

THE GROWTH OF DISPUTE BOARDS AROUND THE WORLD

DISPUTE BOARDS IN SINGAPORE – COMPATIBILITY WITH STATUTORY ADJUDICATION

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SYNOPSIS

Singapore's infrastructure construction programme has been growing ever since the 1980s and is expected to continue into 2030. A large number of these projects are complex, involving capital spending between \$500 million and \$1 billion. Notwithstanding the rising number large-scale infrastructure projects, dispute boards have not made any significant inroads in this country. This paper explores some of the reasons for this state of affairs, including the impact on the reception of dispute boards arising from the entrenched statutory adjudication regime under the Building and Construction Industry Security of Payment Act. It examines two aspects which may be usefully addressed to improve the reception of dispute boards in the local construction industry.

- 1 The Singapore construction industry
- 2 Construction disputes landscape
- 3 Issues with Dispute Boards
- 4 Addressing the Issues
- 5 Positioning Dispute Boards in Singapore
- 6 Conclusion

The Singapore Construction Industry

- 1 The Singapore construction industry is expected to award between \$31 and \$38 billion of work in 2014 and a further \$25 to \$34 billion of work each year for 2015 and 2016². While private sector construction demand is likely to be subdued by reason of a series of drastic measures introduced to reduce the overheating of the residential property sector, public sector construction spending has more than made up for the drop in private sector work. Altogether 60% of the total demand is forecasted to come from building

¹ The author places on record the valuable comments made on this paper by Gerlando Butera, Leong Kok Hoong and Loong Seng Onn.

² Estimates of the *Building and Construction Authority*, Singapore as at 9 January 2014. The value of contracts estimated exclude contracts for land reclamation.

projects while the remaining 40% is expected to come from civil engineering projects.

Construction Disputes Landscape

Arbitration

- 2 The preferred route of dispute resolution for construction disputes in Singapore used to be arbitration. Arbitration is not so much a route chosen consciously by parties as a dispute resolution process mandated in all the major standard forms of contract. However, both the costs and time taken for a dispute to be resolved through this route means that only a minor proportion of matters actually ran the full course. Frequently, a party may commence arbitration proceedings only to convey the seriousness of intent with which the claim is to be pursued. As a result of the advance made by the Singapore International Arbitration Centre (“SIAC”), the complexion of arbitration practice in recent years has been characterised increasingly by international arbitration work. In recent years, construction matters accounted for between 11% and 23% of the cases handled by the SIAC.³

Mediation

- 3 While the industry has resorted to mediation in a number of high profile construction projects in the 1970s and 1980s, it took the establishment of the Singapore Mediation Centre (“SMC”) in 1997 to generate widespread interest on the subject across the industry. An important initiative was the establishment of ACCOM⁴ by the leading development agencies, professional bodies and construction industry associations to promote mediation in the industry. As a result, over the 8 years following its establishment, construction mediation account for between 40 to 50% of the Centre’s caseload.

Statutory Adjudication

- 4 Both the volume of arbitration and mediation cases was to be considerably affected by the enactment of the Building and Construction Industry Security of Payment Act in 2004 (hereinafter “SOP Act”).⁵ The Act was enacted on 16 November 2004 but only came into operation on 1 April 2005. The objective of the Act was to address cash-flow difficulties which caused widespread disruption to construction projects across the country in the years 2002 to 2004. In essence the Act confers a right to progress payment on a party who undertakes construction work or who supplies goods or materials relating to

³ Annual Reports of the *Singapore International Arbitration Centre*, 2010, 2011 and 2012

⁴ Advisory Committee on Construction Mediation, a group established under the Singapore Mediation Centre in 1997

⁵ The Act was enacted on 16 November 2004 and now appears as Cap 30B Revised Edition 2006 issued on 31 January 2006.

construction work. This statutory right is protected by an adjudication machinery which was conceived to provide a quick and inexpensive determination of any dispute arising from a payment claim made under the Act. The determination is temporarily binding but is immediately enforceable. The aggrieved party may apply for the dispute to be finally decided in arbitration or the courts⁶ but, in the meantime, he is required to pay the adjudicated amount to the claimant.

