



DRBF Forum

Volume 23 Issue 2 May 2020

Lessons Learned:

The Use of Dispute Boards on a Public Private Partnership Project

Introduction

Following completion of a Public Private Partnership (PPP) for a major rail project in New South Wales (NSW), Australia (Project) and as the members of the Dispute Avoidance Board (DAB), we were invited to prepare a report on the Lessons Learned from the Project itself and the interaction between the parties' representatives and the DAB members. This article is based on that report and the Lessons Learned endorsed by the parties.

These lessons are generally applicable for all Dispute Avoidance Boards and Projects with a DAB.

Background

The Project was structured as a "typical" availability PPP between the concession giver, a NSW Government agency (Principal), and the special purpose vehicle/equity provider OpCo. OpCo had let two further sub-contracts being:

- (a) A design and delivery contract (D&D); and
- (b) An operations and maintenance contract (O&M).

The Project was part of a larger project which consisted of three major interfacing contracts, with a total delivery value of AUD\$7.3 billion and completed in approximately six years.

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By Ron Finlay, Louise Hart and John Tyrril

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Maintain Dispute Board Best Practices, Especially During Times of Uncertainty and Disruption

Dispute Boards are valuable asset in avoiding inevitable issues and disputes for long-term project success



James Perry
Past President
DRBF Executive
Board of
Directors

The challenges presented by coronavirus/COVID-19 are unlike anything most of us have faced in our lives and professional careers. As a global organization, it is being felt by DRBF members in all regions of the world. At this time, we are focusing on compassion, collaborative spirit, and creativity as we unite as a community.

There are unprecedented short-term challenges for projects and contracting parties, but the industry is also more technically advanced and better connected than we have ever been before. The use of Dispute Boards is intended precisely to help parties manage the issues that arise under any circumstances, and this should in fact be a time for increased DB participation through informal assistance and regular procedures.

The directives now in place in most countries restricting travel and in-person meetings make the task more difficult. DRBF members should be an advocate for maintaining the integrity of the process during this temporary disruption.

Some initial reactions may be to postpone or worse, cancel, DB meetings and hearings. We feel strongly that this should be avoided, due to the impact on long-term project outcomes. Some users are already seeking alternative solutions. The most common recommendation is to move to video conferencing. The options are numerous and easy to implement over the internet without the need for small group meetings or special video equipment. Many services offer free or low-cost solutions for small size groups – perfect for a DB meeting or hearing. Coordinating the platform may best be organized by the DB Chair.

As a second option, an audio-only conference call may be appropriate and very effective. In situations where connectivity is a challenge due to cost or reliability, the parties should nonetheless be encouraged to prepare written reports and circulate project documentation to keep DB members fully engaged in project progress until regular meetings can resume.

Meeting and hearing dates may be rescheduled to accommodate the time needed to organize alternative meeting methods. If there are circumstances that result in an outright cancellation, parties must be mindful of contractual obligations to honor cancellation payments which may be part of the Dispute Board Agreement.

Below are some resources which may be useful as you navigate these new challenges. The DRBF is currently hosting meetings and events by online video conference from remote locations. DRBF staff are available as a resource to DRBF members to understand the options and help you get up and running by providing troubleshooting tips. [Email](#) the DRBF with your questions.

Further, we invite you to share your ideas and post questions for other members of the DRBF community in the DRBF Group on [LinkedIn](#), which is a platform to engage with a valuable network of over 1,700 Dispute Board professionals worldwide.

Although we remain physically apart, we stand together in our commitment to Dispute Board effectiveness, and we trust that we will emerge from this current crisis stronger than ever.

James Perry
Past President

Ann Russo
Executive Director

- Resources**
[WebEx](#)
[Zoom](#)
[Microsoft Teams](#)
[Skype](#)

The Impact of Covid-19 on DB Procedures

The DRBF is hosting two webinars on 1 & 2 June to share the experiences of DB practitioners worldwide. Join the discussion as we adapt to new techniques and challenges.

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Thank you to DRBF members who participated in the recent elections. The Executive and Region 2 Boards installed new members at their May 2020 meetings.

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The Forum is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

The Forum welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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The role of OpCo was to design, construct, operate and maintain the PPP rail system for 15 years.

Following completion of the Project, representatives of the Principal, OpCo, D&D and O&M all contributed to a Lessons Learned paper which each of the participants took away to enable them to use on their respective next projects.

The Lessons Learned are set out in the following sections:

Lesson #1: Signalling Intentions

The Principal elected to use the name “Dispute Avoidance Board” rather than “Dispute Resolution Board” as a signal to the tenderers and the ultimately successful OpCo of its resolve to avoid and prevent disputes (and thus prevent issues from becoming disputes) and not just resolve and determine disputes.

Lessons Learned: Using the name “Dispute Avoidance Board” rather than “Dispute Resolution Board” sends a signal or message to the tenderers of the Principal’s intent to avoid and prevent disputes.

Lesson #2: Attendance of D&D and O&M at DAB Meetings

Although the DAB Agreement was between Principal and OpCo, the DAB encouraged (and Principal and OpCo readily agreed) that representatives from both D&D and O&M should be represented as observers at all DAB meetings and from the outset.

The presence and active participation of representatives from D&D and O&M in the DAB meetings were extremely productive and helpful to identify issues in relation to the Project, have those

issues discussed openly between all parties and the DAB, and generally the DAB meeting became an appropriate venue for devising solutions.

Lesson Learned: Where a DAB is established between the concession giver (in this case, Principal) and the SPV (in this case, OpCo), it is essential for the overall health and well-being of the PPP Project for the Design & Construct Contractor (in this case, D&D) and the Operator and Maintainer (in this case O&M) to be represented at, and actively participate in, DAB meetings. In future PPP contracts, this attendance should be prescribed in the various contract documents and in the DAB Agreement.

Lesson #3: Principal’s Requirements

The Project Deed was a comprehensive document which included a mature identification, development and articulation of the Principal’s Requirements. This has been an important factor in an efficient Project delivery and has generally avoided unnecessary variations, changes, delays and disruption.

Lessons Learned: The investment of time in establishing the Principal’s Requirements to a mature level of detail is a sound investment.

Lesson #4: Stakeholder Engagement

There had been considerable community consultation by the Principal prior to letting the Project Contracts, and the level of stakeholder engagement was apparent from the outset. After the appointment of OpCo and D&D, the level of community and stakeholder engagement continued at a very high level.

Lessons Learned: It is critically important for all major projects to have

extensive community engagement and support for the Project.

