



EFFECTIVE USE OF DISPUTE BOARDS IN CONSTRUCTION CONTRACTS

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Introduction

It has been said that the construction industry is, by its very nature, confrontational, a creator of disputes. It has also been argued that this is simply not true.

From my own observations in the 40 or so years I've been in this business, I can understand why there are those who believe that construction and conflict go hand-in-hand. However, we should try to put this into perspective.

Many disputes, if not the vast majority of disputes in construction projects, are resolved in day-to-day dialogue, in direct negotiations between parties, without the need for third party intervention and without the need to resort to the time consuming, costly and damaging processes of either arbitration or litigation. To illustrate this point, of the construction projects I have been involved in over the years, more than 90% avoided being referred to either arbitration or the courts. The disputes were settled by the parties.

Disputes themselves are not the problem. Disputes themselves do not create the barriers against sensible, common sense resolution. It is the way disputes are dealt with that so often lead to deadlock. It is this deadlock that can eventually lead to arbitration, litigation or worse. How we manage disputes will dictate whether a project runs smoothly, or whether it runs into trouble.

Disputes develop into full-blown conflict because of people, the people involved in construction projects. Egos, attitudes, pride, entrenched positions, unrealistic expectations and personal agendas – any one or any combination of these human characteristics/emotions can lead to a breakdown in relationships, which in turn can lead to barriers being created. It is these barriers that can prevent disputes from being resolved in a sensible (common sense) way.

Having said all that, when sensible dispute resolution procedures are in place, when procedures such as Dispute Boards are written into construction contracts, disputes can be managed and they can be managed effectively.

¹ Author's Note: The paper presented at this event was intended as an outline introduction to Dispute Boards. As such, I have only 'scratched the surface' of this rather comprehensive subject.

Dispute Boards

What are they?

Dispute Boards differ from other forms of dispute resolution procedures in that they are established at the inception of a project and operate throughout the duration. Dispute Boards do not only help the parties resolve disputes, they actively try to prevent disputes from occurring.

The **Dispute Resolution Board Foundation** (“DRBF”) defines Dispute Boards as:

A panel of impartial professionals formed at the beginning of a project to follow construction progress, encourage dispute avoidance and assist in the resolution of disputes – and who remain actively involved for the duration of the project.

There are, in the main, two types of Dispute Boards currently being used in construction projects:

- Dispute Adjudication Boards (DAB); and
- Dispute Review (or Resolution) Boards (DRB)

The main difference between these two boards being that the DAB members determine the issues and make decisions which are binding on the parties unless challenged. The DRB on the other hand makes non-binding recommendations, leaving the parties to make their own decision whether or not to accept the recommendation.

In addition to these two boards (DAB and DRB), there is a process known as Combined Dispute Boards, which was recently developed by the International Chamber of Commerce (ICC). Under this process the parties may request either non-binding recommendations or temporarily binding decisions. If they cannot agree on which of these two to use, the parties may approach the Combined Dispute Board to decide on the appropriate process. My initial impression of this procedure is that the parties (and members of the Combined Dispute Board) could become distracted by focusing on the process rather than on the issues. This would detract from the actual objective and purpose of Dispute Boards, i.e. to help the parties resolve their disputes.

What Purpose do Dispute Boards Serve – What Benefits do they Provide?

The primary purpose and benefit of using Dispute Boards in construction projects is to help parties prevent conflict, to help parties resolve their differences and/or disputes in a timely, cost effective and sensible manner.

Some of the more obvious benefits of using Dispute Boards in construction projects include:

- The appointment of Dispute Boards at the beginning of a project provides the opportunity to acquire early knowledge and understanding of the project. Regular visits to the site, constant monitoring of the project works and getting to know the personnel involved enable the Board members to help the parties resolve issues as and when they occur, as the works progress.
- The objectivity and neutrality of the Dispute Board members encourages the parties to apply common sense in dealing with their differences. If the parties can be encouraged to view the issues objectively and sensibly, potential disputes can be avoided. Objectivity and impartiality can also help maintain good working relationships, which in turn will help the parties resolve their differences in a sensible (common sense) manner.

- The presence and involvement of Dispute Boards encourages carefully considered claims and realistic expectations from Contractors. This encourages fair and balanced responses and evaluation of Contractor's claims by Employers and their Consultants.

Carefully considered claims, realistic expectations and fair/balanced evaluation of claims will go a long way to prevent differences developing into full-blown disputes and conflict.

Dispute Boards help parties resolve their differences by encouraging constructive inter-party dialogue with an emphasis on the parties reaching their own solutions.

How do Dispute Boards Work?

Contract Provisions:

The Dispute Board process should be carefully set out and clearly described in the tender enquiry documents and within the dispute resolution provisions of the contract. Having the process set out in the tender documents will give comfort to those bidding for major construction works (as well as to project owners) that the Dispute Board will be there to guide the parties and to encourage sensible, common sense approaches to any differences that may/will arise during the project. It has been suggested that because of the reduced risk of prolonged disputes, Dispute Boards encourage more competitive (lower) bids from contractors and subcontractors².

