

The 12th Annual DRBF International Conference

3-5 May 2012 Sydney Australia

SESSION 4, FRIDAY 4TH MAY 2012

The Future of Dispute Boards in Non-construction Applications, and Why it Matters

James PERRY*

INTRODUCTION

Over the last ten years there has been considerable discussion regarding the multitude of other possible non-construction applications for the dispute board system. It is certainly true that there are plenty of possibilities, however, dispute boards remain firmly entrenched in the construction world, and organisations which promote their use and best practices, such as the DRBF, remain essentially construction driven.

This paper and the conference presentation are intended as modest first steps in an effort to expand understanding and use of dispute boards beyond the construction-centric application. Why is this important? In researching this paper I was fortunate to have access to input from several colleagues who have already undertaken research in this area, and one comment by Mr. Paul Gélinas, a prominent Paris-based adjudicator and arbitrator struck me as particularly perceptive. In summary, he noted that as long as dispute boards remain a peculiarity of the construction industry, compared to mediation and arbitration, which are widely used across all commercial spectrums, dispute boards risk being marginalised and misunderstood, especially by employers who may not be regular consumers of construction projects. Moreover, if the general legal and political communities have little knowledge or contact with dispute boards, then we should not be surprised that their use is not being promoted as actively as it should be by private institutions such as bar associations and that their application is being neglected by the current worldwide wave of legislation promoting alternative dispute mechanisms. While it can be argued that statutory adjudication legislation in the UK, Australia and other countries would seem to go against these observations, none of the legislative initiatives of the past 15 years, to my knowledge, have given any consideration to the concept of the standing dispute board and the possibility of having recourse to its advisory capacity.

This is why it matters that construction professionals who support the dispute board method be willing to invest their time and energy to promote dispute board use in other industries and help them adapt its application to their specific industry requirements through sharing of our know-how. Over the next 15 years, dispute boards must make the leap into other industries or risk being marginalised as a second-class citizen of the ADR world, or worse being classified as a passing fad.

CONDUCTIVE CONDITIONS FOR THE APPLICATION OF DISPUTE BOARDS.

For people who have had experience with the dispute board method it is not difficult to understand that many other industries could benefit from this procedure. In effect, any industry where suppliers are selling their products or services via contractual vehicles which call for complicated performance over the medium and long term should be particularly interested in dispute boards.

The list of industries where this is the situation is long and varied. Obvious applications include contracts involving the development of software applications and/or data handling, contracts involving the use, transfer and sharing of intellectual property and know-how, the design and building of prototype or bespoke mechanical machines or tools (especially those involving mechanical/software interfaces), the development of oil and gas and other mineral extraction infrastructure, ship building and ship conversion industry, the defence industry, telecommunications, the financial services industry. This list surely just scratches the surface.

In any of these non-construction industries traditional dispute resolution, because of its expense and length, can severely disrupt performance. Just like in construction, any of these industries can benefit from the “real-time” dispute resolution mechanisms of dispute boards. This of course will have a favourable impact on dispute costs but, more importantly, it will improve on-time performance and overall project costs, just as has been shown in the construction industry. Moreover, as will be seen in the case study concerning Ford’s sale of Volvo Car Corporation to the Chinese firm Geely, the risk of disputes can increase price proposals or even scuttle important deals.

THE SALE OF VOLVO BY FORD TO GEELY

This case which unfolded at the end of 2009 and the first half of 2010 is very instructive and may one day become the poster child for dispute boards outside of the construction industry. Unfortunately, the details of the Volvo sale are shrouded in well-kept confidentiality agreements and research for this paper, regrettably, has relied solely on internet information, and precise details of the role of what has been termed an “intellectual property dispute resolution board” could not be verified with any of the firms involved or their advisors.

However, it is known that a dispute board was established under the terms of the sale agreement between Ford and Geely in order to monitor compliance with the terms of the sales contract related to mutual shared use of intellectual property residing in both the Volvo Car Corporation and the Ford Motor Company. It seems to the author that the institution of a dispute resolution board was even an essential element in successfully finalising the sales agreement.