Lesson #5: Project Teams

Quality project teams by both parties are essential for efficient project management and delivery. From the DAB’s experience on other projects, where there are poor quality members of project teams making questionable or bad decisions (sometimes in an adversarial manner), problems and disputes arise between parties over effects upon obligations, rights and interests. On the worst of such projects, there are numerous disruptive changes in project teams, and sometimes persons performing an important role and making a good contribution are questionably removed. Ultimately, it is all about people.

On this Project, both parties had in place quality “A” teams. Importantly, personnel were largely maintained unchanged throughout the Project. In consequence, Project history and the reasons for decisions and actions were not lost. The level of knowledge and understanding demonstrated at DAB meetings by key Project officers of events and issues was consistently very impressive. It was clear to DAB Members that the key Project personnel in attendance at DAB meetings were essential for efficient management and decision making and that the loss of those personnel would have been extraordinarily disruptive to Project delivery.

Lessons Learned: Quality and consistency of project teams by both parties are essential for efficient project management and delivery.

Lesson #6: Reports, Presentations and Meeting Conduct

It is important for the effective functioning of the DAB that the DAB members are kept adequately informed of progress, issues, claims and disputes. The reporting on this Project was thorough and detailed. The monthly reports of D&D, OpCo and the Independent Certifier were thorough, of a high quality level of detail and delivered to the DAB members in a timely manner. The DAB from early stages requested that there be a joint presentation by both Principal and OpCo, but this was extended, from early days, to include D&D and O&M where appropriate.

The parties’ presentations to the DAB were thorough and detailed. In fact, the parties’ presentations were an exemplar for DAB briefing and were much better than has occurred on any other project in the DAB Members’ collective experience.

The fact that the Joint Presentation addressed all of the issues raised in the minutes by the DAB was a strong indication of the parties’ attention to the issues raised by the DAB for consideration.

As the DAB meetings fell into a regular pattern, the fact that the Joint Presentation was produced several business days in advance of the DAB meeting was a credit to the parties and an indication of their willingness to apply their minds, in advance of a DAB meeting, to the issues that needed to be dealt with and the results / status presented.

The DAB commends the quality of the Joint Presentations made by the parties and, in the DAB Members’ opinion, is an exemplar for complex projects of this kind.

Lessons Learned: The preparation of

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high-quality monthly reports, which were also provided to the DAB, to keep the DAB informed about progress, issues, claims and disputes is essential to a functioning DAB.

Lessons Learned: The preparation of a joint presentation by Principal and OpCo (with the support of D&D and O&M) is a best practice method of ensuring that issues are raised and addressed prior to, and at, a DAB meeting.

Lessons Learned: Allowing time for the preparation of a joint presentation by all parties to the DAB, at DAB meetings, including prior distribution of the presentation to the DAB is best practice.

Lesson #7: DAB Meeting Conduct

The DAB has mentioned above the early decision by Principal and OpCo to involve both D&D and O&M in DAB meetings.

Apart from the allure of inclusion, it is the D&D in the early stages of the Project that has most information and, likely, the source of most issues on a Project such as time / delay issues. Having D&D and O&M at the table, allowing them to participate in the presentation and being available for questions all were extremely beneficial to the overall relationships established.

Lesson #8: Communication

Based upon briefings at DAB meetings and also the nature and extent of the parties' agreed outcomes, it has been DAB members' assessment that communications between the parties were (as required for efficient project delivery) good, open, transparent and honest.

The parties invested considerable time,

effort and expense in the relationship and communications, through various facilitated relationship workshops. The advantages of these workshops were evident to the DAB.

The decision to locate project teams in the same building clearly also contributed to the excellent level of communication between the parties.

Lessons Learned: Any investments in relationship building and maintenance as well as communication protocols are well worth the effort.

Lessons Learned: The co-location of members of the Principal, OpCo, D&D, the O&M and the Independent Certifier inevitably leads to improved communications, less email/letter writing, more face-to-face meetings and the development of more personal relationships and is to be recommended as best practice.

Lesson #9: Procurement Interface

It is understood that considerable time was undertaken by Principal to determine the three major procurement contracts for the major project. The procurement process created at least two major contract interfaces, the risk of which needed to be managed by Principal. With the delays to one of the other projects, the risk to the Principal of one of those interfaces manifested, through no fault of OpCo.

Lessons Learned: The lesson learned from this interface issue is not so much about the procurement choices but how to handle a risk when it is realised. Having continuity of personnel, highly skilled management, investing in the relationship and communicating well are all factors that will assist in mitigating the effects of realised interface risks.

Lesson #10: Design/Documentation

Because it rarely became an issue, it was obvious to the DAB that D&D had selected high quality, competent, adequately resourced design professionals and the relationship between D&D and the designers appeared from the outside to work well.

In addition, the management of Design and Documentation also appeared to proceed well, although there were obvious pressures in the early days for Design to keep up. The result seemed to the DAB to avoid fast-tracked design and construction with the Contractor not proceeding to construction too early, at risk, without approval for construction with only partial design/documentation package approvals.

D&C projects are very sensitive to timely and quality performance of Design and Documentation and to any delays in achieving issued for construction status. On the very best projects, the design, documentation, review and Approved for Construction (AFC) process are invisible. On the worst projects, problems in those processes cause considerable delay and disruption to performance. The DAB considers that on this Project, any issues were largely invisible, once through the process described in the next paragraph. Considerable problems in the design, documentation, review and AFC process occurred, including failures in coordination, disrupted iterative processes, redesign/re-documentation loops, construction on the basis of partial AFC and construction taking place at risk without AFC. To their considerable credit, the parties focused on resolving those issues by extensive workshops held over a period of time involving all the design disciplines. Those workshops identified critically required Design and Documentation to enable the design team

to focus efforts and for programming purposes. The design team also identified and resolved coordination problems. Thereby the parties resolved issues and avoided potentially significant delay, disruption and disputes. Whilst the DAB encouraged the parties to undertake and pursue those efforts, it was not involved in them. The outcome of those workshops avoided likely necessity to refer issues to the DAB for assistance.

There also appeared to the DAB for there to be a positive, constructive, proactive relationship between Principal, OpCo, D&D and the Independent Certifier.

One of the features that we observed was a constant interaction between the parties and the Independent Certifier to ensure that the Independent Certifier had the appropriate level of resources to meet the demanding requirements for package approvals.

Lessons Learned: The selection of high quality, competent, adequately resourced design professionals is essential to success.

