

The Dispute Board Concept

Worldwide, substantial sums of money are transferred with great trepidation several hundred times annually from municipalities to construction engineering firms. This is because statistically the construction industries have a high rate of disputes and delay, and until recently these have not been easily resolved without recourse to lengthy arbitrations or worse yet to the courts.

In 1986 Lord Donaldson, one of England's great judges, put it best when he said:

'It may be that as a judge I have a distorted view of some aspects of life, but I cannot imagine a civil engineering contract particularly one of any size, which does not give rise to some disputes. This is not to the discredit of either party to the contract. It is simply the nature of the beast. What is to their discredit is that they fail to resolve those disputes as quickly, economically and sensibly as possible.'

The 'nature of the beast' is changing, however, thanks in great measure to the use of dispute boards. As an example, the Ertan Hydroelectric Dam in China valued at US\$2 billion¹ had 40 disputes referred to its dispute review board for decision and no decision of this dispute board went on to arbitration or litigation of any kind. The Hong Kong International Airport valued at US\$15 billion had six disputes referred to its dispute board and of those only one went on to arbitration, at which time the decision of the dispute review board was upheld, and the Katse Dam in South Africa valued at US\$2.5 billion had 12 disputes referred to its dispute board and of these only one went on to arbitration where, again, the decision of the dispute review board was upheld. In each instance, the dispute board did resolve those disputes as quickly, economically and sensibly as possible.

Dispute boards work, and sometimes their mere presence and the ability of the dispute board members to give informal opinions before any dispute even arises can be of immense assistance. A good example of this in the United Kingdom is the Docklands Light Railway valued at US\$500 million, where no disputes ever fully arose or were submitted to the dispute board, or the Saltend Private Gas Turbine Power Plant in the north of England valued at US\$200 million, where both the number of disputes referred to the dispute board and the number that went to arbitration

¹ Note that worldwide, dispute board valuations are computed in US dollars.

were zero. Needless to say, such statistics were unheard of in the construction industry before the advent of the dispute board.

What is a dispute board?

In the scheme of dispute resolution, the methods most familiar are either arbitration or a court trial. In both you have a 'judge', be it an actual judge or an arbitrator chosen by the parties, and in each the 'judge' is presented with evidence of an event or set of events that have happened in the past which have caused a dispute and which now the parties hope to resolve. A similar method is adjudication, where the title 'judge' is substituted with the title 'adjudicator'. Here the adjudicator again reviews events from the past to come to a decision in the same way that a 'judge' or arbitrator does, but usually on a shorter time schedule. Following along this line we come to dispute boards. A dispute board is different in a number of ways. For starters, it is specific to the 'job-site' and as a dispute adjudication process it typically comprises three independent and impartial persons (adjudicators) selected by the contracting parties. The significant difference between dispute boards and most other alternative dispute resolution techniques (and possibly the reason why dispute boards have had such success in recent years) is that the dispute board is appointed at the commencement of a project, *before* any disputes arise and before any events have occurred which would lead to any dispute, and by undertaking regular visits to the site it is actively involved throughout the project (and possibly any agreed period thereafter).

A dispute board becomes a part of the project administration and thereby can influence, during the contract period, the performance of the contracting parties. In contrast to other methods of dispute resolution in the construction industry, a dispute board acts in 'real-time' as compared with dealing with events in the far distant past, such as in court proceedings and arbitrations. The idea behind a standing dispute board is that it may be called upon early in the evolution of any dispute, which cannot be resolved by the parties, and asked to publish decisions or recommendations on how the matters in issue should be resolved. It is usual (but not compulsory) that an opportunity remains for the matter to be referred to arbitration or to the courts if the dispute board's decision does not find acceptance by the parties. Thus a dispute board may be likened to the UK's adjudication process, either under statutory-compliant contracts or under the regime established by statute itself.² What a dispute board does that UK statutory adjudication does *not* do is to provide a regular and continuing forum for discussion of difficult or contentious matters; to identify ways forward by acting in an informal capacity and to create valuable opportunities for the parties to avoid disputes by keeping proactive communication alive. Another aspect, which is less often discussed, is that by establishing a dispute board from the inception of the project, the dispute board members become part of the project team and are thought of in a different fashion, and because of their 'hands-on' approach they can be trusted to be fair and impartial and their advice is respected and taken more readily than would be the case with a third party or stranger to the project.

The term 'dispute board' is a generic term that includes (a) the dispute review board (DRB), which is a device that originated in the USA (and continues to be used most often there) and provides non-binding recommendations; (b) the dispute adjudication board (DAB), which is a

² Housing Grants, Construction and Regeneration Act 1996.

device emerging from the earlier USA model, but which provides a decision that has interim-binding force and which is used most everywhere else in the world except the USA; and (c) the combined dispute board (CDB), which is a hybrid of dispute review boards and dispute adjudication boards and was created by the International Chamber of Commerce (ICC) in 2004. Various other terms have been used, such as dispute settlement panel, dispute mediation board, dispute avoidance panel, dispute resolution board and dispute conciliation panel. Fundamentally these different varieties of dispute review devices are the same, each providing early adjudication based on the contractual bargain between the parties.

A dispute board is a creature of contract; the parties establish and empower a dispute board with certain jurisdiction to hear and either advise on the resolution of disputes or to make decisions on the disputes presented – hence the difference between a dispute review board and a dispute adjudication board. Within the UK it is entirely possible for the contracting parties to establish a dispute adjudication board to adjudicate construction contract disputes within the statutory requirement for adjudication.³ As yet, there are no statutory requirements for dispute review boards to be established to adjudicate disputes under construction contracts.

While the origins of dispute boards are found in the construction industry, their ambit is far wider than construction and dispute boards are now found in the financial services industry, the maritime industry, long-term concession projects and operational and maintenance contracts. The scope for dispute boards is substantial. The emergence of the ICC as an active supporter of dispute boards,⁴ as well as the Dispute Board Federation (DBF)⁵ and the Dispute Resolution Board Foundation (DRBF), makes it highly probable that dispute boards will be established in a range of industries that, until now, have not used adjudication to any great extent.

What makes a dispute board unique? What can be achieved by using a dispute board?

The construction industry has a reputation for disputes and conflict. Anecdotal evidence from Australia, as just one example, indicates that 50 per cent of all legal costs associated with construction are expended in connection with disputes. In almost 10 per cent of projects, between 8 and 10 per cent of the total project cost was legal cost. Not surprisingly, these projects have a high incidence of disputes. This expenditure, which globally represents an enormous sum each year, does not begin to take into account the hidden costs of disputes: the damage to reputations and commercial relationships, the cost of time spent by executive personnel and the cost of lost opportunities. The situation is aggravated by the increased use of joint ventures, both in consulting and in contracting. Such organisations are less autonomous and perhaps less able to negotiate settlements of their contractual problems.

Every construction project is unique and perhaps this is why there is a general absence of ‘corporate memory’ in the construction industry. Regrettably, similar-type disputes arise on many construction projects and it is naive to think we can eradicate disputes by clever contract drafting alone. Differences will occur, many of which will involve sizeable sums of money and thus provide fertile ground for disputes to arise. What parties want is a dispute-solving device that is considered

³ See the Institution of Civil Engineers (ICE) Dispute Board Procedure published in 2004.

⁴ The ICC Dispute Board Procedure launched in the UK on 13 October 2004.

⁵ The Dispute Board Federation located in Geneva, Switzerland, is an international appointing and accrediting body which promotes dispute boards and dispute resolution in international infrastructure projects and is referred to as the DBF, see www.dbfederation.org.

fair, is economic and will cause the least damage to the full performance of the contract. This is especially true for large projects, where contract periods are lengthy and good interparty relationships are important to satisfactory performance.