Historical background

Ford Motor Company originally acquired the Volvo Car Corporation in 1999 in a transaction valued at 6.4 billion USD. In the ten years following the purchase Ford and Volvo naturally began a process of heavily integrating their research and development and by 2009 it could be said that their

engineering was joined at the hip. Ford was able to draw great benefits from Volvo's well-known safety technology, including in areas such as frame design and seat belt technology. Ford was also able to benefit from Volvo's environmental know-how. Volvo of course benefitted from Ford's economy of scale and by 2009, well-known cars such as the Ford Focus shared a common platform with the Volvo S40, known as "C-cars". Moreover, the larger Volvo and Ford sedans were based on a loosely common platform known as the "C D3". By 2009, Ford had become the leading US firm on safety based on the technology garnered from Volvo.

Nevertheless, Volvo had not been a profitable investment for Ford and, due to the economic crisis, Ford was obliged to put out a public call for tenders for the sale of Volvo, which eventually fetched a price of only 1.8 billion USD; an amount well inferior to the commercial risk of letting Volvo's intellectual property pass to a potentially dangerous competitor.

China's Zhijiang Geely holding group had been lobbying for over a year prior to the public call for tenders in order to convince Ford that it could be counted on to respect provisions protecting Ford's intellectual property interests. Geely had impressed Ford to some degree by its behaviour during litigation related to a trade mark dispute with Toyota. Toyota had sued Geely claiming that its logo too closely imitated the well-known Toyota logo. Geely had eventually prevailed in litigation on this issue. However, following their victory, Geely unilaterally decided to change their logo. This unilateral gesture had favourably impressed Ford executives and Geely was pre-qualified. By October 2009 Geely was considered the preferred tender. However, in the fourth quarter of 2009 the press was full of speculation that IP issues could scuttle the sale. Ford needed to be sure that it would have on-going access to the Volvo technology used by it and of course any buyer of Volvo needed assurance that it would be able to use the Volvo technology and associated Ford technology in order to continue production and development. The climate at the time between western companies and Chinese companies with regard to intellectual property was quite tense. It should be recalled that during this same time period General Motors scuttled deals to sell Opel and Saab to Chinese firms due to issues involving use and development of intellectual property. Moreover, in October 2009, the FBI in the United States arrested a Ford engineer and charged him with selling trade secrets to Shanghai Automotive.

The intellectual (IP) deal

Apparently the negotiations were long and difficult, but by March 2010 the parties announced they had solved their IP questions. Ford declared their part of Volvo's technology would be protected by internationally binding and enforceable agreements and that each party's use of the various elements of intellectual property were spelled out in a Management Plan, which allowed for both Ford and Volvo to execute their existing pre-sale business plans. As part of the IP Management Plan, the sale agreement apparently called for the immediate establishment of an IP dispute resolution board. No details of how this dispute resolution board operates could be found on the internet and the parties contacted by this author understandably declined to comment on the confidential matter. However, it is public knowledge that Ford appointed its member to the dispute resolution board in July 2010; its nominee being at that time the head of the intellectual property practice with the Chinese office of a major US law firm.

Deal structure

The pivotal issues can be described in three themes. First, how would Volvo be able to continue its production using Ford technology, how would Ford be able to continue its production using Volvo technology, and what would Geely be able to use in its own right going forward. A subsidiary issue was access to, and the sharing of, R & D responsibilities for product improvement in the medium term.

Under the terms of the deal, the Volvo Car Corporation was created as an independent company with its own shares. Geely then obtained 100 percent of the shares, but Volvo today is technically a free-standing Swedish company dealing at arm's length with Geely. Moreover, the intellectual property rights (IPRs) remain with the newly created Volvo corporate structure. Volvo has the right to use of all of the IPRs associated with relevant Ford technologies and, as already mentioned, the objective for both Ford and Volvo is to deliver their existing business plans while providing safeguards against misuse.

The IP Management Plan further allowed for Volvo to grant sub-licences on certain portions of Ford's IPRs, but apparently some of Ford's technology was excluded from Volvo's rights to sub-licence. The sub-licences could be granted to third parties generally, including Geely. Ford, on the other hand, retained access to jointly developed technology including improvements made to existing products. This right of access to product improvements appears to be mutual.

Another key issue discussed in press articles in the fall of 2009 was the interconnection between intellectual property developed by key suppliers to Volvo and the sales agreement. There is very little available publicly on this subject, however one can imagine that the IP Management Plan must have involved provisions designed to give the assurances needed to suppliers in order to ensure their continued supply of products and know-how.