Lessons Learned: Developing and maintaining a positive, constructive, proactive relationship between the contract parties and the Independent Certifier is essential to success.

Lesson #11: Authorities/Services

Because it never emerged as a serious issue, it was obvious to the DAB that there had been early proactive engagement by OpCo and D&D with Authorities regarding services requirements and it appeared there was a good working relationship with the service providers. Similarly, there had been early engagement, pre-Contract, by the Principal with the independent rail regulator to better understand the



CONTINUED

- Mechanical Contractors Association of Western Washington
- Meyer Construction Consulting, Inc.
- Mole Constructors, Inc.
- Nadel Associates
- Stephen J. Navin
- John W. Nichols, P.E.
- Parsons Brinckerhoff
- Quade & Douglas, Inc.
- Pease & Sons
- Edward W. Peterson
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- Underground Technology Research Council
- URS Corporation
- Watt, Tieder & Hoffar, LLP
- James L. Wilton
- Ed Zublin AG

requirements of the regulator and assist with embedding these requirements into the various contracts.

The relationship with the independent rail regulator is critical to the successful implementation and commissioning of a rail line, and again the parties seem to have established a strong working relationship with the regulator.

Lessons Learned: Developing and maintaining a strong, co-operative relationship between the contract parties and the Authorities and regulator is an essential key to success.

Lesson #12: Ageing Unresolved Issues

Following a meeting where DAB Members commented that the ageing of unresolved issues that might lead to claims (such as unagreed modifications or variations, EOT claims, unresolved RFIs) was something of a litmus test of good or bad Project management, the parties' special efforts to address and resolve outstanding, ageing issues was evident by the following meeting. Subsequently, ageing of unresolved issues and claims was a matter which was constantly monitored and addressed throughout the Project.

Lessons Learned: Addressing issues that might lead to claims in a timely manner provides certainty for all contracting parties.

Lesson #13: Contract Administration

The parties made special efforts to ensure compliance with contractual notice and claim requirements to ensure timely and adequate information and to avoid the potential for disputes over the contractual and legal consequences of non-compliance.

Where compliance with continuing notice requirements was likely to tie up Project personnel and be counterproductive to timely Project delivery or negotiations regarding the consequences of late handover from an earlier, interfacing project, the parties cooperatively entered into standstill agreements to suspend those obligations without adverse consequences.

Lessons Learned: Compliance with contract administration requirements is obviously critical, but agreeing to sensible standstill arrangements from time to time and as appropriate demonstrates a mature contractual relationship particularly where those arrangements do not disadvantage any party.

Lesson #14: Issue Identification and Resolution

The DAB was thorough in listing issues that it considered may emerge into difficult issues, and possibly claims. The fact that each of these issues raised by the DAB was actively considered between DAB meetings and reported was a credit to the parties.

Although there were a number of occasions where unresolved modifications, change events and the like were, in the DAB's opinion, "falling behind", the parties were always in communication about those issues.

There was one occasion when the parties informally requested the DAB to provide an Advisory Opinion on a difficult issue. The DAB Members concluded that it was in the interests of the parties and the Project that the parties themselves should resolve that issue and the DAB, in effect, "pushed back" against providing an Advisory Opinion. This was successful as the parties ultimately resolved the issue between themselves.

Lessons Learned: Issues and disputes should, so far as possible, be owned and resolved by the Project parties.

Lesson #15: Program resequencing

It was obvious to the DAB that the interface delays referred to above and other associated issues were of such magnitude that they were likely to require matters to be resolved in a timely manner to ensure that project objectives could be maintained. To the parties' credit, they embarked upon a structured process, relevantly involving the project team leaders and CEOs of respective organisations, to assist in the resolution overall of the issues.

The DAB observed from the side line these issues as they were occurring and continued to encourage the parties to resolve the issues and resequencing of the program to maintain achievement of project objectives. The complicated structure of a PPP meant that more time needed to be committed to the process and more parties/stakeholders needed to have their interests explained and satisfied.

Lessons Learned: Whenever a range of issues emerge, parties to a project should endeavour to reach a global resolution with or without the assistance of the DAB.

Lesson #16: Outsourcing Determinations

The DAB Agreement split the DAB's role of avoidance/prevention with determination by "outsourcing determinations". This was seemingly made on the basis that if the DAB was to undertake a determination, the unsuccessful party's resentment could then hinder the DAB's more important dispute avoidance role. The agreement

sought to overcome this potential issue by removing the decision/determination-making function from the DAB and outsourcing determinations to an independent expert agreed upon by the parties or selected by the DAB, if the parties were unable to reach agreement on the expert.

The remaining function of the DAB was avoidance and prevention and, as part of those techniques, the DAB retained the right to provide "Advisory Opinions".

In their collective experience, the DAB members do not believe there is an advantage in separating avoidance and prevention from determinations. These roles are necessarily complementary, and "outsourcing determinations" to a third party denies the parties the considerable expertise and built-up knowledge and experience that the DAB members will have obtained during their role on the Project. It is not the DAB members' experience that an opinion or determination in favour of one of the parties (or partly in favour of each party) adversely affects the DAB's capacity subsequently to meet with the parties and function properly. If anything, the parties seem to have a greater respect for the DAB members, after such (usually complex and difficult) work.

Lessons Learned: It is not necessary to separate the avoidance and prevention role of the DAB from the determination role of the DAB. Experienced DAB members can accommodate both avoidance and prevention (including Advisory Opinions) as well as determinations and still maintain the trust and relationship to make avoidance and prevention an ongoing success.

Conclusion

From the DAB's perspective, the

overriding impressive characteristics of this Project were:

- (a) the quality of key Project personnel and the professional performance of their roles, functions and obligations;
- (b) the parties' open, transparent and honest communications and the effort they put into developing and maintaining those relationships and communications;
- (c) the impressive degree of best for Project (and Project stakeholders) cooperation and mutual problem solving (for example, the original dates for completion were remarkably close to the actual dates, given the significant delays to certain access points); and

(d) the parties' own efforts to resolve issues and to avoid what would likely otherwise have been a costly and time-consuming dispute.

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Forum Newsletter Editorial Deadline

Our readers love to hear Dispute Board success stories and challenges, and the latest industry news and events. If you have information about Dispute Boards, DRBF members, or an article to share, please let us know!

Contact Forum Editor Ann Russo at arusso@drb.org.

Deadline for the next issue:

15 June 2020

Upcoming DRBF Events!

For a full calendar of our upcoming events
visit our website at www.drb.org/events/calendar.



