



THE ROLE OF DISPUTE BOARDS IN CONSTRUCTION — BENEFITS WITHOUT BURDEN

Dispute boards provide a swift and economical resolution of disputes on construction and infrastructure projects, thus allowing the work to proceed without any delay or increased costs. Since Dispute Boards started 20 years ago, their use has been increasing on a worldwide basis. In the past 5 years alone, the statistics show¹ that if there is an operational Dispute Board in existence on a project close to 99 percent of all disputes on the whole project will be successfully resolved, within less than 90 days, and at a cost of about .01-.02 percent of the value of the project as a whole. When one compares this statistic to the results obtained through litigation or arbitration there is no comparison, e.g., the costs of filing at the International Chamber of Commerce (“ICC”) or similar arbitration group alone can be as high as 12 percent of the amount of the claim and the time to resolution of the claim can take several years, and this is for each claim filed. In a Dispute Board setting the amount to be paid to the Board (the .01-.02 percent) is for all of the fees for the life of the project, no matter how many disputes come before the board.

One of the main reasons Dispute Boards can almost guarantee such results is the fact that a Dispute Board is different than any other form of dispute avoidance mechanism such as litigation, arbitration, or mediation. The major difference is that a Dispute Board is appointed from the start of the contract so the members know both the project and the parties very well and have regular contact (about every 3 months) via a site visit and the constant review of documentation from the parties — the employer and the contractor. Compare this to litigation or arbitration where the first time the judge or arbitrator learns anything of the case is when it is filed with either the court or the arbitration association — this is usually many months or even years after the dispute first arose thus the judge or arbitrator gets cold facts and evidence from memory — memory which sometimes can fade due to passing time. It is this intimate involvement with a project that allows for the great success of the Dispute Board process.

1. The opinions and information provided herein are provided with the understanding that the opinions and Statistics compiled by The Dispute Board Federation – Geneva www.dbfederation.org



Another benefit of a Dispute Board is that the board members are all generally very experienced in both construction engineering and the law. These experienced Dispute Board members see the parties on a regular basis and allow themselves to be available to the parties, if jointly agreed, to give an informal opinion about some matter that by prompt intervention can prevent a claim from later arising. Needless to say, if the average Dispute Board member has, on average, about 40 years of construction/engineering experience, their opinions will hold sway and whilst they are not required to decide the same way as the opinion they give, most employers and contractors will take their opinions on potential dispute matters very seriously – thus obviating the need for a formal claim and the costs attendant thereto.

Dispute Boards are usually made up of three experienced engineers and/or construction lawyers who have specialised training in how to administer a Dispute Board. And most importantly the most successful Dispute Boards are those where all of the board members are not from the same country in which the project is located or at a minimum the chair of the Dispute Board is from a country different from the one where the project is being built, thus avoiding any aura of corruption. There are three types of Dispute Boards: Dispute Review Boards, Dispute Adjudication Boards, and Combined Dispute Boards. These boards are very different from arbitration or litigation as the Dispute Board members act as adjudicators and are free to search out their own evidence or facts to determine what has taken place and what the claims are composed of – thus in many Dispute Board settings only claims representatives appear and the need for lawyers is diminished. Whilst this may be bad news for lawyers, it is extremely good news for the employer and contractor as the costs attendant to a Dispute Board hearing are minuscule compared to those of litigation or arbitration.

Indeed the only time arbitration (or court) comes into play is when one party or the other does not accept a decision of a Dispute Adjudication Board.² When this occurs, the unhappy party can file a Notice of Dissatisfaction, which results in the decision having to go to Arbitration – though the decision unless changed by any subsequent award, is binding on the parties until that event occurs – which generally means payment is due and payable and enforceable as such until then. Statistics³ again show that in the past 20 years, the number of decisions overturned in arbitration amount to less than a handful, mostly because the Dispute Adjudication Board Decision, having been made by experienced and extremely knowledgeable construction experts, can and is used in any subsequent proceedings as evidence of what happened and functions as an expert's report on the issues presented. This is yet another reason why Dispute Board recommendations and/or decisions are so valuable. Indeed, as just mentioned, once a Dispute Adjudication Board decision is given it is immediately to be given effect, thus if payment is due from the employer payment must be made and that is the case even if the employer contests the decision or takes it to arbitration or court to have it overturned.

