than 28 days after the event or circumstance giving rise to the claim.

Some have suggested that the contractor will lose its right to bring a claim for time and/or money if the claim is not brought within the timescale.⁸ Under UK law, timescales in construction contracts are generally directory rather than mandatory.⁹ However, clause 20.1 does go on to state that the contractor will lose its right in the event of a failure to notify within a strict timescale.¹⁰ A contractor would be well advised to notify, in writing, any requests for extensions of time or money claims during the course of the works and within a period of 28 days from the event or circumstances giving rise to the claim.

The benefit then of the DAB is that it should be constituted at the commencement of the contract, so that the members of it will visit the site regularly and be familiar not just with the project but



with the individual personalities involved. They should, therefore, be in the position to issue binding decisions within the period of 84 days from the written notification of a dispute pursuant to clause 20.4, which states:

"If a dispute (of any kind whatsoever) arises between the parties in connection with, or arising out of, the contract or the execution of the works, including any dispute as to any certificate, determination, instruction, opinion, or evaluation of the engineer, either party may refer the dispute in writing to the DB for its decision, with copies to the other party and the engineer. Such reference shall state that it is given under this sub-clause."

The DAB is appointed in accordance with clause 20.2. It could comprise individuals who have been named in the contract. However, if the members of the DAB have not been identified in the contract then the parties are required (jointly) to appoint a DAB by the date stated in the appendix to tender. The DAB may comprise either one or three suitably qualified individuals. The appendix to the FIDIC contract should identify whether the DAB is to comprise one or three people. The appendix does not provide a default number, but clause 20.2 states that the parties are to agree if the appendix does not deal with the matter. If the parties cannot agree, then the appointing body named in the appendix will decide whether the panel is to comprise one or three members.¹¹ The default appointing authority is the president of FIDIC or a person appointed by the president of FIDIC. The appointing authority is obliged to consult with both parties before making its final and conclusive determination.

On most major projects a DAB will comprise three persons. If that is the case, then each party is to nominate one member for approval by the other. The parties may then agree upon a third member who is to become the chairperson. In practice, parties may propose a member for approval, or more commonly propose three potential members allowing the other party to select one. Once two members have been selected, it is then more common for those members to identify and agree upon (with the agreement of the parties) a third member. That third person might become the chairman, although, once again with the agreement of all concerned, one of the initially proposed members could be the chairman.

The terms of the general conditions of dispute adjudication agreements are incorporated by reference on clause 4 of the agreements. The retainer fee and daily fee of each member are set out here also. The employer and contractor bind themselves jointly and severally to pay the DAB member in accordance with

the general conditions of the dispute adjudication agreement. Details of the specific FIDIC contract between the employer and contractor also need to be recorded, as it is from this document that the employer and contractor agree to be bound by the DAB and it is also from this document that the DAB obtains its jurisdiction in respect of the project.

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The benefits of a dispute board

The key benefit of a dispute board is the early resolution of disputes, or even mere differences, as they arise during the course of the works. This effectively means that disputes can be resolved on site and at site level. This can only be effective if the dispute board is put in place at the outset of the project. It is a mistake to wait until the dispute arises and then to appoint the dispute board. The FIDIC standard form contract requires the appointment of the dispute board within 28 days of commencement of the works. In practice, it is extremely helpful if both employer and contractor have already discussed and agreed the identity of the dispute board.

Once the dispute board is formed it should be provided with the key contractual documentation. This means that each member of the dispute board becomes familiar with the project and also the documentation. However, and perhaps more importantly, the dispute board becomes familiar with the individuals working on the project, both from the contractor and the employer's organisations. This should help to ease communications through the chair of the dispute board – not just between the employer and the contractor, but also the engineer and perhaps other important stakeholders.

The dispute board can encourage the early resolution of disputes at site level by identifying and discussing issues before they become disputes. Depending upon the nature of the dispute board, it might be possible to provide early advisory opinions. It is, of course, also possible for the dispute board to hold full hearings if necessary and to provide written recommendations for binding decisions. It is important that both the project owner and contractor work together at the outset of the project in order to put the dispute board in place. They will need to complete the tri-party agreement between owner, contractor and each of the board members. In doing so, they formally approve the board members. Once all of the board members are approved, the dispute board is in place and can then convene its first meeting on site and agree a regular schedule of site visits. The dispute board might visit site perhaps every three or four months.

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Cost

The board members are paid a monthly retainer in order to become familiar with the project. In addition, they will be paid a day rate for visiting site, and up to two further days to account for travel to and from the visit. If a hearing is required then the day rate will apply to the preparation and conduct of the hearing, as well as writing up the decision. Direct costs range in between 0.06-0.30% of the final construction costs. That cost is usually shared evenly between the parties. An informed owner and contractor will appreciate that this is a small investment in the cost of the project when compared to the potential costs for litigation or arbitration once the project is complete. The simple question here is whether the owner and contractor wish to invest in avoiding disputes and solving those that do arise during the course of the works economically, or simply hope that no disputes arise and so risk the chance that they could engage in lengthy litigation or arbitration after the works are concluded.

Recommended elements for a successful dispute board

It is extremely important that both owner and contractor agree the identity of the dispute board members. This is much easier to do at the very outset of the project and also means that the



dispute board will be in place from the beginning and therefore be able to become familiar with the project and the documentation.