Contracts do not always provide the necessary mechanisms to determine entitlements with certainty. Many disputes concern ‘non-absolute’ matters and, in such cases, the dispute board can devise solutions which avoid ‘win–lose’ situations whilst keeping within the contractual boundaries. Working relationships are less injured and site-level partnering can continue.

Recommendations vs Binding Decisions

When dispute boards first came into play about 20 years ago, they were created to ease the construction of projects which had both employers and contractors from different jurisdictions, different legal systems and differing standards of practice. Disputes arose, but rather than having a ruling on who was right or wrong, it was felt better to have experienced individuals – experienced in construction and construction contracts – review the situation and offer their opinion of what the difficulty was and perhaps a way forward to resolve the problems between the Employer and the Contractor. Thus the ‘recommendation’ form of a dispute board was born. Neither party had anything to fear from the dispute board, for all that would come from them was a recommendation. This quickly developed a step farther and the recommendations given would become binding after a certain period of time, unless objected to. This method also allowed the parties time to reflect on the comments made by the dispute board and to determine if their ‘suggestions’ were viable, and if so they became the rule: that is, a decision was made that would become binding. This then naturally led to the current model, which is a binding decision in each instance; a decision that is both binding and actionable immediately. The key differences now follow.

Non-binding recommendations

There is much trans-Atlantic debate over the benefits and shortcomings of non-binding recommendations and interim-binding decisions – thus the divide between USA-style dispute ‘review’ boards and the international use of dispute ‘adjudication’ boards. Even if the dispute review board recommendation is contractually ‘non-binding’ (as many still are, particularly in the USA), this does not appear to impair the efficacy of the decision. It is suggested that there are two main reasons for this: first, that if the dispute review board recommendation is admissible in later proceedings (as it often is), the parties know that an arbitrator or judge will be greatly influenced by a decision (on the facts) given by a panel of experienced, impartial construction experts who were familiar with the project during its construction. Thus the parties are likely to accept the recommendation. Secondly, it is unlikely that over the course of a large project the dispute review board will always find in favour of the same party. It is probable that each party will be pleased with certain decisions and if they expect the other party to honour the favourable decisions, they are obliged to accept those that are less than favourable⁶. In many of the early dispute review

⁶ Peter H. J. Chapman, the then President, Dispute Resolution Board Foundation, speaking at the Fifth Annual Conference, Dubai, United Arab Emirates, 2005.

boards, parties were found to give notice of dissatisfaction with every unfavourable dispute review board recommendation (thereby keeping the matter live), only to drop the proposed arbitration or litigation when the contract was concluded and when close-out negotiations resulted in the dispute review board's previous decisions being adopted in their entirety by both parties and without demur.⁷

The arguments in favour of non-binding recommendations from dispute review boards include:

- (i) They often help parties in resolving a dispute by virtue of the advice the recommendation gives, so long as the parties have respect for the standing and competence of the members of the board.
- (ii) Cultural backgrounds may be of influence: for example, in China the tradition of conciliation will often lead to the adoption of the recommendation by the parties to avoid further conflict.
- (iii) It is a non-threatening process.
- (iv) The preparation for any hearing is less than for other procedures.
- (v) Hearings are shorter.
- (vi) Hearings are simpler.
- (vii) Hearing costs are reduced.
- (viii) Experienced parties are very often able to resolve matters based on a recommendation alone.
- (ix) In the USA the non-binding recommendation, which normally extends only as far as matters of entitlement and not quantum, generally finds acceptance because neither side is usually eager to pursue the matter through arbitration or the courts.

The arguments against non-binding recommendations from dispute review boards include:

- (i) They enable the losing party to postpone the day of reckoning merely by giving the required notice of arbitration.
- (ii) The effect of the recommendation may be nil.

Interim-binding decisions

By contrast, the interim-binding decision of a dispute adjudication board has meaning, in that the dispute adjudication board's decision is contractually to be implemented immediately – even if one or other party is unhappy. Thus the 'losing' party will be in breach of contract if it does not pay/grant time in accordance with the dispute adjudication board decision.

The arguments in favour of binding decisions from dispute adjudication boards include:

- (i) If necessary, they may be enforced by legal processes (these may not be without difficulty depending on jurisdiction, and this is discussed in later Chapters).

⁷ For example, the Ertan Hydroelectric Project in China, where all 27 of the dispute review board's decisions were adopted by the parties during the final settlement negotiations, resulting in final account agreement of a mega project constructed over a nine-year period to be settled within less than six months of contractual completion.

- (ii) The binding nature of the decision will focus the minds of the parties during the dispute process and can thus lead to early settlement.
- (iii) The binding nature of the decision is unlikely to be ignored, even by an unwilling or an impecunious party (breach of contract).
- (iv) In a joint venture, consensus may be difficult insofar as adopting a recommendation is concerned – not so with a decision.
- (v) Different situations arise around the world where there is corruption, and suspicion arises if any public employee authorises payments that are not compulsory. Indeed, in some areas payment cannot be made without an actual decision on the merits of the dispute.

The arguments against binding decisions from dispute adjudication boards include:

- (i) Matters are often harder fought, as there is more at stake.
- (ii) Hearing preparation costs and hearing time and costs are likely to be higher, as generally more documentation is put before the board.
- (iii) There is more chance of legal representation.
- (iv) The final decision is taken away from the parties.
- (v) Some matters are very complex and the time limits can be testing when much can turn on the decision.

In general there is no right or wrong answer as to whether the output from a dispute board should be a non-binding recommendation or an interim-binding decision. Much will depend on circumstances, jurisdiction, the skills and identity of the board members and the needs of the parties, as well as cultural considerations.

Differences between dispute boards and arbitration, mediation, adjudication and alternative dispute resolution (ADR)

Judicial historians are in disagreement as to which arose first, arbitration or mediation. In antiquity it would seem that mediation was the first, and if it did not resolve the dispute other more severe methods were available. But arbitration was a close second in the development of numerous judicial systems, where, once the parties chose the arbitrator, the arbitrator had the powers of a judge and could issue awards which were binding on the parties.

The apparently inexorable growth of litigation-generating disputes in building and construction, and the complexity of such disputes, has inevitably increased the expense and delay of both litigation and arbitration of such matters. There is increasing interest in various other ways in which these conflicts could be resolved. Such possible avenues are known collectively as alternative dispute resolution (ADR). Impulse for a change to ADR appears to have originated in the USA, where a number of factors contributed to this development, in particular:

- (a) The constitutionally guaranteed right to jury trial for ‘suits at common law’.
- (b) The absence of any general system of ‘fee-shifting’ in civil litigation, so that each party must bear its own costs regardless of the outcome.
- (c) The absence of any national system of judicature.

- (d) The poor quality of some judges and/or lack of specific expertise in complex engineering matters, due to low pay and/or erratic selection procedure (including their election to office).
- (e) Congestion of the court system.