The 1999 FIDIC suite of contracts sets out the Dispute Board procedure rather well and is a good model for those drafting construction contracts. These FIDIC contracts use Dispute Adjudication Boards, rather than Dispute Review Boards. A brief overview of how FIDIC contracts deal with Dispute Boards is set out below:

- The Dispute Board process is contained in the Conditions of Contract and deals with, among other things, the appointment of the Board, the hearing, decision and post-decision amicable settlement
- 'General Conditions of Dispute Adjudication Agreement' are appended to the Contract. A standard (sample) Dispute Board Agreement form is also appended, which is a tripartite agreement between both parties and each Dispute Board member and must be entered into before the process can begin
- The Procedural Rules are contained in an Annex, which among other things, give the Dispute Boards the authority to conduct the process as they deem appropriate
- Guidance notes for using Dispute Boards are also contained within the bound FIDIC documents. These are entitled 'Guidance for the Preparation of Particular Conditions'
- Acceptance (by the contractors/bidders) to use Dispute Boards is contained in the Letter of Tender, a sample of which is appended to the contract.

A well drafted dispute resolution procedure within construction contracts will assist all parties to administer the process wisely and effectively.

² **Dispute Resolution Board Foundation** Concept Notes on the benefits of Dispute Boards: DRBF 2007

Establishing (setting up) the Dispute Board:

A Dispute Board may comprise of one or more members depending on the size and complexity of the project. Single member Boards can be used, but would not be appropriate for large and/or complex construction contracts. The most common structure for large projects is a three-member Dispute Board.

Selecting the appropriate members of the Dispute Board is important. Subject to the nature of the project, the ideal Dispute Board would, in my opinion, comprise of members with a range of technical (engineering and construction), quantum (quantity surveying and commercial) and legal knowledge and experience.

Establishing the Board entails a process whereby the Board members are selected, approved and agreed to by the parties. In the case of a three-member Board, each party will select one member (for the approval and agreement of the other party). The third member, who will be the Chairman of the Board, will either be selected by the two appointed members or jointly by the parties. In the event the parties fail to agree on any member, the member(s) can be appointed by a third party³, who should be named in the contract. The process is similar to that of establishing Arbitral Tribunals, the main difference being that Dispute Boards are set up at the start of a project.

The Process:

In order for Dispute Boards to be effective they should be appointed at the commencement of the project. Once established, the Board members will become involved in the project with immediate effect and one of the first actions by the parties is to provide the Board members with a bundle of essential reading.

Documents provided by the parties to the Board members at the outset of the project will usually include:

- The Agreement
- Conditions of Contract
- Specifications
- Contract Drawings
- Tender documents, particularly those incorporated into the Contract
- Contract base-line Programme (when available)

Further documents will be submitted to the Board members at regular intervals throughout the project and these will include:

- Monthly progress reports
- Minutes of meetings
- Relevant correspondence relating to matters (such as claims) that may signal potential disputes.

The documents provided at the outset and during the project will help keep Board members abreast of developments at all times.

³ An example of which would be the President of the **Dispute Resolution Board Foundation**

Site Visits:

Dispute Board members will visit the project site on a regular basis, usually every two to three months. The Procedural Rules (found in all FIDIC contracts) provide guidelines as to the timing of these visits, as well as guidelines as to the agenda, which will include meetings/discussions with the parties, issues to be referred for formal hearings, reports, etc.

The site visits are useful, and arguably essential, as they provide a prime opportunity for direct interaction and communication between the Board members and the parties. This interaction with and between the parties will enable them to (collectively) identify differences and potential disputes at an early stage, which will allow the Board members, together with the parties, to 'nip potential disputes in the bud' before they develop into full-blown conflict. This will help the parties find early and sensible solutions to their problems.

Dispute Board Hearings

Written Submissions:

If the Dispute Board members are unable to persuade the parties to settle their differences during the regular site visits, the disputes will be dealt with on a more formal basis – the hearing.

Prior to the hearing the parties will be required to submit written accounts of the dispute. These submissions should be concise statements explaining each party's views and arguments and be accompanied by relevant (and I suggest limited) supporting documentation.

The statements are exchanged between the parties and copied to each member of the Dispute Board in sufficient time for the Board members to examine and familiarize themselves with the issues. The time frame for exchanging/submitting the said documents will be decided by the Dispute Board.

The Hearing:

The Procedural Rules governing Dispute Boards will, as touched on earlier, give the Board members the power and authority to conduct the process and hearing as they deem fit. The Board members will usually take the initiative in deciding when an issue will be the subject of a hearing and they will decide when and where the hearing will take place.