DRBF International Conference: Cape Town, South Africa

This event is postponed until May 2021.
Check out www.drb.org/events/calendar
for complete details.

Contact Amy Avery for additional questions:
AAvery@drb.org

DRBF Northwest Regional Conference & Workshop Seattle, Washington, USA

Dates Postponed to November 2020

Contact Kimberly Peterson for registration
or additional questions:
kpeterson@drb.org

DRBF's Strategic Direction:

Region 1 Board meets to advance performance targets for implementing key actions of DRBF's Five Year Plan

The Dispute Resolution Board Foundation has a Five Year Strategic Plan which was reviewed and refreshed in January 2018 by the Executive Board of Directors. The key visions contained in the Five Year Strategic Plan include:

- DRBF financial stability
- Improved membership
- Improved governance systems
- Country or area representatives
- Formalizing a DRBF Annual Meeting, Annual Report and financial statements
- Outreach activities
- Enhancing dispute avoidance and prevention techniques
- Enhancing DRBF's relationship and collaboration agreements with international, regional and professional organizations
- Improving DRBF's information and communications technology capabilities
- Monitoring new and additional regions for DRBF
- Improving the DRBF project database
- Continuing strategic planning

DRBF Five Year Strategic Plan is available for viewing by members in the DRBF Library at www.drbf.org

In March 2019, the Executive Board met in Boston, Massachusetts for a Strategic Planning Implementation Session facilitated by DRBF member Randy Over. The session was considered very successful and a detailed action plan was developed and covered:

- Membership
- Membership levels
- Membership database initiative
- Governance
- Education/training
- DB project database
- Development of new regions (a potential Region 4/Latin America)
- Relationships with other organizations and collaboration agreements
- Continuing strategic planning
- Upgrading DRBF Country Representatives
- Outreach/global Dispute Board development

In February 2020, the DRBF Region 1 (US and Canada) Board of Directors met in Atlanta, Georgia to identify how the vision and strategies can be implemented in the region. The session, also facilitated by Randy Over, identified some actions specific to the region, with discussion of achievable performance targets and measures. The Board specifically focused on:

- Outreach, expansion of the DRB process and its utilization
- Membership – expansion of base to include users (owners, contractors, A/E,



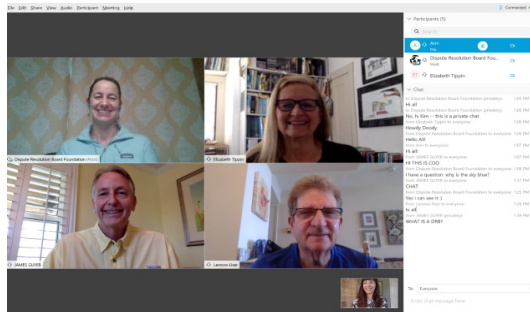
- lawyers, and academia) and reach new practitioners
- Improvement of training program with new course development

Executive and Region 1 Board members agreed that strategy and strategic planning is “a journey, not a destination” and the initiatives identified will be rolled out progressively and reported to members in the future.



UPCOMING PROGRAMS

The DRBF is planning several online training workshops for DB practitioners in 2020, including the [DRBF Administration & Practice Workshop](#) and an [Advanced Practice Workshop](#). The virtual platform opens availability to our worldwide audience. However, there will be variations in content, format, and even language to help members select the best option. As dates are confirmed, members will receive notification by email and the events calendar will be updated on our website, www.drb.org



DRBF delivered its first online workshop in April 2020

[DRBF Advanced Training Workshop](#) [Sydney, Australia - 22 September](#)

Hosted by DRBF Region 3 and currently scheduled at Minter Ellison Offices in Sydney, Australia
Contact Jennifer Foreman for registration: jforeman@drb.org

Proactive Dispute Avoidance

By Alan McLennan
Vice President
DRBF Region 3
Board of
Directors and
Recipient, Al
Mathews Award
for Dispute Board
Excellence

INTRODUCTION

A high proportion of contemporary construction projects are complex and challenging. Very often, the challenges are not apparent during the development and tendering phases of the project. “Brown-Field” settings, cutting edge technology, and the preponderance of non-technical demands, such as environmental regulations, governmental requirements, and pressures from external parties all combine to make a project more complex and challenging.

Such projects can be prolific generators of trying issues that need to be resolved speedily, in real time, if the momentum and smooth flow of the project is to be maintained and overall project costs minimised.

In response to these project pressures, and in recognition of the critical importance of preventing a build-up of unresolved issues and uncertainties that destabilise the flow, it is now common practice for Dispute Boards in Australia to focus primarily on dispute avoidance, with the determination or recommendation function used as a last resort.

Key client organisations in Australia have taken leadership in promoting this view such that some transport authorities and airport corporations have adopted the terminology ‘Dispute Avoidance Board’ (DAB) in their contract documentation.

In the DRBF Region 3 Dispute Board Process Summary and Guidelines, the following is included in the role statement: “The primary role of the Dispute Avoidance Board is to avoid or prevent issues becoming disputes; and to facilitate the Principal and the Contractor resolving their own disputes.”

The Dispute Avoidance Board General Operating Procedures, in common use in Australia, states: “The role of the Dispute Avoidance Board is to provide independent and specialised expertise in technical and administrative aspects of the Contract in order to assist the Other Parties in firstly attempting to avoid or prevent; and, if unable to avoid or prevent, in determining Disputes under clause [.] of the Contract in a timely manner.”

Dispute Boards in Australia tend to operate at three levels:

- i. To encourage the parties to identify potential issues and to overcome them on their own,
- ii. If disagreements arise and persist, provide informal assistance to help the parties to resolve the issues by agreement; and
- iii. If requested by the parties, use the formal procedure of referral to give a decision on the matter.

This paper sets out to explain the importance of the emphasis on avoidance, to discuss effective techniques to achieve avoidance, to discuss challenges; and to summarise examples of effective avoidance.

WHY IS AVOIDANCE IMPORTANT FOR PROJECT SUCCESS?

By dispute avoidance, we mean that contractual disagreements are either prevented from arising, or they are dealt with in the early stages, in real time, before they reach dispute status.

Not only does avoidance eliminate the need for costly and time consuming processes, like arbitration and litigation, but it prevents the ever-expanding backlog of unresolved claims that create disruption and uncertainty, as well as fostering an atmosphere of acrimony. Each resolution reduces or eliminates legal and consultancy

fees, and also avoids the loss of productive project time for both owners and contractors. In fact, the avoidance of issues and disputes facilitates positive relations, open communications, respect and cooperation – all of which are needed to underpin a successful project.