However, most countries with well-developed legal systems have experienced a growth in interest in ADR. It appears to be a common experience around the world that as legal systems become better developed and more sophisticated, so problems of delay and expense increase. There are a wide variety of different techniques for dispute review that can come under the umbrella of ADR. These include:

- *Judicial appraisal*: the parties make written submissions to a judge, who then gives an appraisal of the likely outcome should the matter go to trial. It is for the parties to agree whether or not the appraisal is to be binding.
- *High–low arbitration*: prior to the arbitration the parties agree the parameters of the settlement. If the award is within the parameters, it is binding. If it is outside the parameters, the higher or lower limit set by the parties applies, whichever is the nearer.
- *Expert determination*: expert determination can be used to resolve a discrete matter. Usually the expert will investigate and report on the matter. Reliance on submissions made by the parties is therefore not essential. The decision is usually binding. Where the parties have agreed that the expert's determination will be final and binding, then, in the absence of an agreement as to specific grounds upon which the determination may be challenged, the courts will only interfere with the determination in limited circumstances, such as fraud or a failure on the part of the expert to follow his instructions.⁸ The extent to which an error of law made by the expert is open to review by the courts is uncertain.
- *Mediation*: mediation involves the introduction of a neutral third party, the mediator, whose purpose is to assist the parties in reaching a negotiated settlement of their dispute. There are two main forms of mediation – facilitative and evaluative. In facilitative mediation, the mediator remains neutral throughout. In evaluative mediation, the mediator may express a view or make a recommendation where this will assist the parties with their negotiations.
- *Mediation–arbitration*: the parties use mediation to attempt to reach a negotiated settlement but should that not prove possible, a decision is imposed on them in respect of any unresolved issues. The parties decide whether one person is to act as both mediator and arbitrator or whether the roles are to be split.
- *Conciliation*: the terms 'mediation' and 'conciliation' are often used interchangeably. However, in the UK conciliation is usually regarded as a more evaluative than facilitative approach. For example, under the Institution of Civil Engineers (ICE) Conditions, parties may refer their dispute to conciliation and, in the event of a conciliated settlement not being reached, the conciliator has the power to make a 'recommendation' for the settlement of the dispute.⁹

⁸ *Dixons Group plc v. Jan Andrew Murray-Oboynski* (1997) 86 BLR 161, Judge Bowsher QC; *Jones v. Sherwood Computer Services plc* [1992] 2 All ER 170; [1992] 1 WLR 277, CA.

⁹ See, for example, ICE Conditions 7th Edition, clause 66, and ICE Design and Construct Conditions of Contract 1992, clause 66.

- *Executive tribunal*: this process involves a mediator sitting as a panel with an executive from each party who has not been personally involved in the dispute. The panel hears submissions from each party. Thereafter the executives retire with the mediator to negotiate a settlement.
- *Neutral fact-finder*: this is similar to expert determination. It is usually restricted to specific issues within an overall dispute and is not binding in that the fact-finder does not usually make an award.
- *Adjudication*: this is akin to judicial appraisal or expert determination, but the submissions are made to a neutral third party rather than a judge. The third party is usually chosen on the basis of expertise in the matter in dispute. Adjudication can encompass oral submissions or site visits. The decision is usually binding but not necessarily final. Adjudication has also become increasingly common in the UK construction industry as a result of the statutory right to adjudicate under the Housing Grants, Construction and Regeneration Act 1996. Part II of the Act, which came into force on 1 May 1998, provides that construction contracts (as defined) must contain an adjudication procedure that complies with section 108 of the Act. If the contract contains no adjudication provisions or those provisions fall short of those required by the Act, then the statutory Scheme for Construction Contracts applies.

It is from this combination of alternative dispute resolution methods available that the modern dispute board was formed.

History of dispute boards

Dispute review boards evolved to meet the need in the construction industry for prompt, informal, cost-effective and impartial dispute review. The dispute review board concept originated in the USA, where it has been used for over 30 years as a means of avoiding and resolving disputes in civil engineering works, particularly dams, water management projects and contracts for underground construction. The earliest reported use was on Boundary Dam in Washington in the 1960s, where the technical 'Joint Consulting Board' was asked to continue its operation and make decisions regarding conflicts and other related matters. The idea worked well and the dispute review board embryo began to grow.

In 1972 the National Committee on Tunneling Technology undertook a study in the USA into improved contracting practices. This led to a publication, in 1974, entitled *Better Contracting for Underground Construction*, in which the undesirable consequences of claims, disputes and litigation were highlighted. As a result of the study and the consequent publication, a dispute review board was established in 1975 for the Eisenhower Tunnel in Colorado. The benefits of the dispute review board approach were recognised and appreciated by the contracting parties and 'The Eisenhower' became an example that was followed with enthusiasm throughout the USA.

The International Federation of Consulting Engineers (FIDIC)¹⁰ has for some years published several forms of contract that are popular for use in international procurement. The FIDIC forms emanate from the standard form of contract published by the Institution of Civil Engineers in the UK. Both the ICE and FIDIC forms originally empowered the 'engineer' to act in a quasi-judicial manner in settling disputes that arose between the contracting parties. As suspicions grew

¹⁰ Known as FIDIC from the French name, Fédération Internationale des Ingénieurs Conseils, an international organisation based in Geneva that represents consulting engineers.

concerning the independence of an owner's agent to act fairly to determine disputes, and as costs in resolving claims by arbitration or the courts increased, the need grew for a cheap and timely system of dispute review in large infrastructure projects where parties of differing nationalities were involved.

In 1980, a dispute review board was used on a large international project in Honduras (the El Cajon Dam and hydroelectric facility). This project was funded in part by the World Bank, which was convinced, mainly by the efforts of an American, Al Mathews, who had been involved in a number of dispute review boards in the USA, that a dispute review board would overcome the potential problems that were foreseen on this large project that was to have an Italian contractor, a Swiss 'engineer', and an owner – the Honduras Electricity Company – that had never embarked on such a large project before or on one with international contractors. The El Cajon dispute review board was successful and the use of dispute review boards on international projects started.

The World Bank

The World Bank, in the very early 1990s, published *Procurement of Works*,¹¹ which comprised *inter alia* a modified FIDIC contract with provisions for dispute review boards to publish non-binding recommendations. FIDIC followed suit in 1995–6 with a new version of the design-build contract and an optional amendment to its standard form construction contracts. In both these new documents dispute adjudication boards were introduced. It was at this stage that the divide first occurred between the traditional dispute review boards, which give non-binding recommendations, and dispute adjudication boards, with their interim-binding decisions. Additionally, FIDIC removed the engineer as the first-tier dispute decider if the dispute adjudication board option was incorporated in the contract.

In 1999, FIDIC revised its various forms of contract and in this edition the dispute adjudication board was presented as the principal means of dispute review within the contractual mechanisms. In the FIDIC Red Book (construction), the dispute adjudication board is to be established *at the start* (and thus is a true dispute board), while in the Yellow Book (plant and design-build) and the Silver Book (engineering, procurement and construction (EPC)/turnkey), the establishment of the dispute adjudication board may be deferred until an actual dispute arises.

In 2000 the World Bank produced a new edition of *Procurement of Works*. This was a significant publication, as the World Bank moved away from the USA model of dispute review boards towards the FIDIC-style dispute adjudication boards. The World Bank has thus adopted a contract whereby the dispute review board (the name remained) gives recommendations that are interim-binding and where the engineer is not required to act in the traditional quasi-judicial manner in deciding disputes arising between the parties.

Harmonised contract conditions

The World Bank and FIDIC embarked upon a process to harmonise the dispute resolution board/dispute adjudication board provisions to bring them into alignment. Other development banks (European Bank for Reconstruction and Development, Asian Development Bank, African

¹¹ World Bank, *Standard Bidding Document Procurement of Works*, Washington, DC: World Bank, May 2006, revised March and April 2007.

Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, Council of Europe Development Bank, Inter-American Development Bank) were involved in this harmonisation and in 2005 a set of contract conditions, published by FIDIC, was adopted by all the leading development banks utilising dispute adjudication boards; this form of contract was recently updated and the new 2011 version is the standard.

ICE in the UK has an initiative to consider a statute-compliant clause in its standard form contract whereby dispute boards may be established that comply with the UK statutory provisions for adjudication. A number of such boards are already in progress and the ICE initiative would mean that contracting parties are provided with standard wording should they wish to adopt the dispute board route. Whether or not ICE formally adopts the dispute board option in the immediate future, it has launched its own dispute board procedure that can be selected by parties choosing to use a dispute board in association with an ICE contract.

