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## **THE ROLE OF DISPUTE BOARDS IN DISPUTE AVOIDANCE**

by

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### **1. Introduction**

Dispute Boards (usually known as DRBs, DABs or, in this paper, DBs), are a relatively new development in the spectrum of dispute resolution processes used on major projects. Despite their recent provenance, DBs appear to have reached the threshold of a period of rapid growth, due to their remarkable success in not only resolving disputes on projects more efficiently (with respect to both time and cost) but also and more significantly, by the creation of a ‘dispute avoidance’ attitude to project management and a ‘best-for-project’ relationship between the parties.

A high level of disputation has been part of the landscape of construction projects for many years. There are many causes and reasons for this state of affairs. However when negotiated solutions fail, as they frequently do, the parties have traditionally resorted to arbitration or litigation. In recent years, industry concern with the extremely high costs, the disruptive impacts and the significant risks of proceeding to arbitration / litigation have given rise to several “alternative dispute resolution” (ADR) processes. Such processes now include mediation, expert determination and statutory adjudication. While these ADR processes have to some extent ameliorated the ‘high costs’ issue, they are, by definition, initiated only after a dispute has arisen (as is the case with formal arbitration or litigation). In other words, they are reactive rather than pro-active processes, in the sense that they are generally not able to influence the performance and outcome of the project in any positive way. Similarly, since the ADR process inevitably follows after the causal event(s) giving rise to the dispute, there is little or

no opportunity for the contracting parties to manage the project in a way which addresses or eliminates such causes.

In contrast, the unique feature of the DB process is that if properly utilised, it can provide a relatively low cost, effective means of not only resolving disputes but more importantly, preventing and avoiding disputes. This pro-active role for DBs clearly differentiates the process from all other conventional ADR processes.

While the DB concepts were originally developed with their focus only on dispute resolution (e.g. Dispute Adjudication Boards as used in FIDIC forms of contract), this aspect is now seen as utilising only one part of a DB's potential and is no longer regarded as "best practice" within the DB world. In particular, the 'ad hoc' formation of a DB only after a dispute arises on a project, fails to utilise the real and most significant advantage of the DB – the opportunity to avoid the dispute altogether. A 'standing' DB which is in place between the parties from the project outset seems to be the only available ADR process which can deal with 'issues' as they arise, influence the project participants' behaviour, maintain good relationships between the parties and substantially reduce the probability of "issues" escalating into "disputes" on the project.

Recent information from current projects where a pro-active approach has been adopted by the members of the DB, indicates a high degree of acceptance by both owners / principals and contractors. The success of these DBs generally results in a 'best-for project' outcome for all parties and the completion of large and complex projects within time and at or below budget. Although the DRBF's information in this regard is somewhat subjective, DB members appointed to these projects regularly advise us that the major part of their working time is now spent on "dispute avoidance" activities. In some of these projects, recent statistics indicate that no disputes have ever reached the stage of a formal referral to the DB for resolution.

## **2. Proactive Dispute Avoidance**

The concept of dispute avoidance and prevention has received strong support within the DRBF community worldwide, particularly from the more experienced and sophisticated DB users on major public infrastructure projects. Significantly in many US and Australian projects, DBs are taking more innovative approaches to dealing with potential 'disputes' and the procedures being adopted reflect a far more proactive role for the DB within the governance structure of the project.

In addition to the direct benefits in project cost and time which flow from the avoidance of disputes, there are significant intangible benefits provided by the regular meetings between the DB and the senior executives from the project parties. These DB meetings provide a forum, outside the formal contractual regime, for the parties to review their performance, identify current and future problems, remove road blocks to progress and actively engage with each other in a constructive relationship. While these ‘team-building’ or ‘partnership’ aspects of DBs are important, when the inevitable issues (commercial, technical, legal) arise, it is still necessary to remind project participants that proactive ‘issue’ resolution by the DB is not and cannot be a substitute for proper contract administration and management. Further, the parties are ultimately bound by the risk environment and the contract terms and conditions they entered into, however unfavourable they may be. Within these constraints, DBs are frequently able to encourage and assist the contracting parties to deal pragmatically with the inevitable lack of perfection in any complex set of contract conditions and specifications.

### **3. The Role of DB Members**

Dispute avoidance and prevention requires DB members to take a more “hands-on” and inquisitorial approach during the regular DB meetings and generally during the course of the project. Such an approach requires DB members who possess a high level of professional skill and experience, together with a well-developed sense of the requirements for independence, impartiality and procedural fairness.

For example, at the first DB meeting with the parties, the DB members should ensure they:

- educate first-time users in relation to the role of the DB and the procedures which the DB intends to adopt;
- emphasise that the DB’s role is an integral part of the project governance and management;
- stress that the DB’s objective is to ensure a successful and “best-for-project” outcome for all parties;
- seek and obtain the parties’ agreement to include DB operating procedures which are specifically directed at dispute avoidance.