On the other hand, escalating adversarial attitudes that accompany conflict over divisive issues and disputes can quickly compromise efficient construction processes.

In an environment free of disputes, it is possible for the Parties to maximise efficiency through collaboration and cooperation and to minimise overall project costs.

A Dispute Board, by showing leadership and by being proactively involved in identifying potential issues and by offering competent guidance and assistance in the timely close-out of those issues, contributes to the project's success. Indeed, when a Dispute Board performs its role in this way, it cements its position as a vital component of the project's overall governance structure in the eyes of both the owner and contractor teams alike.

TECHNIQUES FOR AVOIDANCE

The nature of the vexing issues that trouble contract parties from time to time varies enormously, depending on the vagaries of the project, the contract documentation and the quality of the interaction between the project personnel.

The most common sources of issues are:

- Technical, e.g. quality of the product
- Unanticipated risks, e.g. from abnormal conditions or interference from external parties
- Commercial hardships
- Administrative or management processes
- Clarity of contractual documentation
- Quality of the interaction between project personnel

The part played by the project personnel is significant in the achievement of project success. In the end, the project is built by people who use the design, the specifications and the contract documents to manage and deal with each emerging issue. However, this is generally where the resolution of issues can become problematic. Typically individuals in the project team present a wide range of personality traits, beliefs, interests, and past experiences. This diversity can potentially lead to a wide spectrum of behaviours that can complicate issue resolution.

An important factor in determining the overall success of the project is how well the project leadership teams combine to manage this interaction between the individuals in the project management teams.

It is widely recognised in mature industries such as civil construction that project success is enhanced when the interaction between project personnel is characterised by open, cooperative behaviours. The project success is further enhanced when a proactive dispute avoidance strategy, led by a Dispute Board, is working in conjunction. The Dispute Board contributes a high level of knowledge and experience that is respected for its impartiality and independence.

However, there are no defined dispute avoidance rules or even processes that will guarantee success. Dispute avoidance is more an art than a science. It comes down to the skill, experience and wisdom of Dispute Board members, together with the cooperative spirit of project team members, to find ways and means to successfully address each particular issue.

Some proven examples of concepts and techniques that can be used in dispute avoidance are discussed below.

Proven Avoidance Techniques include:

Communication of the role and purpose of the Dispute Board to project personnel.



In order to build confidence in the Dispute Board process and in the Dispute Board members, ensure that there is a complete and accurate understanding throughout the project team membership by:

- The Chair of the Dispute Board provides a fulsome presentation on the Dispute Board's role, processes, and expectations at the first Board meeting and subsequently reinforces this throughout the project as team members change; and
- Dispute Board members seek to promote and align the role of the Dispute Board with the project team members' efforts to deliver the project. That is, the Board integrates itself into the project governance structure and avoids any perception that it travels separately, alongside, as a 5th column, offering judgemental or critical comment from time to time.

Early identification of risks and potential issues through proactive Dispute Board leadership.

- Dispute Board members continuously monitor progress, keep themselves well informed, use their knowledge, experience and skill to proactively identify potential issues. Through discussions at meetings and site visits, they explore the potential issues with the Parties and assist them to avoid conflict and to move forward.
- Dispute Board members use their experience to encourage cooperation, openness and respectful relations between project team members. That is to say the Board members seek to encourage cooperation rather than to endure misplaced competition and division.

Skillfully apply informal interventions to progress difficult issues towards resolution.

In situations where attitudes have hardened, conflicts have emerged, or where issues have lingered for months without resolution, a Dispute Board can suggest the use of informal techniques to bring about a breakthrough, such as:

- Propose the use of an Advisory Opinion as an informal intervention.

- For special issues, have the parties conduct joint workshops between Dispute Board meetings, to collate factual information, consider options, and to seek opportunities to reach agreement.

- For special issues, e.g. where the parties appear to be driven by self-interest, use a Dispute Board member, acting independently, to facilitate a joint workshop to identify/discuss/resolve an issue.

- The Dispute Board ensures the "right" people are included in discussions, e.g. designer, frontline operatives, if this might provide the breakthrough that is needed.

FACTORS LIKELY TO HINDER AVOIDANCE EFFORTS

Even though dispute avoidance is accepted as a fundamental part of a Dispute Board's role, there are a number of factors that can adversely influence a Board's performance in this aspect of its role.

Some of the factors are discussed below to provide an insight into their negative impacts on avoidance efforts.

Dysfunctional or uncooperative behaviour by project personnel from either party.

Due to a lack of knowledge or confidence with the Dispute Board processes, or even due to a lack of self-confidence, it is not uncommon for individuals in the project teams to perceive the Dispute Board as judgemental intruders who can complicate the team's efforts to deliver the project. This perception can lead to blockages in the flow of information to Dispute Board members and even result in the Dispute Board being held "at arm's length" from critical developments.

Obviously, such behaviour will frustrate the Board's efforts to work proactively with team members to avoid issues escalating to dispute status.

Examples are:

- Poor organisation culture in one or

both parties as evidenced by inadequate delegated authority causing delayed or inappropriate decision-making.

- Self-serving or adversarial behaviours with individuals pursuing their own preferences and opportunities.
- Limited communications or mixed messages.
- Unresponsive behaviours and poor cooperation in dealings with the Dispute Board.

Inadequate skills and understanding by Dispute Board members.

Examples are:

- Lack of experience and know-how to recognise potential issues and to successfully apply avoidance techniques.
- Not discharging all obligations under the Code of Ethics, e.g. lack of impartiality.

Dispute Board members “over-reaching” in their role.

Examples are:

- Attempts by Dispute Board members to be technical experts or project managers and telling project leaders how to do their jobs.
- Using leading questions (that may suggest bias) rather than using neutral questions.

Concerns about conflicts of interest where a Dispute Board has been involved with informal avoidance measures and later has the same matter referred to the Board for a decision.

Examples are:

- Dispute Board members must remain independent and impartial in whatever they do.
- Should there be any concern, or likelihood of conflict, a “Supplemental Dispute Board Agreement” can be signed to specify the level of separation required by the Parties.

When factors such as those described above are encountered, it falls to the Chair of the Dispute Board to look for ways to mitigate the effects of these factors as they

occur.

This may require the Chair to share concerns with the senior executives of both parties so that the parties can act quickly to rectify any shortcomings that are adversely affecting the efficiency of operations.

When these factors that hinder avoidance efforts are identified and dealt with, the project team’s ability to dissipate the costs and delays that lingering unresolved issues generate, is maximised. The additional costs and delays of formal dispute resolution are also avoided.