The newest version of the FIDIC Harmonized Major Works (Construction) Contract also now includes acceptance by the majority of the World's Multilateral Development Banks along with bilateral development agencies and Multilateral Financial Institutions.

Growth of dispute boards

By the start of 2009, well over 2,500 documented projects had been completed or were under construction utilising dispute boards. The total value of these projects was approaching US\$130 billion. Although issues of confidentiality prevent an absolute determination, it is understood that almost 4,000 disputes have been the subject of dispute board decisions. There have been few occasions (under 30 cases reported to date) where a dispute board's decision or recommendation on a substantive dispute has been referred on to arbitration or the courts. Of such referrals, very few decisions of a dispute board have been overturned.¹²

Dispute resolution boards are currently known to be in operation in numerous countries (for example, the USA, UK, Ireland, France, Sweden, Denmark, Bulgaria, Romania, Czech Republic, Iceland, Greece, Italy, Switzerland, Turkey, South Africa, Uganda, Ethiopia, Egypt, Hong Kong, China, Vietnam, Cambodia, Bosnia-Herzegovina, Serbia, Croatia, Ukraine, Georgia, Russia, India, Pakistan, Bangladesh, the Maldives, St Lucia, New Zealand and Australia, to name just a few). They are ideally suited to larger projects, to projects which are 'international' (i.e. contracting parties from differing domiciles) and to multicontract projects such as mass transit railways and high-speed railways, large power stations and the like. A recent development is the establishment of dispute boards for major concession projects lasting over several decades (e.g. Channel Tunnel Rail Link, hospitals, schools and private power plants).

Dispute boards are undoubtedly set to grow in popularity and frequency of use. Quite apart from their effectiveness in promoting early resolution of disputes – in the words of Lord Woolf, 'lancing the boil'¹³ – there are several clear reasons why the use of dispute boards will develop. First is the support given by the World Bank, other development banks, FIDIC, the ICC, ICE, the

¹² The DBF (Dispute Board Federation in Geneva) has conducted research that indicates that for almost 99% of the time when a dispute is referred to a dispute board the matter is successfully resolved. Further, of the remaining small percentage of disputes that are not resolved and referred on to arbitration or the courts, half of those that reach a determinate stage see the dispute board's decision upheld and an exceedingly small number have the dispute board's decision overturned.

¹³ Keynote speech: 'Adjudication: A New Deal for Disputes' (ICE, 20 October 1997).

Dispute Board Federation and the DRBE. Second is the success shown by dispute boards in avoiding and resolving disputes fast, inexpensively and to a high quality of decision-making. Third is the adjudication explosion in the UK arising from the Adjudication Act 1996; and finally, the ever-growing need in construction contracts for certainty and consistency in decision-making during – rather than after – the period of construction.

An overview – composition of dispute boards and their operation

Dispute board panels of three are usual, but this composition is not mandatory. For small projects, which could not justify the expense of a three-person tribunal, a dispute board of one person can be utilised. Both the World Bank and the FIDIC Conditions encourage one-person boards for small contracts. Very large multidiscipline and multicontract projects could necessitate a larger pool from which a panel of one, or three or more members can be selected.

The Channel Tunnel project in the UK/France had a dispute board of five persons. All five members heard all of the disputes, but the final decisions were made by a three-person panel composed of the chairperson and two of the other members (chosen for their particular expertise). The Hong Kong Airport had a disputes review group (DRG) of six members plus a convenor to cover all the main contracts (about 20) awarded by the Hong Kong Airport Authority. A panel of one or three members was selected, depending on the nature or complexity of the dispute. The members of the DRG were chosen to provide the range of expertise that was considered likely to be required to comprehend the technical aspects of disputes that could arise.

Under the Channel Tunnel Rail Link project, a US\$5 billion concession project in the UK on which construction started in October 1998, two panels were established: a technical panel comprising engineers (who would give decisions on the construction-related disputes) and a finance panel (who would give decisions on disputes concerning the financial provisions of the concession agreement). The Docklands Light Railway Extension to Lewisham, opened to the public in about 2000, established technical and financial panels (each of three persons) but chaired by the same individual. A Private Finance Initiative (PFI) hospital project in northern England has a dispute board comprising a chairperson and one other standing member, but other members (from a long list including about 30 doctors) are to be co-opted to strengthen the board when required, to deal with financial, facilities and clinical matters.

Several dispute resolution boards are being set up in Eastern Europe for long-term concession infrastructure projects. The notion is that the board will have a ‘moving membership’ to suit the various stages of the project (construction, operation and maintenance, tariff indexation, economic trends, etc.).

The chairperson’s role

The role of the chairperson is paramount to the success of a dispute board. That person must chair all meetings and know precisely which issues should receive the most attention during the limited time when the members and the parties are together. The chairperson must understand the contractual and technical issues involved and be prepared to lead discussions between the parties (during informal meetings and during hearings) and between dispute board members (during board deliberations). The chairperson must strive for consensus and be prepared to view

the issues through the minds of the other board members (who will, inevitably, have different experiences and bring different perspectives to bear on the matters in question). During the hearings the chairperson must ensure fair play and enable a party who is poorly represented adequate opportunity to present and defend its case. The chairperson must not be arrogant, short-tempered, over-familiar, too talkative, patronising or inconsiderate – particularly where parties are conducting the proceedings in a language that is not their mother tongue. The chairperson must be firm but not autocratic.

Nor should a chairperson undertake all the work or attempt to be a ‘one-person board’ by ignoring the others. He or she should share the work between the members, reserving for him/herself those areas where he/she feels best able to contribute, delegating other matters to colleagues in the knowledge of their capabilities.

The chairperson’s role is not easy, but it is absolutely vital that it is undertaken with integrity and competence. If a dispute board fails to provide the service expected by the parties, much of the blame will rightly fall on the chairperson.

Appointment and membership

Typically, each party selects one member of the dispute board and these two then select the third member, who, with approval of the parties, then acts as chairperson – this is sometimes referred to as ‘Bottom-up’ selection. Occasionally the chairperson is appointed by the parties directly or by the first two members without the parties’ further input. Another approach sometimes utilised is where the parties choose the chairperson who then selects the two other members of the board – this is sometimes referred to as ‘Top-down’ selection. This method allows the chairperson to select individuals who are best suited for the particular project involved. For dispute boards to function well, a right of (reasonable) objection over the other party’s selection is usually included. Yet another method of selection is for the parties to agree the identity of the chairperson who, once appointed, works with the parties in selecting the other members.

Despite the first two members being party selections, each member is entirely independent. Appointment is not as party representative. The members are to serve both parties with total impartiality. A member’s independence is paramount as a dispute board that is perceived as partisan will not engender respect and its recommendations or decisions are less likely to be acceptable. Consequently, whenever possible, active participation by the parties in the selection of members should be encouraged.

Dispute board members should be chosen with care because the success of a dispute board depends on the parties’ confidence in the expertise of the members, particularly in those of the chairperson, who must conduct the regular meetings and hearings fairly and firmly. In construction projects the majority of issues brought to the attention of a dispute board have a technical content. In such cases, a member with little or no understanding of such matters may fail to appreciate the extent of the dispute and may thus be unable to contribute to the proceedings. Additionally, members need to be well versed in contract administration and confident in their ability to understand and interpret contractual provisions. It is usual for the dispute board to publish its decisions with reasons. Confidence in the dispute board would disappear if the board’s interpretation of contractual provisions appeared bizarre or unsubstantiated.

However, there are many occasions when a dispute does not lend itself to absolute interpretations under the contract and the dispute board needs to give decisions which do not contravene

contractual principles but which are robust enough to give clear and sensible guidance which is acceptable to the parties. The dispute board should provide the parties with avenues that could lead to the resolution of their disputes at the earliest opportunity. This will enable the real project to proceed, unhindered by any contractual baggage.