Hearings are, as would be expected, usually held on the project site. The procedure followed at the hearing will be decided upon and managed by the Board members and will often take the following form:

- An initial joint session will be held during which each party is given the opportunity to summarise its case. A debate (or series of debates) will then follow, allowing the parties to cross-examine each other and more often than not, to vent their grievances.
- Private sessions with each party and the Board members usually take place after the initial joint session. During these private sessions, reality checks are often carried out and Board members will encourage the parties to think objectively (i.e. get rid of negative emotions) – encourage the parties to start using a little common sense.
- A series of joint and private meetings may, at the discretion of the Dispute Board, take place throughout the hearing. The purpose of this mixture of joint and private sessions is to encourage the parties develop sensible solutions.

The Procedural Rules are clear on the matter of fairness and impartiality. The Board members must at all time act fairly and impartially and must give each party the opportunity to explain their case and to respond to matters raised by the other party. Furthermore, the Board members have an obligation to abstain from expressing opinions on the merits of either party's case prior to issuing its decision or recommendation.

The Decisions/Recommendations:

If no solutions are found, if no agreement is reached on the dispute being considered at the hearing, the Dispute Board members will retire to deliberate in private before making their decision or recommendation.

The Board members shall try to reach unanimous decisions or recommendations. If this proves impossible, the majority vote will prevail. In the case of a majority verdict, the dissenting member may be asked to provide a report for submission to the parties.

The decision or recommendation will be made in writing and contain the Board member's reasoning applied in arriving at its findings. The decision/recommendation will be submitted to the parties (with the dissenting member's report – in the event of a majority verdict) within the earliest practicable time frame, which (from my experience) can be any time between one week and two months, depending upon the complexity of the dispute in question.

Life after the Decision

While Dispute Boards have a very high success rate, for example the **Dispute Resolution Board Foundation** reports that 98-99% of disputes reviewed by its Dispute Boards are settled without the need for referral to either arbitration or the courts, there are times when one or other party is unhappy with the decision or recommendation.

In such cases, what options are available to the parties?

Under the FIDIC 1999 suite of contracts, the procedure is quite simple. Initially, a party will give its notice of dissatisfaction as to the Dispute Board's decision⁴ within a stated time (28 days under FIDIC). If such notice is not given within the stated time, the decision shall become binding on the parties.

A 'cooling off' period will follow the notice of dissatisfaction (FIDIC provides a period of 56 days), which is designed to give the parties a further chance of reaching a settlement. During this period the parties will be required to make at least one attempt to settle their dispute amicably.

If after this cooling off period and further attempts at amicable settlement the parties are still unable to agree, they are then at liberty to refer the dispute to arbitration or, if no arbitration clause exists in the contract, to the relevant competent courts.

⁴ In the case of DRB recommendations, it is usual for a similar process to exist, whereby a notice of dissatisfaction is to be provided within a period stated in the contract, failing which it is deemed the parties have agreed to the recommendation

Using Dispute Boards Effectively

As has been mentioned a few times in this paper, the primary objective of Dispute Boards in construction projects is to help the parties find solutions, to help them settle their differences/disputes without resorting to the time consuming, costly and potentially damaging arbitration or litigation processes.

If used effectively, Dispute Boards provide an ideal opportunity for the parties to find amicable solutions to their differences and full advantage should be taken of this opportunity. Dispute Board members have a duty to manage the process to maximum effect. That said, the parties should not rely on the Board members alone, the parties should themselves be proactive in obtaining the maximum benefit from the process – the parties should be proactive in working with the Dispute Board to find solutions to their problems.

For Dispute Boards to be effective, Board members should

- *Practice flexibility when managing the process:* A mediation-style approach to managing the Dispute Board process can be (and usually is) most effective in helping the parties resolve their differences
- *Try to create a relaxed atmosphere:* This will help the parties think more clearly and to think objectively.
- *Encourage communication:* The parties should be encouraged to talk to the Dispute Board – but more important, the parties should be encouraged to talk to each other. The more often parties meet and talk to each other, the better the chances they have of finding the right solutions.

Conclusion

As I mentioned in my introduction to this paper, disputes themselves are not the problem. Disputes themselves do not create the barriers against sensible, common sense resolution. It is the way disputes are dealt with, the way disputes are managed, that will dictate whether a project runs smoothly or whether it runs into trouble.

When sensible dispute resolution procedures are in place, when procedures such as Dispute Boards are written into our contracts, disputes can be managed and they can be managed effectively. In my opinion, Dispute Boards are most effective when they encourage the parties to communicate with each other to seek and find their own solutions.

Finally, to those of us involved in the construction business, in particular Clients (Project Owners) and their advisers, those of us responsible for drafting construction contracts, if we desire happy endings to our projects, I strongly recommend we use Dispute Boards in all our future contracts.

Wayne Clark

*Chartered Quantity Surveyor and Accredited Mediator
Contract Manager/Coordinator, Bilfinger Berger, Doha.
Dispute Resolution Board Foundation (DRBF) Country Representative for the State of Qatar.*