SOME AVOIDANCE CASES

Much can be learned by reflecting on real life cases where avoidance has prevailed over the agonising slide into formal disputation. The following scenarios provide examples of avoidance techniques that can be used by Dispute Boards to prevent the need for formal disputation measures. The scenarios have been drawn from actual Dispute Board experiences.

Scenario 1: Issue Relating to Design Approval Process

Background

This scenario relates to a large Design and Construct form of contract used for the delivery of a major bridge across a tidal estuary, together with associated roadworks.

Although the procedures for obtaining “approval to construct” status for the completed design packages were set down in the contract documentation, the parties seemingly had much difficulty in efficiently applying those procedures. Delays were occurring in gaining approval to proceed with construction. Multiple re-submittals of “final” design packages were occurring and rework of completed designs was common.

Working relations at site level had become

tenuous, tending to adversarial, and there was some reluctance to engage freely with the Dispute Board.

The contractor was expressing concerns about the delay and disruption impacts on the contractor's work program.

Action by the Dispute Board

Because of concern about the potential for this matter to lead to disputation with significant adverse impacts, the Dispute Board called on the parties to make a joint presentation to the next scheduled Dispute Board meeting. In addition, to ensure that the "root causes" were exposed, the Dispute Board stipulated specific questions to be addressed in the presentation.

This was designed to frame the presentation so that root causes could be identified and strategies could be formulated for solutions to be developed cooperatively by the parties. The Dispute Board saw an opportunity for the Board to take a leadership role in moving the parties forward towards a solution.

Outcome

The discussions during and after the Dispute Board presentation revealed many weaknesses in the way the design approval processes were proceeding. These weaknesses included:

- Reviewers were raising "design requirements" that were beyond the requirements of the design specifications but, nevertheless, the reviewers framed them as "best practice" or as implied requirements. It appeared to the contractor's design team that reviewers were insisting on personal preferences.
- The contractor's design team showed frustration with the uncertainties and, as a result, contributed to the difficulties by allowing an appreciable number of errors and omissions to filter through.
- An adversarial approach between the parties had developed over some months and this significantly affected the level of cooperation in daily affairs.

As part of the project governance arrangements, a Project Leadership Team, which included senior off-site executives from both parties, regularly reviewed progress on the project. The Dispute Board worked with these Senior Executives as well as with senior site level project managers to identify changes to the way the design processes were being managed and also to the working relations by fostering a cooperative and supportive environment. It is noted that, in this case, there was a need for the senior executives to make changes to project personnel in order to be certain that the changes to processes and behaviours would overcome the conflicts that had arisen and that the project could proceed efficiently.

In summary, the proactive steps taken by the Dispute Board were essential in uncovering the root causes and in opening the way for the parties to make changes, and to ensure that project could be completed without formal disputation.

Scenario 2: Issue Relating to Relocation of a Major Coaxial Cable

Background

This scenario relates to the need to protect or relocate a major coaxial cable as part of a large highway upgrade project. This project also used a Design and Construct form of contract.

The contractual obligation for the restoration of a plant owned by third-party utility owners rested with the contractor. This includes responsibility for design, construction and obtaining approvals from the utility owners.

The contractor tendered on the basis of an option to protect the existing cable in its original position. However, during the construction phase when the contractor sought approval for its protection proposal from the third-party owner, approval was not granted for this option, and only an extensive and costly relocation (node to

node) was acceptable to the owner.

The contracting parties were in disagreement over liability for the additional costs and requested the Dispute Board to provide an Advisory Opinion.

Action by the Dispute Board

The Dispute Board called for, and received, extensive pre-tender documentation from meetings which involved representatives from the project owner, the utility owners, and tendering contractors. It was revealed that options to protect the existing cable, as well as relocate the cable, were considered during the pre-tender meetings.

A close review of the pre-tender documentation showed that both the project owner and the utility owner favoured the option to protect the existing cable at that stage, due mainly to the lower cost of that option, and also due to the low risk of damage to the cable during construction and over the life of the infrastructure.

The contractor was able to demonstrate to the Dispute Board that it had tendered on the basis of protecting the cable.

Outcome

The Dispute Board was bound by the contract provisions. In this case, the contractor carried the responsibility to meet the approval conditions imposed by the utility owner and to carry the associated costs. The Dispute Board stated this in its Advisory Opinion.

However, in its opinion, the Dispute Board saw fit to report on all of the information that it had obtained, including both pre and post tender information. In light of this information, the Dispute Board suggested that the parties meet without the Dispute Board, to review the entire matter in view of the conflicting positions that were taken before and after tendering.

This was done, and the parties arrived at a mutually agreeable position amicably

thus resolving the issue without recourse to formal dispute resolution under the contract.

CONCLUSION

The best indicator of a project's success is the degree to which project objectives have been achieved. These should include the reputations earned by the parties as well as cost and time performance.

The outcomes across the range of objectives are most likely to be optimised when communications between project team members in the construction phase are open and when cooperation and respect are high. Further, project success tends to be highest when all issues that rise between the parties are dealt with in a timely fashion before increased costs, delays, distractions, and damaged relations occur.

A Dispute Board, working proactively with the parties and with a focus on dispute avoidance, can assist in identifying potential troublesome issues. The Dispute Board members bring the skills, knowledge and experience that assist in resolving issues quickly. Thus the need for costly, time-consuming dispute resolution procedures is avoided.

In addition, a Dispute Board can, in the way it discharges its duties, reinforce a positive culture of cooperation and respect, thus enhancing productive working relations throughout the team.

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Dispute Boards - Pertinent Aspects of Operation

Part 2: Jurisdiction

This article is Part 2 of a summary of an article published in the journal Civil Engineering. For the full article, including references, visit the DRBF online library. Part 1 was published in the previous issue of the Forum.

reviewed by an arbitral tribunal or the court, as the case may be. Should it then transpire that the DB did not have the necessary jurisdiction, any decision would not be enforceable.

JURISDICTION – WHAT IT IS AND WHY IT IS IMPORTANT

In the November 2017 article on DB decisions it is stated that the primary obligation of a DB, when acting in its role as adjudicator under the Dispute Adjudication Agreement (DAA), is to ultimately give an enforceable decision.

Also, that it is accepted that a DB's decision would usually be enforced by the courts, even in the face of errors of law, fact or procedure (except in very limited circumstances).