Board member qualities

Qualities essential for dispute board membership include open-mindedness and respect for the opinions and experience of the other members. For dispute boards on international projects, the members are in very close proximity throughout the site visits, during the hearings and deliberations. Harmonious relationships and mutual trust are very important. Whilst decisiveness may be a virtue, individuals possessing very dominant personalities may prove unsuitable as dispute board members. A successful dispute board is a team effort and it is very important that all members are totally committed to the successful operation of the process.

Impartiality and objectivity are vital qualities and should not be compromised, or appear to be compromised, by a member having a professional or personal affiliation with an organisation involved with the project. Terms of appointment sometimes prohibit persons who previously have worked for either of the parties to the contract or who are of the same nationality as the contracting parties.

Unlike an arbitrator or judge who walks away from the reference after the award or judgment, the members of a dispute board remain with the project until completion. Appointment should be for the duration of the construction contract and termination of a member or of the board should only be 'for cause' and then by agreement between the parties. Finally, it is important that dispute board members remember that they are not engaged as consultants and they should never attempt to redesign the project or advise the contractor how it should be constructed.

The importance of early appointment and of regular site visits

The dispute board should be established at the commencement of construction and should exist throughout the contract period. This is the feature that most differentiates dispute boards from some other forms of adjudication. Some lending institutions make provision in their loan agreements whereby funds are suspended until the dispute board has been appointed and has commenced its programme of regular visits to the project. In some contracts failure to appoint the dispute board (within a certain period) constitutes breach and enables the non-defaulting party to apply for institutional appointments.¹⁴ The establishment of the dispute board should not be left until a dispute has arisen or after the contract has been completed. A dispute board's main value is in being part of the project from the outset so that its presence can, from the start, influence the attitudes and behaviour of all those involved.

Early appointment and regular site visits enable the dispute board members to become highly conversant with the project and actually observe the problems on site as they develop. Technical

¹⁴ Such as FIDIC or the Dispute Board Federation – organisations which appoint and/or publish lists of accredited dispute board members and chairpersons.

difficulties and their contractual ramifications can readily be appreciated and, should the dispute board be required to make a decision on a dispute, its close knowledge of the project and of the issues (and personalities) should permit quick, well-informed, even-handed and consistent responses. As every arbitrator and judge knows, it is difficult to visualise factual circumstances that are said to have existed several years earlier merely by listening to others or by reading documents. If the disputes involve allegations of delay or disruption, or if ground conditions are in issue, even contemporaneous correspondence or photographs can be misleading. By having witnessed the technical and physical conditions prevailing at the time, through regular (three or more times per year) visits to the site during construction the difficulties of *ex post facto* determinations are avoided and the expensive task of reconstructing historical events is reduced.

Routine operations

Experience indicates that the routine visits to the project of a dispute board become a focus for the parties and their professional advisers. Claims and potential claims are subject to regular (albeit general) review and are not permitted to lie and fester and surface again as major disputes some time later.

The frequency of site visits depends on the nature of the work, the construction activities in process and the number of potential or actual disputes. In technically complex construction projects, or those where ground conditions are known to be suspect, or where contract interfaces and rates of progress could become issues, visits should be relatively frequent, perhaps every three months. This frequency can reduce to six months or more as the work progresses. Whenever appropriate, site visits should be combined with hearings of disputes (which would normally be conducted on or near the site).

A typical programme for a visit would be for the dispute board to be given a brief progress update followed by a site inspection, particularly of those areas where potential difficulties exist (e.g. rock quality in a tunnel drive). The parties would be given ample opportunity to provide the dispute board with further information on such issues, not by way of contractual argument but so that the dispute board can better appreciate the consequential effects to the project and the steps the parties and their advisers are taking in mitigation. Further site inspections of particular areas could take place in the light of information received. The dispute board will also convene sessions with the parties during which the dispute board asks questions or seeks additional information from the parties as to how they are going about resolving their differences. These sessions often stimulate remarkable interaction between the parties and it is not unusual for issues to be clarified and new understandings develop as a result. In cases where a dispute has arisen, the hearing of the dispute would commence on site once the routine visit is over.

It can be advantageous for the dispute board to prepare a report at the conclusion of each regular site visit. This should state what occurred and make suggestions as to how matters of concern could be progressed to settlement. The higher up the chains of command this report reaches, the better. Most contracts now provide for a report after each site visit.

Apart from the regular visits to the site, dispute board members should be kept informed of construction progress on a regular basis, usually by being sent copies of, or extracts from, the routine progress reports. It is vital that the member takes the trouble to read and digest the content of these reports (and to keep them accessible and in good condition for later reference

should a dispute arise). Total familiarity with the project is essential when visiting the job-site and each board member must spend a considerable amount of time in preparation. But a member's obligation is not only to read reports. Dispute board members must be available at short notice to read dispute submissions, convene hearings and prepare decisions. This availability is paramount and warrants the retainers which members are usually paid. The dispute board agreements usually specify a period from notification within which the hearing is to be convened. For the members of the dispute board to request deferrals of the hearings because of inflexible schedules defeats a principal benefit of the dispute board. Consequently, individuals should not accept invitations to serve on a dispute board unless they have the availability to fulfil these important obligations.

Subcontractors

Construction disputes often originate at the subcontractor level. A dispute board established under a contract between an employer and main contractor (or concessionaire) can be empowered to hear disputes arising at lower tiers of the contracting hierarchy – with dispute board language in each subcontract. Clearly, such arrangements need to be structured at the time subcontractors are engaged and thus ensure that the subcontractors 'buy in' to the dispute board process. It is important to note that if this is the case it is essential that the parties take into account the need for a separate 'buy-in' of the existing dispute board by the subcontractors. Indeed, there needs to be some evidence that the various subcontractors have agreed to the use of the dispute board in place between the Employer and the Contractor and that the same rules and procedures apply. Other points to consider are: who pays the dispute board if the dispute arises between the Subcontractor and the Contractor without any involvement by the Employer.

FIDIC Conditions of Subcontract for Construction

As at the writing of this book, FIDIC in February 2010 published the '2009 test' edition of FIDIC Conditions of Subcontract for Construction, a subcontract for use with the 1999 Red Book and 2004 (Revised 2006, 2010) Pink Book: that is, the MDB Harmonized Edition. The purpose of this new book is to meet the needs of the various MDBs for a uniformly recognised form of subcontract, particularly for use on the projects financed by them.

The main points are that for the subcontract works the subcontractor assumes the duties and obligations of the main contractor under the main contract and the new payment terms include 'pay-when-paid clauses'. For the purposes of this book, however, the main points are that the parties can refer disputes that arise out of the relationship between subcontractor and contractor, or so on, to the DAB, which is constituted as needed: that is, an ad hoc rather than a standing board. Of particular interest are the Claims, Termination and Dispute Resolution sub-clauses.

Generally, the relevant sub-clauses include 3.3, 3.4, 20.1 and 20.2, with the key element being that of notification. Here the parties are required to provide notification of any claims, either existing or ones that are intended, as soon as possible. Obviously, this follows from the fact that prompt notification is required under the main contract and as such is of equal if not greater importance here, and accordingly as any such claims then will flow through the main Contractor

to the Employer, this notification period is shorter under sub-clause 20.2 of the subcontract than those under sub-clause 20.1 of the main Contract.

The Dispute Resolution portions are somewhat different in certain respects, and this arises from the fact that since *Roche Products Ltd v. Freeman Process Systems Ltd*¹⁵ dispute resolution clauses cannot be incorporated by reference to the Main Contract conditions, the Subcontract contains its own specific provisions on how disputes are to be managed. Here the approach is similar to that used under the Red Book, with the main difference being that the dispute adjudication board is 'ad hoc' and only appointed when a dispute arises, rather than a 'standing board', as set out in the Red Book.