Again, publicly available details of the agreement are very sketchy but one can imagine that a dispute board will be focused on monitoring the sub-licence process to be sure that the protected Ford technology is not being conveyed to third parties and that royalty provisions related to the sub-licences are being respected. Other areas where scrutiny will be likely is in relation to transparent exchange between Ford and Volvo of product improvements in regard to jointly developed technology. Finally, another area where there may be future risks of disagreement would be related to the determination of the line between what constitutes a simple product improvement versus the creation of new product. New technology seems to be naturally excluded from the Management Plan.

How does the Ford/Geely deal look from the perspective of 2012?

At least from the outside, the sale of Volvo to Geely looks like it has largely been successfully carried off. From a European corporate social responsibility point of view, the Volvo factories in Sweden are running at full production and 2011 sales volumes are up by 20%, and analysts believe Volvo's profitability is sustainable. Moreover, Volvo's R&D unit is as active as ever. From a pure Volvo corporate perspective, the company has gained privileged access to the world's most coveted

commercial market. Volvo has built new production capacity and additional R&D facilities in China. With Geely's support they appear to have a real competitive advantage in China.

Moreover, there are no public signs of any IP disputes or litigation between any of the three companies during the last two years.

What was the role of the IP dispute resolution board in this historic sale, and what role did it play in the intervening 2 years?

The author can only provide a speculative response to these questions. However, we know that safeguards for IPRs are "make or break" issues in such cross-border mergers and acquisitions, and it seems logical to conclude that the establishment of a dispute resolution board was likely to have been the solution that allowed this deal to see the light of day. The fact that there have been no public rows over IPRs in the intervening 2 years may also be due, at least in part, to the existence of the DRB.

Exactly why General Motors on the other hand was unable to conclude similar deals for the sales of Saab or Opel to Chinese carmakers is also not public knowledge. Perhaps the parties attempted to look at a DRB as a solution, perhaps they didn't. However, the public interest in creating environments where such deals can proceed is obvious. Today, Volvo is a healthy, functioning contributor to the Swedish economy thanks to the fact that the parties were able to find solutions to their IP problems. Saab factories, on the other hand, are shuttered and the firm is likely to go out of business permanently.

Clearly it is in the world's interest that deals such as these take place and it should be of extremely interest to the DRBF that a dispute resolution board seems to have played such an important role.

The author hopes we will follow this unfolding story over the next few years as the story is not completely told. The last internet posting on this subject coming from April 2012 was an announcement that Geely and Volvo Car Corporation had announced the creation of a joint-venture in order to continue Volvo's expansion in China. Is this new twist simply born of a need to comply with Chinese legislation for foreign companies operating in its territories, or is this an effort to get around provisions of the Ford/Geely sale agreement? Perhaps this might be a good question for a dispute resolution board!

OTHER AREAS FOR EXPANSION

Sub-contracts

While not particularly a new application outside of construction, it is clear that dispute boards can, and should, grow in the sub-contracting field. An obvious example is in the power industry where the EPC contractor is often also a major fabricator of power equipment, such as Siemens, Mitsubishi or Alstom and where the EPC contractor in turn calls upon often well-known international general contractors to design and build the plant's related civil works and buildings. On

these sub-contracts, which are between sophisticated firms and for substantial amounts of money, the use of dispute boards is perfectly adapted, but and to date under exploited. We should anticipate the growth of sub-contract dispute boards whether or not there happens to be a dispute board in place between the EPC contractor and the employer, or whether more sophisticated “nesting” dispute boards are in place which in effect cascade down from the main contract to secondary dispute boards with selected sub-contractors, such as can be found in the FIDIC Conditions of Sub-Contract for Construction, First Edition of 2011.

Dispute boards may also be applicable where the sub-contractor is providing highly technical systems which are typically unrelated to traditional construction such as radar and control equipment. The exposure to dispute boards in this manner would contribute to the expansion of dispute board use into other areas such as Defence.

Concession contracts

Many under-exploited opportunities also exist in the domain of PPP projects, specifically in regard to the concession portion of these agreements. For example, dispute boards are known to exist in the UK for concession contracts related to the operation of new hospital facilities under the NHS PPP programmes. Dispute boards overseeing the concession period will deal with issues such as provisions of equipment leases, sinking funds for reinvestment, benchmarking and applicable fees for concession services, sale of the concession, and ultimately restitution of the asset to the state.