- 5 The industry found two very compelling selling points with adjudication. It is inexpensive and it is fast. Tribunal fees typically account for less than 3% of the contested sum and most cases are decided within the prescribed 14-day period⁷. In addition claimants have found that tactically they are better placed in adjudication because they are, in general, better prepared for the regime and have the advantage of determining the timing of the payment claim and formulating the terms of the adjudication application.
- 6 The full impact exerted on both arbitration and mediation by adjudication was felt some three to four years later. From my inquiries with three construction law practices for the purpose of this presentation, it would appear that there has been a decline in *domestic* construction arbitration work by an order of 40 to 50%. This decline was attributed to the increasing acceptance of the statutory adjudication regime in the industry. The same sources suggest that, consistent with the experience in the United Kingdom⁸ and elsewhere, this percentage is expected to rise as the industry becomes even more familiar with this new species of justice.

Issues with Dispute Boards

Limited Inroads

- 7 Against this landscape, dispute boards have made very little inroads into the industry. Since 2005, the writer is aware of only 3 projects where some mechanism akin to a dispute board has been applied. These projects share two characteristics:
 - (a) They are all privately funded projects and

⁶ The Act also provides for a respondent who is aggrieved by the decision to apply for an adjudication review but as a condition for this application, the applicant has to pay the claimant the adjudicated amount: see section 18(1), (3).

⁷ Section 17(1)(a) provides for the an adjudication application to be determined within 7 days in cases where the respondent fails to make a payment response and to lodge an adjudication response or if the respondent fails to pay the response amount which has been accepted by the claimant. Section 17(1)(b) provides that “in all other cases”, the period of determination is 14 days unless this is extended by agreement with the parties.

⁸ See Robert Gaitskell, QC “Adjudication: Its Effect on Other Forms of Dispute Resolution (the UK Experience)” *Presentation at the UK Society of Construction Arbitrators* 14 May 2005 (as updated 5 July 2005).

- (b) One or more of the investors or stakeholders had previously some exposure to dispute boards.

Public Sector Projects

- 8 Strikingly none of the mammoth infrastructure projects which were directed by government agencies have reportedly used dispute boards or anything close to the dispute board approach. This is despite the fact that many of the contract officers of these public sector entities are familiar with the FIDIC suite of Contracts which feature the dispute adjudication boards as an important component of the dispute resolution process.
- 9 Since 2010, I started to share this observation with a number of public sector contract officers. At a seminar held four years ago I raised this issue as part of my presentation on the subject to an audience which included a few representatives from these government entities⁹. Although the responses I received from these queries are clearly insufficient for any definitive conclusions, they indicate some of the points which may be usefully considered in a fuller inquiry on the subject.

Relationship with Statutory Adjudication

- 10 The most important of these reasons given for not using dispute boards is the establishment of statutory adjudication. Nearly all of the participants I spoke to thought that the statutory adjudication regime discharges the same role as dispute boards. Dispute boards were seen by some of these officers essentially as a preliminary tier of dispute determination and thus replicating substantially the role of adjudicators. Others were not sure that these dispute boards are compatible with the operation of the statutory regime. They did not appear to consider the role of dispute boards in dispute avoidance¹⁰ and dispute management¹¹.

Dispute Resolution Culture

- 11 A second reason which I discerned from the tone of their response is that these public sector contract officers are confident that they have sufficient leverage and skills to engage and deal effectively with contractors in contract disputes. Most pointed to the fact that despite the size of the government procurement programmes compared with private sector projects, relatively few matters end up in adjudication or arbitration.

⁹ Chow Kok Fong "Dispute Boards: Case Studies" *Presentation at the meeting of the Society of Construction Law*, 9 February 2010

¹⁰ A dispute board enables issues to be ventilated very early to prevent many of these from germinating into full blown disputes.

¹¹ Where disputes remain, dispute boards serve to help parties focus on the substantive aspects of the dispute so that even where these have to be referred to some determinative process, these can be resolved more expediently and economically.

- 12 Public sector agencies can rightly point to the fact that in a vast majority of the large infrastructure projects in Singapore, parties manage to resolve their contractual differences with little incident. The only large scale project which was embroiled in a long drawn out arbitration was the Central Expressway Project. The arbitration proceedings of this project commenced in the early 1990s but the dispute was eventually settled. Since then, there were several larger infrastructure projects. Two of these projects were well documented in the press: the celebrated Terminal 3 project in Changi Airport and the Circle line of the MRT. In Terminal 3, the delivery schedule was changed mid-stream in the project because of the economic downturn in 2003 and there were significant variations including the design of the roof¹². A substantial number of contract packages of the Circle Line of the MRT had to confront disruptions arising from the collapse of a highway which sat on top of one stretch of the tunnelling work. In addition, when portions of this MRT line was commissioned, the line had to contend with several operating issues¹³. Nevertheless, in each case, the respective public sector agency and the main contractors were reportedly able to settle the final accounts without resorting to adjudication or arbitration.