It is interesting to note that, whilst the Subcontract appears to invite interaction with the main Contract regarding the resolution of any disputes, it does not allow for multi-party adjudications or arbitrations. Thus, in any notice given by the Contractor, or within 14 days of receipt of a notice by the Subcontractor, the Contractor may notify the Subcontractor that the dispute involves issues which are in dispute between the Employer and the Contractor and, additionally, the main Contractor is also required to submit its claims to the main Contract DAB and copy the Subcontractor. The process then requires that the parties put off any claims being submitted to the Subcontract DAB until 112 days have elapsed, thus giving the main Contractor time to resolve any dispute under the main Contract before becoming involved in the DAB procedure under the Subcontract. Whether this will work in practice is left open for further review, however.

Further sub-clause provisions of interest include 20.1 and 20.2, where the notice provisions of the main Contract are such that the Subcontractor is only entitled to an extension of time or additional cost if it complies with the main Contract notice requirements. Another point of interest is that any failure by the Subcontractor to provide information needed by the Contractor which results in the Contractor being prevented from making a claim for amounts other than those claimed by the Subcontractor will result in the Contractor being entitled to deduct the irrecoverable element from the Subcontract price which is set out in sub-clause 20.3.

As just mentioned, sub-clause 20.4 allows the Contractor to defer the referral of a Subcontract dispute to the Subcontract DAB whilst it refers the dispute to the main Contract DAB, and during this time the Subcontractor is required to assist the main Contractor in pursuing the Subcontract dispute under the main Contract, but will not be bound by the main Contract DAB's decision.

Formal vs Informal operations

The formal involvement of the dispute board as dispute adjudicator arises when one or other party to the contract serves notice of a dispute. Sometimes, this referral may not be made until a dispute has reached a relatively advanced stage and after negotiations between the parties have failed to resolve the matter.

A dispute board can, however, operate on an informal level. During the routine site visits matters of concern and potential dispute are brought to the attention of the dispute board and grievances can be aired and a dialogue established between the parties, under the watch of the dispute board. However, caution must be exercised and the dispute board should not give informal pronouncements or attempt to prejudge issues that may later be the subject of a formal refer-

¹⁵ (1997) 80 BLR 102.

ence. It is not difficult, however, to steer the parties towards new understandings and thereby help clarify matters in contention. This role of the dispute board has obvious similarities to non-evaluative mediation.

But it must be stressed that the informal operation of dispute boards should be undertaken with caution. Injudicious statements from the dispute board should not usurp the role of the professional advisers. Nor should the formal role of the dispute board be prejudiced. With this said, the parties usually welcome the informal operation and it is a valuable means of dispute avoidance.

The dispute board can, with the agreement of the parties, be asked to give an advisory opinion that is similar in nature to an award or judgment on a preliminary point in arbitration or the courts. The advisory opinion can be used when the parties need guidance on a contractual interpretation that is preventing the settlement of a dispute. By referring this interpretative matter to the dispute board (who may agree to deal with the matter on inspection of documents only), further hearings on the dispute may be unnecessary.

Hearings

Hearings can take many forms. There can be informal hearings to review a developing situation, or to have the dispute board consider some site condition. There can be formal hearings similar to those conducted by an arbitrator, but, as will be discussed, the dispute board format for such hearings is vastly different from the typical adversarial one found in court or in arbitrations. Or there can be information or informative-type hearings where the dispute board, or more likely the parties, request a hearing not because of any difficulty but merely for directions on how to proceed.

The hearings themselves can be short: for example, one day; they can be in person at the site, or other location agreed to by and between the parties and the dispute board; they can be done via telephone or other communication methods; or they can be lengthy, such as for evidentiary hearings at the site as part of obtaining evidence for a recommendation or decision. When either party considers that a dispute should be put to the dispute board, that party initiates an application.

A hearing before a dispute board is far less formal than an arbitration hearing or an action in court. It is more like a site meeting. Typically, although there are many variations, each party would have presented 'position papers' to the dispute board and to the other party some days before the hearing date. These position papers should not attempt to be legal 'pleadings'. The objective is for each party to commit to paper its own understanding of the disputed issues (of fact and contractual entitlement) and to state reasons why it considers its opinions are correct. By this means the issues should become crystallised for the benefit of the dispute board and the parties themselves. The position papers should avoid the 'attack-defence' routine, which inevitably leads to confrontation and can result in the real issues of the dispute being lost in procedural in-fighting.

The position papers may cite contract provisions and refer to relevant documents, but they should be relatively slim submissions. A bundle of supporting 'reliance' documents, preferably agreed by the parties, can be provided. If the need arises, further information can be supplied. If a dispute concerns both principle and quantum, these matters can be heard separately. This separation (which is a feature of the USA-style dispute review board process) can be particularly

beneficial in cases where an employer has not evaluated quantum or has refused to analyse the contractor's proposed quantification on the grounds that the claim has no contractual merit. In such cases, a decision on the principle alone may be the first stage in what may become a two-stage process. This often encourages the parties to resolve the quantum issue themselves, without further involvement of the dispute review board. It is, however, sensible for the dispute board to have an idea of the quantum involved when considering principle alone.

Both parties should be present throughout the hearings and the dispute board should not receive confidential information on a dispute from either party. Adjudication, by a dispute board or other means, differs from mediation in this important respect.

At the commencement of the hearing, each party would be required to outline its position paper to the dispute board, possibly agreeing to certain facts contained in the other party's paper. The dispute board would then raise initial questions and may ask a party to respond to particular points. Usually, each party would be given an opportunity to submit a brief rebuttal paper, but the hearing should not become confrontational and the dispute board needs quickly to prevent confrontation from starting. Witnesses of fact may be called, but cross-examination would generally be through the dispute review board. In certain situations there may be benefit in cross-questioning by the other party, particularly if technical matters are in issue. Use of expert witnesses is unusual, as the dispute board members are themselves construction professionals who bring wide experience to the project. However, party experts are not unknown in dispute board proceedings and may, in certain circumstances, add value.¹⁶

After the position papers and rebuttals, the dispute board would normally adjourn the hearing to hold private discussions, possibly reconvening to make further enquiries until such time as the dispute board feels adequately informed of the issues and of the facts. It is important that each party feels satisfied that it has been given adequate opportunity to present its case. Particularly when decisions are non-binding, eventual acceptance of the dispute board decision depends on the parties' confidence in the dispute board process. However, the dispute board must be firm in preventing repetition. The dispute board process is more inquisitorial than the adversarial processes of arbitration and litigation, and it can be argued that the dispute board is under an obligation to make any necessary inquiries before reaching its decision.

Once the hearing meetings are closed, the dispute board sets about preparing its written decision. The dispute board will, before publishing the decision, deliberate on all it has heard and read during the hearing, review the contract documentation and consider the particular circumstances of the dispute. It is not unrealistic for a dispute board to hear a dispute and publish its decision whilst still on site. Some decisions may take longer, particularly where quantifications of time and costs are involved, but the hallmark of dispute board adjudication is prompt decisions leading to quick settlement of disputes.

It is clearly preferable for the dispute board to act as a single entity and to give unanimous decisions. Whilst provisions may allow the dispute board to give majority decisions (with minority opinions), this would be unusual and unsatisfactory. If the members hold differing views, these can often be incorporated within the decision without adversely affecting the final outcome. Unanimous decisions engender confidence in the dispute board process and are more likely to

¹⁶ A taxation expert was engaged by a dispute resolution board on a project in China where the parties were in dispute over the application of Chinese taxation decrees.

result in a settlement. Under some dispute board provisions, arbitration is only permitted in the event of a non-unanimous dispute board decision.