The opportunity for dispute boards, and the existence of similar issues to be resolved, can be found in other PPP projects, including for toll operated motorways and ring-road projects, or for projects related to public facilities such as sports stadiums. In both situations complicated issues can arise in respect of minimum revenue guarantees and other conditions of operation.

Where DABs are involved in PPP projects a typical provision will call for a DAB during the construction period, consisting of construction professionals and/or construction lawyers as we are used to seeing. However, at completion and acceptance of the works or at the issue of a commissioning certificate, the standing construction DAB will typically hand over to a standing operation service DAB. Typical provisions for this second DAB during the concession period can be found in the FIDIC Conditions of Contract for Design, Build and Operate Projects, First Edition 2008 (the Gold Book). The FIDIC provisions call for the establishment of a one-man Operation Service DAB commencing from the Commissioning Certificate. These DABs having five-year terms.

Clearly, operation service DABs may be used even if there had been no traditional DAB during the design/build phase. On one reported occasion the parties of a concession contract related to a power project in Japan ran into various disputes and decided to bring in an outside mediator. The mediation process was successful and a great number of issues were resolved between the parties. So much so that the parties requested the mediator to take on a role as an operation service dispute board, which has continued to successfully keep the parties from delaying resolution of any further disputes or litigations.

Telecommunications

In fields even further away from the familiar territory of construction, dispute boards may find a use in international telecommunication contracts. Perhaps initially in respect of the myriad of agreements between mobile operators which govern the repartition of their infamous roaming charges, and disputes related to the application of the complicated revenue sharing formulas involved. Anecdotally, the author has read that in some cases *ad hoc* dispute boards have been put in place in this domain which operate with a 30-day decision calendar.

Again in this business we find the elements conducive to the application of a dispute board, including the need to maintain long-term working relationships and complex arrangements to be executed over extended periods of time. The clients of mobile telephone operators of course demand seamless mobility, and operators cannot permit disputes to fester for fear of creating coverage holes in their global networks.

Similar opportunities may exist with firms in the media industry as they struggle with similar webs of contracts governing the distribution and sharing of their content on a global scale.

WHERE TO NOW?

As mentioned in the introduction to this paper, by far the largest concentration of experience and knowhow regarding the best practices and usage of dispute boards lies within the membership of construction industry groups and notably the DRBF. Also as mentioned in the introduction, a concerted effort by our membership to communicate and assist development of dispute boards in other fields requires personal commitments to invest substantial amounts of time.

A proactive approach is required of contacting targeted industry associations, both on the supply and demand sides, and any advisory associations which provide related legal or engineering services.

Are these wishful and altruistic goals? Perhaps to some degree, but that does not mean they do not merit pursuit. Moreover, the author sees primarily in these actions a healthy dose of self-interest. The longevity of the dispute board concept and growth of the DBs, even in the construction industry, requires a broader understanding and acceptance of the process among a wider range of businesses and legal circles if the concept is to achieve the same level of use and acceptance as mediation and arbitration. Barriers to acceptance still remain in part because of poor understanding within the general legal and political communities.

RECOMMENDATIONS

The DRBF can take the lead in an initiative to expand the use of dispute boards and become the dispute board umbrella association for all industries.

To do this the author proposes the following basic outline of goals and actions.

As a first step, working committees by Region can be formed with the goal of promoting the use of dispute boards in new industries, sharing know-how, researching and documenting new uses and potential new uses.

These committees should define targeted industries in order of priority, seek out their industry associations and send representatives to their professional conferences with a view to finding opportunities to make presentations on the benefits of dispute boards. We should thereafter be willing to provide assistance in developing practice manuals and know-how in adjudicator training programmes.

The growth of DBs into other sectors also requires long-term planning within the DRBF. We should be looking to expanding our own membership to professionals from other industries who have already or are interested in adopting the dispute board process. In order to be the most relevant organisation we can in 15 years, we should be anticipating today the development of sections within the DRBF by industry and multidisciplinary executive committees. Of course, all of this requires committee members and massive amounts of elbow grease.

The author hopes there will be an appeal to the membership in the coming months for volunteers and their outreach proposals.