Recent developments at the ICC⁴ have shown that decisions for the payment of moneys will be enforced immediately and even prior to the actual full arbitration, thus allowing the decision to be given immediate effect per the parties' contractual agreements. Thus not only are Dispute Boards cheaper than arbitration, they, through the help of arbitration if necessary, are much faster and guarantee prompt payment under any decisions given by the Dispute Board.

2. Note that decisions are only issued by Dispute Adjudication and some Combined Dispute Boards.

3. Statistics compiled by The Dispute Board Federation - Geneva, www.dbfederation.org

4. See article, "Enforcement of Dispute Board Decisions" - DBF Newsletter September 2010, www.dbfederation.org

HISTORY

The first Dispute Board was called a Dispute Review Board (“DRB”) and it made recommendations rather than decisions.

Over the years, the major developments regarding DRBs were as follows:

- 1975** First Domestic DRB in U.S. (Eisenhower Tunnel).
- 1981** First international DRB (El Cajon Dam, Honduras)
- 1995** World Bank makes DRBs mandatory for all IBRD financed projects over U.S. \$50m.
- 1997** Asian Development Bank and EBRD adopt DRB approach.

Following closely on the idea of a DRB, which only gave recommendations, was the concept of a Dispute Adjudication Board (“DAB”), which gave binding decisions rather than just recommendations. The use of DABs developed internationally, as follows:

- 1995** FIDIC introduces DAB in its Orange Book
- 1998** England introduces mandatory statutory adjudication; subsequently, parts of Australia, New Zealand and Singapore do the same
- 1999** Fédération Internationale des Ingénieurs-Conseils (“FIDIC”) adopts DAB in all contracts for major works
- 2000** World Bank adopts DB recommendations as binding and requires parties to give effect to them unless and until revised by an arbitral award
- 2001** The Dispute Board Federation formed in Geneva

Dispute Review Board

- A DRB issues Recommendations, which are non-binding opinions.
- If no party expresses dissatisfaction with a recommendation within a stated time period, compliance is required.
- If a party expresses dissatisfaction within a certain period of time, that party may resort to arbitration, if so provided, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties are not required to comply with the recommendation.

Dispute Adjudication Board

- A DAB issues Decisions, that are binding.
- The parties must comply with a decision as soon as they receive it.
- If a party expresses dissatisfaction with a decision within a specific time period, it may submit the dispute to final resolution by arbitration, or the courts, but the parties meanwhile remain contractually bound to comply with the decision.

Combined Dispute Board (“CDB”)

- A CDB normally issues recommendations but may issue a decision if a party so requests and no other party objects.

DISPUTES BOARD RULES

There are three main International bodies providing rules and procedures for Dispute Boards. These are FIDIC, DBF, and the ICC.

FIDIC

FIDIC Clause 20 (“Claims, Disputes and Arbitration”) provides for a combination of a DAB (20.4), amicable settlement (20.5), and ICC arbitration (20.6), in that order.⁵ In particular, this Clause 20 refers only to a Dispute Adjudication Board or “DAB” and is now used by World Bank and all international development banks.

Under FIDIC, the DAB is composed of one or three members, usually engineers, independent of the parties, but all are accepted by the parties and/or appointed by FIDIC. Further, under the FIDIC Red Book the DAB is a permanent Dispute Board from the start of the project until completion. The other FIDIC form of DAB is an ad hoc DAB and is set out in both the Silver and Yellow Books.⁶

The purpose of a permanent DAB is that it maintains familiarity with the project, visits the site periodically, and decides disputes that arise by (provisional) binding decisions. Ad hoc DABs are constituted for and decide individual disputes by a (provisional) binding decision.

FIDIC’s experience to date shows that both these forms have been successfully used on all major projects internationally.