The dispute board's product is its decision document, which is drawn up carefully with particular attention to ensuring that a party knows why it has failed on a point or issue. As a general rule, the decision should be written for the unsuccessful party's benefit (not forgetting that both parties can win and lose points within a dispute board decision). Dispute board decisions are often useful to the parties in settling future disputes where the same or similar issues arise.

Dispute board procedures

To achieve maximum benefit from a dispute board, the procedures adopted for the hearing of any dispute should be simple, easily understood, fair and efficient. To impose multiple steps of review and negotiation prior to or during the dispute board hearing can lessen the likelihood of success by increasing confrontation. In particular, procedures should facilitate the prompt reference of the dispute to the dispute review board.

The World Bank, FIDIC, ICC, the Dispute Board Federation and ICE publish standard procedures for use by dispute boards and, in the main, permit the dispute board to adopt whatever procedure it considers necessary to conduct its business in a fair and efficient manner.

Strict rules of evidence are not followed in dispute board hearings. All documents that are to be referred to during the hearings should have been provided to the dispute board and the other party prior to the hearing. For a party suddenly to produce a stack of correspondence upon which it relies without having given due notice will inevitably delay the procedure. In practice, there are occasions when discussions or questions at the hearing require a party to produce further evidence. In such cases, the dispute board should allow the other party an opportunity to consider and reply to the new material. This is normally possible after a few hours' recess or by the next morning. If more difficult questions arise, the dispute board can reserve its decision pending receipt of written responses. The dispute board should ensure that neither party is prejudiced by an 'ambush' but, at the same time, should try to prevent the submission of non-essential material that carries no substantive weight and merely confuses the issues. This judgment is one of the most difficult aspects of the dispute board's operation. The balance between fairness and expedition is not always easy.

Dispute board costs

When compared to the likely costs of arbitration (or court), dispute boards do seem to offer good value. It has been estimated that three-person dispute review boards can cost between 0.015 and 0.025 of total project costs. Clearly, the larger the project the easier it is to justify the expense of a dispute board, but one-person 'local' boards can be considered for smaller projects at very modest costs. It is usual that the cost of a dispute board is shared equally by the contracting parties – some users viewing the expense of a dispute board as an insurance premium against more costly procedures. Indeed, it should be noted that many contractors and employers look at the cost of a dispute board as just another form of insurance on the project – insurance in this case against the uncapped costs of litigation and the delay that arises when parties are forced to resolve their disputes through typical forms of litigation.

Furthermore, the costs of a dispute board are offset by the lower bid prices that are known to result when contractors prepare tenders on dispute board contracts, particularly when working overseas. Obviously, a tenderer will include dispute board costs in their tender, but they should not need to inflate their prices to cover what, without the dispute board, may be a risk of injustice or delay. In cases where the dispute board actually replaces the owner's engineer as the first-tier adjudicator, the terms of reference under which the engineer is appointed may omit certain of the dispute review functions, thus producing some savings further to offset the cost of the dispute board.

Perhaps one of the most significant aspects in considering the expense of a dispute board is the significant difference in time (and thus costs) between preparing a dispute for a dispute board hearing and in assembling the voluminous trial documentation to put before an arbitrator or a judge – costs that are never recovered in full, even by the winning party. Notwithstanding the fact that the cost of resolving a particular dispute is considerably less by dispute board than by arbitration or litigation, the parties do expect something for their money and a proactive, enthusiastic and well-informed dispute board will achieve far more and give better value than one that is entirely passive or reactive.

The biggest single factor in determining the cost of a dispute board over the entire life of the project has to do not so much with the cost of the dispute board members and their expenses but rather in what generates those costs and expenses. If the dispute board members are receiving an hourly or daily rate then the cost is dependent on what is presented to them and how the various presentations are made. Thus if a skilled claims person makes the presentation and that takes two days, the cost is rather low per claim. But if instead the individuals presenting the claim do not know what they are doing, present sloppy paperwork or do not know what to present, the dispute board has to take more time to understand the situation, spend more time in ferreting out the details and take more time in trying to come to grips with what is wanted, all resulting in more days spent and more expenses outlaid. When one hears that the dispute board was very expensive, that is usually the result of poor presentation abilities on the part of the side bringing the claim, which results in more work for the dispute board and a larger cost to the parties, for it is a rare event indeed for a dispute board to want to spend more time than absolutely necessary in resolving any dispute.

Other factors which add to the costs are travel, which is usually business class, hotel accommodations, which are usually not five-star facilities, meals, courier and other expenses which are again dictated by the number of hearings, site visits and the like and the amount of paperwork, exhibits and other filings given to the dispute board.

Why dispute boards work

Dispute boards generally succeed without the parties requiring recourse to law. The parties must live with the dispute board for long periods and it is obviously counterproductive to chase off to the courts on every small matter whilst the contract is ongoing and the dispute board is still operating.

From the available figures, it appears that dispute boards are effective in avoiding arbitration and litigation and bringing the parties to settlement; the record for dispute boards would indicate that parties accept the 'judgments' of dispute boards as fair – or at least as fair as they might expect from an arbitrator or a judge.

With a dispute board in place, it is evident that the parties will themselves make efforts to resolve potential disputes and reduce matters in contention. The dispute board is thus an effective

dispute avoidance device. Its very existence (its 'long shadow') minimises the outbreak of disputes and fosters cooperation between the parties, often providing the impetus for amicable settlements. The damaging 'duel of egos' is avoided. Claims and defences are more carefully prepared and more credible as there is a natural desire not to appear foolish before the dispute board, or to be seen as unhelpful or exaggerating. The parties thus undertake their own reality check before embarking on the referral. Fewer spurious claims are advanced and fewer meritorious claims are rejected. Dealing is more open and the procedural posturing, so common in arbitration or litigation, is rarely evident.

Parties are less inclined to send acrimonious correspondence that can damage relationships. They are aware – possibly subconsciously – of the dispute board's reaction to such exchanges and the negativity that such correspondence creates. The parties' approaches are thus tempered by their perception of the dispute board's view of their behaviour. Attitudes remain positive, not adversarial.

By the employer/owner's adopting the dispute-board approach in the bidding documents, tenderers are given a strong indication that fair play will prevail. This promotes openness and the partnering spirit. Furthermore, engineers, whether owners, engineering consultants or contractors who engage them, have very strong paternalistic feelings towards their projects. With the parties having to report to the dispute board during the site visits, cooperation towards the common goal is encouraged and mutually acceptable solutions emerge.

When a dispute does arise, it is given early attention and addressed contemporaneously. This avoids the commonly encountered situation of the engineer being too busy to address a voluminous claim; an inclination to reject in any event is not unknown, possibly in the hope that such action would make the claim go away. Delays occur which can result in aggravation, acrimony and the development of entrenched views. Opportunities to negotiate and settle are lost. The dispute board prevents this by its regular review of progress on claims. Parties' fantasies do not turn into their expectations and issues are isolated and contained, not being allowed to snowball into unmanageable proportions.

Because of the dispute board's familiarity with the project and the speed with which disputes come up for hearing, those presenting and adjudicating the dispute better understand facts. Reconstruction of historical circumstances is greatly reduced. In most projects, senior construction personnel rarely remain after construction activities complete; they are eager to move to their next job, often depriving the arbitrator or judge of the benefit of their first-hand knowledge of events. With such individuals on hand, greater certainty prevails and the parties are usually content that the material germane to the issue has been revealed.

For meritorious claims, acceptance of the dispute board decision results in earlier payments to the contractor, easing cash-flow difficulties. With claims resolved as they arise, finalisation of the contract account is usually quick and retention funds may be released earlier. Both parties can draw their bottom lines and get on with operating their core businesses.