Selecting agreeing and appointing dispute members is therefore crucial.¹² The dispute board members must be impartial and subject to the approval of both parties. It is important to conclude the tri-party agreement in order that everyone knows the terms on which the dispute board is appointed, the procedural rules that apply and also how the dispute board is to be paid. In this respect, it is always important for the fees and expenses of the dispute board to be shared equally between the owner and the contractor.

It is important for the dispute board members to remain informed about the project and its progression. They therefore need to receive relevant documentation during the course of the works and site visits should be maintained throughout. There is sometimes a tendency for a dispute board to be put in place, but the first site visit to be delayed for many months or even years.

Finally, either party should be able to freely refer disputes to the dispute board at any time. It is then important for the dispute board to conclude its work within the 84 day period (assuming that the FIDIC rules apply), to hold hearings promptly and deal with all of the matters in dispute in a written decision. That written decision should then be implemented by the parties, even if they do not agree with it. The decision of the dispute board binds the parties unless and until the disputed dispute board decision is reheard in arbitration.

Any written recommendation of the dispute board should be well reasoned. It is important that both the contractor and the employer understand the rationale of the dispute board. This might make it easier for the parties to accept the dispute board's decision, or perhaps avoid further disputes by considering the rationale that the dispute board applied to the dispute between the parties. It is likely that the dispute board will apply that rationale to future disputes.

Dispute avoidance

The presence of a dispute board itself can promote sensible communications between the parties. The recognition that a neutral body is able to make binding decisions can promote early resolution between the parties and also facilitate positive relations and open communication. A failure to communicate, delay information or deal with matters in an unhelpful or unreasonable manner will be something the dispute board will be made aware of. Focusing on the early identification and evaluation of disputes can, in itself, often lead to early resolution. It is usually much easier to settle a dispute about delay, changes, instructions, prolongation costs, defects and so on around the time that the issues arise, rather than leaving them for many months or years. Disputes that are dealt with in small chunks are often more manageable and less contentious.

If a full dispute board procedure is required then it is possible for the dispute board to visit the site and often see the physical works that related directly to the dispute itself. The impartial forum

of the dispute board provides an opportunity for a rational basis for the resolution of the dispute. This can be important in many parts of the world where accountability – whether financially or politically – can be in some incidences extremely sensitive.

Disputes that are resolved during the course of the project will help to reduce delays and costs to the project. A consistency of approach in the early resolution of disputes for projects around the world has to eventually lead to an increased number of bidders for any one project. If bidders know that disputes will be dealt with in an open and more timely manner, then this may also be reflected in the tender prices.

Conclusion

Dispute boards are now being widely used around the world. DRBs that make recommendations are frequently used in North America, while the decision making DAB approach of FIDIC has been adopted for the rest of the world. The most effective dispute boards are those that are appointed at the outset of the project and therefore have the opportunity to follow the progress of the project, become familiar with the project; in particular, the individuals involved in the project. This means that there is an opportunity for some informal dispute avoidance by virtue of the board's advisory role, but also the possibility for formal written decisions to be made during the course of the works.

On smaller projects, a single person DRE could be engaged. Further, it may be possible for a collection of minor projects, which are perhaps being carried out under framework, to engage the services of either a single or a three person dispute board who would be available to deal with any one of a large number of projects. Once again, the benefits even for these smaller projects are that the dispute board can be familiar with the framework agreement, the projects in general and the people that are involved from the key organisations that are carrying out the works.

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¹ 1972. See also National Academy of Sciences (1974) 'Better contracting for under ground construction', *Contracting practices of the US National Committee on tunnelling technology and national research counsel*, Standing Committee number 4, National Committee of Washington

² Matthews, A A (1997) 'The first dispute review board' DRBF Foundation Forum, 1(1); Harman, K M J (2009) 'A case study as to the effectiveness of dispute review boards on the central artery/tunnel project' *Journal of Professional Issues in Engineering Education and Practice*, 1(1), 18-31

³ DRBF (2010) Database of Projects http://www.drbf.org/manual/Database_2005.xls, 22 April 2010. Harman, K M J (2011), 'To be or not to be – that is the question: is a DRB right for your project?' *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, ASCE, February 2011.

⁴ Ibid, Para 7-029

⁵ Effective 1 December 2000.

⁶ Rule 1.01 General, D Purpose.

⁷ Section 108 of Part II of the *Housing Grants, Construction and Regeneration Act 1996* introduced in England, Scotland, and Wales the right to adjudicate 'at any time' a dispute arising under a construction contract as defined by the HGCRA. Similar legislation has been introduced in Australia, New Zealand and Singapore. These mandatory procedures take precedence over contractual dispute resolution provisions.

⁸ Seppala, Christopher (2003) 'Claims of the Contractor', a paper given at the Resolution of Disputes under International Construction Contracts, ICC, Paris, 6-7 February

⁹ *Temloc v Errill Properties* (1987) 22 BLR 30, CA

¹⁰ *Bremer Handelsgesellschaft mbH v Vanden Avenue-Izegem PVBA* (1978) 2 Lloyd's Rep 109, HL. Cf *City Inn Limited v Shepherd Construction Limited* (2002) SLT 781, Second Division, Inner House, Court of Session.

¹¹ Clause 20.3.

¹² See Gould, N (2006) 'Establishing Dispute Boards: Selecting, Nominating and Appointing Board Members' SCL paper 135, a paper given at the Society of Construction Law's International Conference in Singapore 16-17 October.