Cost of Dispute Boards

- 13 The third area of concern relates to the cost of dispute boards. However, this was raised briefly. The concerns expressed were not so much the cost of the dispute boards as with the time and effort required to brief and attend to the inquiries of DB members.

Addressing the Issues

Emphasis on Dispute Avoidance

- 14 I begin by taking the first of the secondary objections raised – that is, as is practised currently, there are very few instances where public sector projects have been stalled by protracted disputes. There can be no doubt that public sector development entities in this country possess a sophisticated level of expertise and capacity in negotiating and resolving disputes. Nevertheless, a properly constituted dispute board process may enhance the quality of decision making by parties in addressing issues before they germinate into disputes. In addition, where a dispute materialises in spite of the efforts of dispute boards, experience suggests that by navigating the dispute board process frequently, the issues of the dispute are narrowed and more definitively framed. Unfortunately, the impression persists among many in the

¹² This terminal building of Changi International Airport was designed for 23 million passengers and was awarded at a contract sum in the region of \$950 million. As a result of the financial crisis following 9-11, the parties had agreed to stretch out the construction period of the project.

¹³ The several packages for this project were estimated originally to cost \$6.7 billion but as a result of the Nicoll Highway collapse, the construction of this MRT line was delayed by 3 years. The result was that the final cost was a little over \$9.5 billion.

industry of dispute boards purely as an alternative adjudication process. This has largely prevented the industry from appreciating that the more salutary function of a dispute board lies with dispute avoidance and dispute management.

Contest with Statutory Adjudication

- 15 Several writers have discussed the role of dispute boards in the United Kingdom where there is a growing preference for construction disputes to be referred to statutory adjudication¹⁴. These writers refer to the situation in the United Kingdom but it is suggested that the position in Singapore is substantially similar.
- 16 A party to a construction contract is entitled to make an adjudication application under the SOP Act according to the timelines provided by the Act and the Regulations. Section 36(1) prohibits a party from contracting out of the Act¹⁵. Thus if the contract incorporates a standard form such as the FIDIC Contract which does not comply with the SOP Act, the default provisions and timelines under the Act apply. As a consequence it is not open for parties to jettison the adjudication regime and replace it with a dispute board. Nevertheless, the Act does not prevent parties from setting up a dispute board under the contract. Provisions for a dispute board remain enforceable, much in the same vein as would a clause providing for arbitration but they cannot prevent the claimant from invoking the statutory right to apply for adjudication or operate as a condition precedent before a party commences adjudication proceedings.
- 17 The inevitable question is this: Does a dispute board add anything beyond the provision for a provisional determination of a dispute? It is suggested that, aside from the salutary function of dispute avoidance alluded to earlier, there are at least three further reasons why dispute boards should not be summarily dismissed from the local construction dispute landscape.
 - (a) First it will be clear that unlike the regime under the HGCRA in the United Kingdom, the Singapore adjudication regime only addresses a particular class of disputes. Adjudication applications can be made under the Act in respect of claims for work carried out and this would include claims for variations. Although there was some uncertainty earlier, it is now settled that statutory adjudication would also embrace the class of claims which arise from items classified as preliminaries such as idling and prolongation costs. However, it is clear that section 6(a) of the Act confines claims to those which can be “calculated in accordance with the terms of the contract”. Consequently, it is generally accepted that the Act does not countenance claims for damages, for example loss arising from misstatements or negligence.

¹⁴ See Robert Gaitskell, *op. cit.*

¹⁵ In the United Kingdom the equivalent provision is section 104(5) of the Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”) and this provision has been enforced by the English courts: *John Mowlem & Co plc v Hydra-Tight Ltd* (2000) CILL 1650