Acknowledgements: The author greatly appreciated the advice, writings, facts, opinions and encouragement received from the following contributors:

Paul A. Gélinas, Arbitrator and adjudicator, member of the Paris and Montreal Bar Associations, Paris France

Richard Appuhn, Arbitrator, adjudicator, President Region 2, Dispute Resolution Board Foundation, Rome Italy

Toshihiko Omoto, Arbitrator, adjudicator, Dr. Civil Engineering, Tokyo Japan

Christopher Koch, Partner, Landolt & Koch, Geneva Switzerland

Harry L. Arkin, Partner Arkin & Associates, LLC, Denver CO, USA

Hon. Robert Faulkner (Ret.) JAMS, Dallas TX, USA

Wayne Stacy, Partner Cooley LLP, Broomfield CO, USA

The views and opinions expressed in this paper are entirely those of the author and are not necessarily shared by the contributors.

Internet References:

Automobile Magazine: "Ford and Geely Reach Agreement on Volvo's Intellectual Property Rights," 30 November 2009 by Andrew Peterson, <http://rumors.automobilemag.com/ford-and-geely-reach-agreement-on-volvos-intellectual-property-rights-1972.html#ixzz1rpQPr6S6>.

Reuters, Beijing: 27 November 2009, Micheal Wei and Simon Rabinovitch,
<http://www.reuters.com/article/2009/11/27/geely-volvo-idUSPEK4290820091127>

Motor Authority: "Official: Ford Completes Sale of Volvo to Geely," 2 August 2010, Viknesh Vijayenthiran, http://www.motorauthority.com/news/1040325_official-ford-completes-sale-of-volvo-to-geely

China Intellectual Property: "The IP Perspective on Geely's Acquisition of Volvo," June 2010, Kevin Nie, <http://www.chinaipmagazine.com/en/journal-show.asp?id=605>

The Economist: Geely closes in on Volvo, 29 October 2009, from the print edition,
<http://www.economist.com/node/14756895>.

Media.Ford.com: "Ford Reaches Agreement to Sell Volvo Cars and Related Assets to Geely; Sale Expected to Close in Third Quarter," 28 March 2010,
http://media.ford.com/article_display.cfm?article_id=32294.

The Mustang News: "Ford to sell Volvo to Chinese Company Geely," Sam Haymart, 28 March 2010,
<http://www.themustangnews.com/content/2010/03/ford-to-sell-volvo-to-chinese-company-geely/>.

IP Dragon: "IPR Challenges in Geely-Ford Talks About Volvo," 21 October 2009, Keith Naughton and Cathy Chan, <http://ipdragon.blogspot.fr/2009/10/ipr-challenges-in-geely-ford-talks.html>.

Auto evolution: "Ford and Geely Reached Final Volvo Transaction Agreement," 28 March 2010, Andrea Tutu, <http://www.autoevolution.com/news/ford-and-geely-reached-final-volvo-transaction-agreement-18581.html>.

Orrick marketing brochure 2010, "Your Future with Orrick in Asia,"
<http://www.orrick.com/fileupload/4117.pdf>

InAutoNews: "Volvo may lose supplier contracts if Geely bid succeeds," 29 October 2009,
<http://www.autoevolution.com/news/ford-and-geely-reached-final-volvo-transaction-agreement-18581.html>.

Asian Business Daily: "China's Geely formalizes a JV with Volvo at last," 12 April 2012,
<http://asianbusinessdaily.com/2012/03/china-based-geely-in-a-jv-with-volvo-at-last/>.

The Detroit News: "Ford-Geely deal spells out tech sharing," 22 April 2010, Christine Tierney,
<http://scottrlap.proboards.com/index.cgi?board=general&action=display&thread=7704>

Other References:

FIDIC® Conditions of Subcontract for Construction, for Building and Engineering Works Designed by the Employer, First Edition 2011, ISBN 978-2-88432-068-9.

FIDIC® Conditions of Contract for Design Build and Operate Projects, First Edition 2008, ISBN 978-2-88432-052-8.

Institutions for possible future collaboration:

The Technology Dispute Centre, Sydney Australia, www.tdc.org.au

The Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, www.cepmplp.org

Community of European Shipyards' Associations, www.cesa-shipbuilding.org

Shipbuilders Council of America, www.shipbuilders.org

Global Billing Association, www.tmforum.org