DBF

The Dispute Board Federation was started to meet the needs of infrastructure development internationally by providing a simplified and binding dispute resolution system for use in construction projects worldwide, as well as in the training, accreditation, and certification of potential panel members for Dispute Boards. These dispute resolution methods allow for the swift and economical resolution of disputes, thus allowing construction project to proceed without delay and to benefit the parties involved. Originally formed in Geneva as a nonprofit NGO, the DBF has expanded to offices in Singapore and Belgrade, and in 2014 will be opening offices in Santiago and Beijing. Partnering with some of the world’s major organisations, such as the World Bank/IFC and FIDIC, it has grown to become the only truly international organisation which not only acts as an appointing body but also trains and allows for networking between its members, government officials, infrastructure lenders, and contractors.

The DBF Dispute Board Documents, in force from 1 January 2001, consist of: Standard DBF Dispute Board Clauses, which the parties can incorporate into their contracts and which provide for two types of Dispute Boards: A DRB; and a DAB. Further there are the DBF Dispute Board Rules, which govern the procedure before any Dispute Board (DRB, DAB); and the DBF Model Dispute Board Member Agreement, which can be used as the model for the agreements to be entered into between each of the Dispute Board members and the parties.

It is interesting to note that DBF Dispute Boards can be established **for any type of contract** and are not limited to construction contracts. Further under these forms, the DBF can select the chair who then selects the other board members – this is known as top-down selection, as compared to bottom-up selection where each party selects one board member and those two select the chair.

DBF rules also provide for automatically binding decisions from DABs with and/or without appeal to arbitration and a fast-track DAB with decisions within 30 days.

5. See Conditions of Contract for Construction (1st ed. 1999) (“CONS”), Conditions of Contract for Plant and Design-Build (1st ed. 1999) (“P&DB”), and Conditions of Contract for EPC/Turnkey Projects (1st ed. 1999) (“EPCT”).

6. Conditions of Contract for Construction Works (for Building and Engineering Works Designed by the Employer) (1999) (Red book); Conditions of Contract for Plant and Design-Build For Electrical and Mechanical Works and for Building and Engineering Works Designed by the Contractor) (1999) (Yellow Book); Contract for EPC Turnkey Projects (1999) (Silver Book).

ICC

The ICC Dispute Board Documents, in force from 1 September 2004, consist of Standard ICC Dispute Board Clauses, which the parties can incorporate into their contracts and which provide for three types of Dispute Boards: A DAB; and a CDB.

ICC also provides Dispute Board Rules, which govern the procedure before any Dispute Board and they also provide their ICC Model Dispute Board Member Agreement. Further, as with the DBF, ICC Dispute Boards can be established for any type of contract and are not limited to construction contracts.

CONCLUSION

The use of Dispute Boards allows for a fast and effective method for the resolution of disputes. What should also be realised is that this method not only is fast but very economical and more importantly allows the project or the contract to proceed without any interruption. All the other forms of dispute resolution generally involve a delay whilst the parties fight it out, be that in litigation or in arbitration, thus leading to delay and further expense, to say nothing of damaged business relationships — something that a Dispute Board prevents. With a Dispute Board, the parties get all of the benefits of litigation and/or arbitration but none of the burdens.

ABOUT THE AUTHOR

Cyril Chern is a Barrister with Crown Office Chambers, London, and secretary of the Dispute Board Federation (Geneva-Singapore). He has practised since 1972, specifically in the areas of engineering and construction disputes in the United Kingdom, the EU, and internationally. In addition to being a Barrister he is a Chartered Architect, Chartered Arbitrator, Accredited Mediator and Adjudicator. He is also the author of numerous articles and texts including: *Chern on Dispute Boards* (Wiley Blackwell, 2007, 2nd Edition, 2010), *International Commercial Mediation* (Informa, 2008), *The Law of Construction Disputes* (Informa, 2010), ADR Editor of *Emden's Construction Law* (Butterworths), Contributor to *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* (2008). His newest books — *The Commercial Mediator's Handbook* (Informa Publishing) and *Public-Private Partnerships in Practice* (Informa Publishing) are both due in early 2014. In addition to his publications, he teaches the Dispute Board Course for the World Bank/IFC, FIDIC, and the Dispute Board Federation, as well as the comprehensive FIDIC contracts course and commercial mediation for the Bar Council Mediation seminar, the World Bank, the IFC, and the DBF.

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