The confidential and low-key procedures preserve good site relationships, vital for the remainder of the project. Face-saving settlement options are provided and neither party is being seen as having to back down. The 'pay-up or we'll stop work' scenario – guaranteed to put an end to project partnering – is avoided.

The question has arisen as to whether the easy and inexpensive resolution options offered by dispute boards leads to and encourages disputes. This does not appear to be the case, as many dispute board projects have no disputes whatsoever. As at the start of this chapter, several large projects in England have had dispute boards that were never required to make a decision on a

dispute. The contractors there freely admitted that this was because the dispute board was seen patrolling the site during the quarterly visits and was on top of problems even before they began. Both parties tried very hard to prevent the dispute board being used: that is, for actual hearings, as neither wanted to be proven wrong.

Why dispute boards are claimed not to work

In an era of austerity and increased oversight, it is interesting to note that on occasion dispute boards don't work, but not for the reasons one would first think of. Each year thousands of billions of US dollars are awarded to developing countries to re-build their infrastructure: roads, bridges, dams and the like. Once the funds are gone, little if any monitoring or audit takes place to ascertain whether the ultimate beneficiaries of these funds did in fact receive any benefit.

In a typical development bank scenario involving bodies such as the World Bank, a country applies – let's use the hypothetical country of Botuland – for a loan of USD \$100 million to build a highway system connecting its capital to an outlying town. Paperwork is completed, tenders received, the contractor chosen and work begins. The loan is drawn down.

Problems arise in the unfolding process. All contracts of development banks such as the World Bank use, contain provisions that the FIDIC Harmonized Contract, discussed earlier, be used, ostensibly to protect the Lender as well as the Employer and Contractor (read here Botuland and the Contractor). A key provision is one which requires a full-time dispute adjudication board for the length of the project, ensuring two things: that no delay hampers completion and that Botuland gets what was intended – a new highway system – without having to stop the project or go to court or arbitration to sort out each and every dispute that arises.

This dispute adjudication board is usually comprised of three experienced individuals, who are available almost on call, to hear disputes as they arise and give their decisions within 84 days – thus no delay to the project, no 'walking off' or downing tools. Thus the project proceeds unimpeded. This DAB also makes regular visits, can give informal opinions as to process and problems that may be brewing and generally help prevent disputes from arising in the first place, all at a predictable cost – much like an insurance policy.¹⁷ Unfortunately there is a disconnect in the system, and that disconnect is abused by many countries such as Botuland, usually in an attempt to keep more of the funds in their coffers rather than make proper distribution.

What happens in practice is that, whilst the contract requires that a dispute board be appointed by the parties at the start of the project and before any construction occurs, the Employer fails to comply; the Lender doesn't care (as they have been told by the Employer that it will be costly); the Contractor's opinion is never asked, as it is usually the Employer who applies to the Bank for the loan, not the Contractor; and later the contractor is afraid of 'rocking the boat' and does not push matters nor insist on a DAB till a dispute gets out of control and the parties are fixed in their positions.

Later, when the problems start to arise, the Employer then refuses to comply and jointly pick a dispute board, and the Contractor is forced to go to an appointing body, usually FIDIC, the originator of the form of contract used by the Development Banks. This adds about six to eight months to the process. When finally established by the contractual procedures, the Employer then

¹⁷ The current DBF studies show that the cost of a full-time DAB over *the life of a project* averages a little over 1 per cent of the cost of the project, and many times less than that amount.

refuses to participate and any Claims are heard by the dispute board unilaterally – again taking an excessive amount of time and effort. Then, invariably, the Employer claims that the DAB lacks jurisdiction and when the decision is made, claims it has no bearing on itself and then waits for the hapless Contractor to attempt enforcement through arbitration. Eventually the Employer will be required to pay, but can delay the process for many years and thus thwart what was put in place as a fast, economical process designed to enhance a country's development.

It is interesting to note that at any time an Employer does not want a dispute board, it usually means that it intends to cause later problems for the Contractor, delay payments or remove the Contractor altogether, as and when it desires to increase its own profits. One never hears of a Contractor who does not want a dispute board, for generally that is the only source of quick and efficient justice on the project. Absent a DAB, the only option is resort to the local court system, which can be treacherous for a foreign Contractor, or resort to arbitration, with its usually high cost and time delays – often years. Following on this, certain Employers will delay the process in such a way that the Contractor will demand payment or quit, which is what the Employer is hoping for, so that it can take advantage of almost a year's worth of semi-paid work and then put the project out to tender again for the next hapless Contractor, who, hoping for a good profit and shown the certainty of the dispute resolution provisions, thinks that it does not have to worry about payment. And thus the process is repeated, until eventually the project is completed, several Contractors later. What the Employer relies upon is that some of these Contractors will drop out of sight, as they can ill afford the costs of enforcement through arbitration, such as through the ICC, which charges about 10 per cent of the costs of the claim on a sliding scale – a high threshold for the Contractor, as most of those doing this sort of work are cost-conscious firms. Thus the Employer, through attrition, already stands to gain a large advantage and of course, faced with this most Contractors will gladly take the few pennies on the dollar that are eventually offered in settlement. To achieve this situational advantage, Employers of this category will downplay the use and effectiveness of dispute boards and claim that they do not work.

Inadvertently, the development banks, rather than supporting their own contract, are allowing poor governance at a local level eventually to harm the project by delay. Another factor of note is that the development banks rarely follow the money to ensure that what has been paid for actually goes into the project. For on most of these sorts of projects the distribution of funds is handled through an 'independent' Engineer, who just happens to be hired by the Employer, and of course, whilst maintaining their professional standards, a few slip through, and the advice given seems almost 100 per cent of the time to match exactly the needs and desires of the Employer rather than those of the project.

The solution is rather simple. The Lenders should enforce the terms of their own selected contract and require that a dispute board be in place and operational before the first drawdown on the loan and that thereafter all draws and/or payments or distributions on the loan go through the dispute board which, in effect, acts as a truly independent third party for the handling and distribution of funds. The other aspect of all this is that the decisions of the DAB, which are enforceable immediately, be written that way in the addendum to the Contract.

Currently, there have been ICC Tribunals that recognise this situation¹⁸ and, rather than wait till the end of the arbitration to enforce the decision for payment to the Contractor, have taken

¹⁸ This situation is covered in more detail in the Chapter dealing with Enforcement.

the view, correctly, that as the Contract provides that decisions are immediately enforceable, that they too, through an Interim Partial Award, allow the Contractor to collect what is owed and later, in due course, have the arbitration. This approach will most certainly even the playing field, as it will allow the Contractor sufficient funds to proceed to litigate the matter in arbitration and not force it to drop out for lack of funds. Once Employers realise that there is no benefit in delaying matters, what was originally perceived by the development banks as a benefit to both the developing countries and the Lenders will truly take effect and any talk of dispute boards not working will vanish.

International aspects

On international projects (those where the contractor is not of the same domicile as the employer and is working outside its country of origin) it is very likely that the members of the dispute board will be of different nationalities. Translation of all written and spoken material into a foreign (non-English) language is not unusual and it does not take much imagination to foresee the difficulties in communication. It does take patience and consideration on the part of the dispute board to ensure that the parties, party representatives and each member of the dispute board fully understands each and every step of the proceedings. In many instances, certainly during the development of dispute boards, many of the participants in the dispute board process will lack experience. Guidance and assistance from the tribunal will be essential.

The future

The popularity of dispute boards continues to grow as the construction industry comes to realise the benefits, both in cost and time savings. Further, an additional benefit that is being realised is that the timely use of dispute boards helps prevent corruption in international infrastructure development projects and ensures that money lent by the world's development banks is used to benefit local development projects instead of lining the pockets of corrupt politicians.