- (b) Secondly, the processes under the Act can only be initiated by a person who “has carried out” the construction work. Thus an employer cannot trigger the statutory adjudication process against the contractor to pursue a counterclaim for liquidated damages or damages arising from defective work. These amounts may be set-off against any payment claim made by the contractor but the Act does not provide for the respondent to make an adjudication application to claim for these items.
- (c) Thirdly, while adjudication produces a provisional determination of a matter, the fact that parties had to resort to adjudication will affect adversely the working relationship of the parties. Regardless of the outcome of the adjudication, it injects a degree of suspicion and caution in the subsequent conduct of the parties. This increases barriers for co-operation for the remainder of the project. Parties may be prompted to expend effort and time in preparing records and additional documentation work in order to safeguard their positions in anticipation of subsequent adjudication applications.
- (d) Finally, the statutory adjudication process in Singapore is exposed to jurisdictional challenges which inject a considerable degree of uncertainty in the outcomes regardless of the merits of the case. Section 15(3) of the Act, for example, precludes a respondent from relying reasons for withholding the whole or part of the claimed amount unless these reasons have been stated in a payment response. A payment response is only valid if it is served within the prescribed period for service. Unfortunately under the Singapore SOP Act, for some reason, there is an inexplicable multiplicity web of timelines depending, *inter alia*, on whether the contract is a supply contract or a construction contract¹⁶, whether the dispute settlement period has been triggered and whether the contract prescribes a period for this purpose¹⁷. The adjudicator himself may be tripped by the different periods allowed for adjudication depending on whether one party has accepted a sum offered as a payment response and whether a payment response and adjudication response had been issued¹⁸. There is uncertainty as to certain powers of the ANB in relation to the re-appointment of an adjudicator if an adjudicator is unable to continue midstream in the adjudication. In a significant number of cases, decisions reached by adjudicators are founded purely on technical grounds. In these situations, both the merits of the dispute and the basic issues between the parties remain unresolved.

¹⁶ Section 11(1), SOP Act

¹⁷ Section 11(2) and section 12(3), SOP Act

¹⁸ Section 17(1), SOP Act

Economics of Dispute Boards

- 18 The cost threshold of adjudication under the SOP Act is low in relation to both arbitration and litigation. There are two reasons for this. First the power of the adjudicator to order costs is very limited. He can only determine which party should pay the costs of the adjudication and these are confined by the Act to the application fee payable to the authorised nominating body and the fees and expenses of the adjudicator.¹⁹ Thus irrespective of the outcome, each party is to bear the cost of their legal representation, technical experts and other expenses.²⁰
- 19 Secondly the SOP Regulations prescribe the maximum rates which an adjudicator may charge for his services.²¹ The maximum hourly rate is \$300 per hour, subject to a maximum charge-out limit of 8 hours per day. This means that senior lawyers who sit as adjudicators are paid only a third of their typical charge out rates.
- 20 By way of illustration, consider the costs of adjudication recorded for two matters. In each case, the adjudicator was appointed from the ranks of senior counsel.
- (a) In *ALB Pte Ltd v ALC Pte Ltd* (2012)²², the matter concerns a payment claim for \$1,559,342.43 million and a set-off of \$324,006.69 (and hence a dispute quantum of around \$1.88 million). In the adjudication determination, the claimant was awarded a sum of \$741,343.14. The adjudicator's fees amounted to \$27,619.38 (inclusive of GST).
- (b) In *ALD (Pte) Ltd v ALE Pte Ltd* (2012)²³, the payment claim quantum was \$6,161,227.37. The adjudicator allowed the full claim on account of the operation of section 15(3) and the determination therefore did not entail an inquiry into the merits of the claim. The adjudicator's fees amounted to \$4,012.50 (inclusive of GST).

Clearly, in relatively straightforward matters, as demonstrated in particular by the second of these cases, there is therefore little to rival the affordability of adjudication in affording a provisional resolution of a matter.

- 21 However, where a project presents considerable issues, the economics of dispute boards can be persuasive. There have been several instances where a single project gives rise to serial adjudication applications. In one of these projects, a total of 12 adjudication applications were made between 2010 and 2011. This was not a particularly big contract. The contract sum was \$95.87 million and the construction period was relatively short. The fees incurred for

¹⁹ Section 2 of the SOP Act

²⁰ Section 30(4) of the SOP Act

²¹ Section 31(1) of the SOP Act and Regulation 12 of the SOP Regulations (as amended on 1 December 2012)

²² SOP AA28 of 2012 [2012] SGSOP 6; [2012] SCAAdjR 123 b. Goh Phai Cheng SC

²³ SOP AA38 of 2012 [2012] SGSOP 7; [2012] SCAAdjR 153 b. Philip Jeyaretnam SC

the Tribunal over the span of the 12 adjudication applications²⁴ amounted to around \$260,000.00. I was appointed adjudicator in respect of four of the adjudication applications. It seems to me that the differences between the parties could have been substantially dealt with more economically if a dispute board had been appointed for the project from the start. A one-person dispute board would, in this case, cost probably around \$100,000.00 over the 18 months construction period and it could have probably reduced the differences between the parties to a two issues. These might be disposed of by statutory adjudication which may entail a further \$40,000.00 in tribunal costs.