However, one of the limited circumstances in (and grounds on) which a DB's decision can be challenged, is that of lack of jurisdiction of the DB. This means that the DB did not have the jurisdiction to hear the matter and give the decision in the first instance.

It is thus not surprising that responding parties, when seeking to resist enforcement of an unfavourable DB decision, often rely on grounds that the DB had no jurisdiction.

In the November 2014 *Civil Engineering* article on DB operation, DBs were cautioned to ensure that it had the necessary jurisdiction to decide on the matter referred to it.

Common reasons why a DB may not have jurisdiction to decide on a matter would include:

- The DB (or a Member) has a conflict of

INTRODUCTION

This article explores the matter of Dispute Board (DB) jurisdiction in more depth – what it is, why it is important, the circumstances in which a DB's jurisdiction could be challenged, important considerations and how a DB is to manage jurisdictional challenges. It also provides some guidelines as to how a party which has a credible challenge to a DB's jurisdiction, should proceed.

A DB, in the first instance, needs to ensure that it has jurisdiction to hear the matter referred to it, and then it needs to ensure that it maintains that jurisdiction.

- Typically, the relevant dispute adjudication agreement would empower the DB to decide on its own jurisdiction. For example: FIDIC 2017 Red Book Procedural Rule (PR) 5(c) and FIDIC 1999 Red Book PR 8(b) – it is to decide on the DAAB's/DAB's (as relevant) own jurisdiction, and the scope of any dispute referred to it.
- GCC 2015 Rule 6.4.11 – it is to settle any dispute regarding the Adjudication Board Member Agreement and may decide on its own jurisdiction to act.

However, unless the parties have agreed otherwise, the DB's ruling on its jurisdiction will not be (final and) binding; it simply allows the DB to proceed in the presence of a challenge to its jurisdiction without having to delay matters for a court or arbitral decision on the challenge. Ultimately it can be



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interest.

- No dispute exists.
- The DB has not been properly appointed.
- A contract does not exist, or if it does, it does not contain an agreement to adjudicate.
- The matter has already been adjudicated.

Common reasons why a DB may lose its jurisdiction would include, where the DB:

- Exceeds the time limit within which a decision must be given.
- Does not follow the rules of natural justice (as it may apply to adjudication).
- Decides on the wrong dispute.

A number of other reasons exist, however, mostly related to ad hoc DB and adjudication procedures, rather than standing DB procedures.

The above reasons are considered in detail hereunder.

CONFLICT OF INTEREST

The DB DAA generally includes undertakings, obligations and warranties (as the case may be) that the DB member has no conflict of interest and is impartial of the Parties. For example:

Under the FIDIC 1999 Red Book the DAB Member shall:

- have no interest financially or otherwise in the Employer, the Contractor, the Engineer, or the Contract ...;
- not previously have been employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except in such circumstances ...;
- have disclosed in writing before signing the agreement any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project ...;
- not, for the duration of the DAA, be

employed as a consultant or otherwise by the Employer, the Contractor or the Engineer ...;

- not enter into discussions or make any agreement with the Employer, the Contractor or the Engineer regarding employment by any of them, whether as a consultant or otherwise

Under GCC 2015 the AB Member undertakes to/states that he/she:

- remains independent and impartial of the Contractor, Employer and Employer's Agent for the duration of the proceedings
- acts with complete impartiality and knows of nothing which could affect his/her impartiality
- had no previous involvement with this project
- does not have any financial interest in this project
- is not currently employed by the Contractor, Employer or Employer's agent
- does not have any financial connections with the Contractor, Employer or Employer's agent
- does not have or has not had a personal relationship with any authoritative member of the Contractor, Employer or the Employer's Agent which could affect his/her impartiality
- immediately discloses to the parties any changes in the above position which could affect his/her impartiality or be perceived to affect same.

Under the FIDIC 2017 Red, Yellow and Silver Books the DAAB Member warrants and agrees that he/she:

- will remain at all times impartial and independent of the Employer, the Contractor, the Employer's Personnel and the Contractor's personnel
- on becoming aware of any fact or circumstance after signing the agreement, which might call into question his/her independence or impartiality or appear to be inconsistent with his/her warranty,

shall immediately disclose this in writing

- has no financial interest in the Contract, or in the project of which the Works are part, except for payment under the DAAB Agreement
- has no interest (financial or otherwise) in the Employer, the Contractor, the Employer’s personnel or the Contractor’s personnel
- in the ten years before signing the agreement, has not been employed as a consultant or otherwise by the Employer, the Contractor, the Employer’s personnel or the Contractor’s personnel
- has not previously acted ... in any judicial or arbitral capacity in relation to the Contract
- has disclosed in writing to the Parties, before signing the agreement, any existing or past professional or personal relationships with any director, officer or employee of the Employer, the Contractor, the Employer’s personnel or the Contractor’s personnel (including as a dispute resolution practitioner on another project); and/or facts or circumstances which might call into question his/her independence or impartiality; and previous involvement in the project of which the Contract forms part
- will not, while a Member, be employed as a consultant or otherwise by, or enter into discussions or make any agreement regarding future employment with the Employer, the Contractor, the Employer’s personnel or the Contractor’s personnel.

If the DB Member is found to have breached any of these undertakings, obligations and warranties, or otherwise have a conflict of interest, his/her decision would be open to challenge.

NO DISPUTE EXISTS

The absence of a dispute is generally the most common reason for a DB decision to be challenged on the grounds of lack of jurisdiction.

For example, the FIDIC Guide states: “No matter can be referred to the DAB unless it is in dispute ...”, and: “If a Party refers a matter to the DAB and the other Party asserts that the matter has not yet developed into a dispute, the DAB must consider whether a dispute has actually arisen.”

In the South African context, regard is to be had to *Telecall v Logan* where it was held that:

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer.

is merely an expression of dissatisfaction not founded upon competing contentions, no arbitration can be entered upon.

The obvious question then to be considered is – What is a dispute?

The definition of a dispute can be given in the contract or in the DAA, which simplifies the matter. The matter referred can then obviously be interrogated quite easily to establish whether a dispute exists.

However, many contracts are concluded which do not include a definition of a dispute. The DB would then need to rely on the relevant law of the contract to establish whether a dispute exists.

Dispute is defined

A dispute is defined, for example, in the FIDIC 2017 (Red, Yellow and Silver Books) at SC1.1.29, FIDIC 2008 (Gold Book) at SC1.1.31, CIArb 2015 DB Rules at Article 1 and ICC 2015 DB Rules at

Article 2(iv). A typical definition would be:

‘Dispute’ means any situation where (a) one Party makes a claim against the other Party; (b) the other Party rejects the claim in whole or in part; and (c) the first Party does not acquiesce, provided however that a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.