At all subsequent DB meetings, the DB members should continue to:

- work hard to build and maintain the DB’s relationship with the parties, instilling trust and confidence in the DB process;

- focus on the early identification of issues arising within the project before they become disputes;
- encourage a collaborative approach between the parties in relation to issue resolution;
- ensure that ‘difficult’ issues are brought forward and addressed rather than being suppressed and left to fester.

#### **4. Practical Steps for Dispute Avoidance**

There are several practical aspects of a DB’s work which need to be considered when maximising the DB’s potential for dispute avoidance and prevention.

##### Early involvement of the DB

As noted above, it is important that the tripartite agreement between the DB and the contract parties should be finalised and signed concurrently with the execution of the main contract. By this means, the DB is appointed and empowered from the start of the project. The DRBF’s experience in this regard has clearly demonstrated that the early involvement of the DB is extremely important when the primary object of the DB is dispute avoidance. However, early appointment in itself is of little real benefit unless it is accompanied by several early meetings of the DB with the contract parties, in order to set in place the procedures to be followed and to encourage effective relationship building with the parties.

Further, the DRBF’s particular experience with ‘design and construct’ (D&C) and ‘design / build’ contracts has also shown that the ‘design’ phase of the project is the single aspect which generates potentially serious differences of opinion, and if not resolved before construction commencement can lead to long running and serious disputes. The design phase of a major D&C contract may extend over six to twelve months before any significant construction work commences. It is nevertheless critical for the DB to be fully involved through this early period. The DB will then be in a position to assist the parties in any areas of ambiguity, inconsistency or reasonably interpreted requirements for performance or design standards, enabling pragmatic solutions to design-related issues.

##### Amendments to DB procedures

An important ‘proactive’ step for a newly-formed DB is to review (or in some cases, draft) the DB procedural rules (usually provided in the tripartite agreement) which will apply to the project. Even when the DB is purportedly bound by a set of standardized procedures (such as in the FIDIC form of

contracts), there are significant benefits to be gained by discussing and, if appropriate, amending the DB procedures for that particular project with the agreement of the parties. This is a good way of introducing a proactive *modus operandi* into an otherwise silent set of DB procedural rules. It also enables the DB, at the start, to establish a cooperative relationship with the contracting parties and where necessary, define its role in influencing the project participants' behaviour.

#### 'Without prejudice' status of DB meetings

It is, of course, a necessary part of the DB process for a DB's formal recommendation or determination (in relation to a dispute) to be issued "with prejudice", so that it might be relied upon by the parties within the framework of their contract. It may also be required as evidence in any subsequent proceedings. However, it is uncommon for there to be any express contractual provision which defines the status of other DB-generated documents such as DB meeting minutes, reports prepared for the DB or notes of discussions between the parties and the DB. Thus an issue sometimes arises as to the nature and legal status of this documentation.

Further, at routine DB meetings, the "best practice" protocol now being used by many DBs is to actively encourage both contracting parties to speak freely and to frankly discuss current 'issues' that are foreshadowed. The parties provide a detailed report (usually jointly) to the DB on the status of the project, site work, program claims, delays, disputes and the like. Frequently, the DB may request one or both contracting parties to provide a specific report or position paper on a particular, issue, either out of session (copied to the other party) or at the next DB meeting.

To encourage frankness and openness in all these communications between the parties and the DB, such DBs now often implement a procedure whereby the information and documents noted above, as well as the minutes of the DB meetings, are afforded a "privileged" or "without prejudice" status. This status does not, of course, apply to documents produced by or exchanged between the parties in the normal course of business, nor to claims or disputes that are formally referred to the DB for determination. Nevertheless, there is no doubt that the 'without prejudice' umbrella under which the DB meetings are conducted is a significant contributor to the dispute avoidance objectives and success of the DB.

#### Other steps towards dispute avoidance

Other important protocols and procedures which have been adopted by DBs, leading to successful dispute avoidance and prevention include:

- ensuring that the “right” people from each party attend all DB meetings. In this regard, the attendance by senior “off-site” executives is an important requirement;
- implementing an issue tracking procedure, whereby issues identified by the parties (or the DB) are specifically listed, actioned and reported upon at each DB meeting;
- calling for special reports or presentations in relation to specific, identified or potential risk areas such as the design, the specifications, the construction programme or the contractor’s planned methodology;
  - one of the DB members acting as a facilitator of party meetings / workshops, convened to discuss or resolve particular issues;
- the use of an advisory opinion from the DB as a means of providing an independent, expert view on an issue for consideration and negotiation by the parties, before the issue escalates into a dispute.

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