- 22 In any case, the economics of dispute boards should not be considered only on the basis of situations where determinative rulings or assessments are sought. As discussed in this paper, the more substantial value-add proposition is the dispute avoidance and dispute management roles performed by well constituted dispute boards.

Positioning Dispute Boards in Singapore

Focus on Dispute Avoidance

- 23 The benefits of instituting a dispute board have not been fully appreciated by the construction industry in this country. The determinative-centric image of dispute boards has to be balanced by directing the industry's attention to its primary function, that of dispute avoidance and dispute management. Efforts to raise the profile of dispute boards may therefore be better undertaken as part of the broader mediation movement which was launched in the late 1990s.
- 24 The Singapore Mediation Centre has been in the forefront of this movement and the concept of dispute boards might be better understood by the community here as an extension of mediation rather than another species of dispute resolution. To facilitate an understanding of the role of dispute boards, two points may be explored:
- (a) A protocol may be drafted which sets out a typical programme of work for a dispute board during the life of a project. This programme should include the initial briefing of board members and determining the intervals for the visits of the dispute boards.
 - (b) Certain guidance may be provided for the management of specific issues. For example, guidelines may be provided for the structure of the briefing reports which are prepared before each site visit and on the manner by which progress of a project is to be presented for discussion.

²⁴ The adjudication determinations arising from this project includes *SOP AA116 of 2010*, *SOP ARA05 of 2010*, *SOP AA140 of 2010*, *SOP AA019 of 2011* and *SOP AA073 OF 2011*. At the time of writing, a 13th adjudication application had been lodged: *SOP AA248 of 2013*. This last determination had not been reported but it is conceivable that it relates to the final account of the project.

- 25 In addition, it may be useful to choose a term for dispute boards in the local context which better describes the centrality of its task in dispute avoidance. One possibility is “Dispute Management Panel”. It is interesting that for the delivery of the venues and infrastructure for the London Olympics, a distinction was made between a dispute avoidance panel and an adjudication panel²⁵. Arguably this may have ensured a clearer understanding of the two distinct functions of dispute boards.

Relative Economics

- 26 An issue with the use of dispute boards is their cost. The cost of dispute boards is tiny when measured against the cost of a project. Figures published by the Dispute Resolution Board Foundation suggest that these costs range between 0.06 and 0.30% of construction cost²⁶. Nevertheless, the cost of dispute boards will be compared with adjudication. The statutory adjudication regime was designed as a low cost dispute resolution procedure. If the objective is to allow disputes to be resolved determinatively, it is probably difficult to make a case for dispute boards. Furthermore while the cost of adjudication arises only when a dispute has been determined, the cost of a dispute board is all the more visible because it has to be allowed up front, when the contract is placed for tender.
- 27 On the other hand, if the issue of cost is considered against the context of instituting a mechanism which is to facilitate less disruptive working relationships and allow parties to a construction contract to focus their attention more purposively to the carrying out of construction work, the economics of dispute boards may be persuasive. For a fraction of the cost of the project, parties are provided with a customised machinery to anticipate potential areas of conflict with the capacity to consider creatively solutions to manage parties’ expectations of their working relationship and, if necessary, perform the function of speedily resolving most disputes.
- 28 In any case, in a situation where the issues can be complex, dispute boards may be very cost effective. In the example of the project with a series of adjudication applications, it is considered that the presence of a dispute board will probably eliminate between 80 to 90% of the differences between the parties. The upfront cost to the parties is likely to be in the region of around \$100,000 compared to the \$260,000 which they had to incur as a result of the series of 12 adjudication applications.

²⁵ Gerlando Butera “Statutory Adjudication v DRBs” *DBRF 13th Annual International Conference*, Session 6, Sydney, Australia May 2012

²⁶ Christopher Miers “Benefit from a Dispute Resolution Board on your project” in *Perspective*, Spring 2011 www.probyn-miers.com

Conclusion

- 29 It is clear that Singapore is not alone in coming to terms with the use of dispute boards. Dispute boards also appear to have made limited headway in places which have in place a statutory adjudication regime, capable of providing cost and time efficient provisional determinations of construction disputes. The documented experience in both the United Kingdom and Australia is that statutory adjudication does present both a conceptual challenge to the understanding of the larger role of dispute boards beyond adjudicating disputes.
- 30 Nevertheless it is considered that dispute boards can add value to a construction project by anticipating and resolving many of the issues which may otherwise flare up as disputes. In so doing, they help ensure that resources are focussed on carrying out the works and facilitate the working relationships of parties in a project. This aspect of the work of dispute boards deserves to be developed and communicated to all stakeholders in the industry.