Where a dispute is defined, the matter referred to the DB can be tested against the definition to ascertain whether a dispute has crystallised for purposes of a referral to, and decision by, the DB.

Dispute is not defined

A dispute is not defined in, for example, the FIDIC 1999 (Red, Yellow, Silver and Green Books), GCC 2015, ICE 2012 Dispute Board Procedure and ICE 2012 Adjudication Procedure. Wording along the following lines is often used:

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer.

However, these words do not define a dispute, although it describes what can be referred to a DB as a dispute. Dictionaries of course define the word “dispute”. However, such definitions are of limited use when it comes to the legal inquiry of whether a matter referred is a dispute.

This is exemplified by the litany of cases

in the UK dealing with whether or not a matter referred to adjudication for a decision, is in fact a dispute.

The seminal case(s) in the UK is that of *Amec v Secretary of State for Transport* where, in the Court of Appeal Judgment, Lord Justice May endorsed Justice Jackson’s “seven propositions” which he took to be the current law of England (and Wales) on the existence of a dispute, and added further points of his own. Justice Jackson’s “seven propositions” are summarised as follows:

- The word “dispute” should be given its normal meaning; it does not have some special or unusual meaning conferred on it by lawyers.
- Case law provides guidance, rather than legal rules, on the meaning of “dispute”.
- The mere fact that a party notifies the other party of a claim does not automatically give rise to a dispute.
- A dispute does not arise unless and until the claim is not admitted – this could include a rejection, prevarication or silence.
- If the claim is so nebulous and ill-defined that no sensible response is possible, neither silence nor even (perhaps) an expressed non-admission would be likely to give rise to a dispute.

The FIDIC Guide provides the following guidelines:

The matter may be said to have developed into a dispute:

- (i) after rejection of a final determination,
- (ii) when discussions have been discontinued without agreement on the matter,
- (iii) when a Party declines to participate in discussions or to reach agreement under Sub-Clause 3.5,
- or (iv) when so little progress is being achieved during protracted discussions that it has become clear that agreement is unlikely to be achieved.

Thus, in summary and in simple terms, where a dispute is not defined it can be considered to have arisen when:

- In connection with a claim:
 - one party makes a claim against another party
 - the other party (or its agent) rejects the claim, and
 - the first party does not accept the rejection.

- In the event settlement discussions were in progress:
 - discussions have been terminated without agreement
 - a party declines to continue to participate in discussions to reach agreement, and
 - so little progress is being achieved during protracted discussions that it has become clear that agreement is unlikely to be achieved.

As per one of Justice Jackson's propositions, the "dispute" cannot be nebulous and ill-defined. The international trend in dispute resolution is to avoid technical, legalistic or procedural objections that matters referred are not disputes.

NO CONTRACT / NO AGREEMENT TO ADJUDICATE

Circumstances where the existence of a contract or agreement to adjudicate are challenged are unlikely to arise with a standing DB. However, ad hoc DBs or adjudicators should be vigilant where it is likely that a contract or agreement to adjudicate appears not to exist.

THE MATTER HAS ALREADY BEEN ADJUDICATED

Once a DB has decided on a matter, it is (interim) binding on the parties, until the decision is successfully challenged, either in arbitration or in court. A DB cannot decide a matter which has already been decided. Although such a situation may arise where more than one ad hoc

DB is appointed during the lifetime of a project, it is unlikely to arise where a standing DB has been appointed on a project.

NOT COMPLYING WITH THE RULES OF NATURAL JUSTICE

Not complying with the rules of natural justice is probably the next most common ground on which a DB's jurisdiction is challenged.

In the article on DB Decisions published in the November 2017 issue of *Civil Engineering*, it is observed that there is debate (in particular in South Africa) around whether or not an adjudicator is bound by the rules of natural justice.

The rule of natural justice under consideration here is the rule that states that each party is entitled to be heard and to have its evidence and arguments considered by the DB.

In addition, many dispute adjudication agreements place an express obligation on the DB in this regard, e.g.:

- FIDIC 2017 Procedural Rule 6.2(a): "... give each Party a reasonable opportunity (consistent with the expedited nature of the DAAB proceeding) of putting forward its case and responding to the other Party's case."
- FIDIC 1999 Procedural Rule 5(a): "... act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case."

GCC 2015 arguably obliges the DB to observe the rules of natural justice:

The Adjudication Board shall not be required to observe any rule of evidence, procedure or otherwise, of any court, except the rules of natural justice.

In *Sasol v Peter Odell & E-Hel Civil Services* the judge remarked (in passing) that adjudication is not subject to the rules of natural justice. The judgement states at paragraph 19 (emphasis added):

The strict time frames in clause W1.3 (3) accord with the intention of **adjudication** as being a speedy remedy, **not subject to the rules of natural justice**.

Commentators have remarked that this view is considered as taking matters too far.

In the context of adjudication under the UK Housing Grants Construction and Regeneration Act (HGCRA), various judges have considered the matter.

In *Balfour Beatty v the Mayor & Burgesses of Lambeth*, Judge Humphrey Lloyd QC conveniently places the dilemma into perspective as follows:

It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality and fairness in adjudication must be considered in that light. ... It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. ... However the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator.

HHJ Bowsher QC in *Disca in Disca v Opecprime* rejected a view that the rules of natural justice did not apply to adjudication and rejected any submission that a breach of natural justice was to be regarded as a “procedural error”. However, he effectively added a softer edge to its application:

... one has to recognise that the adjudicator is working under pressure of time and circumstance which make it extremely difficult to comply with the rules of natural justice in the manner of a court or an arbitrator. Repugnant as it may be to one’s approach to judicial decision-making, I think that the system created by the [1996] Act can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded.

Sir Peter Coulson suggests that this formulation by HHJ Bowsher remains the most practical guide, for parties and adjudicators alike, as to the requirement to act in accordance with natural justice to the extent that, within the constraints of adjudication, such conduct is possible.

As to sharing material with the parties, Judge Lloyd in *Balfour Beatty* also stated that, where the complaint was that some important material was not drawn to the attention of the parties by the adjudicator prior to the eventual decision, that material had to be either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. He reiterated, however, that, within the rough nature of the process, decisions still had to be made in a basically fair manner so that the whole process of adjudication continued to enjoy the confidence which it had earned.

In the context of a hearing, in its Guidance Note on Natural Justice, the

Adjudication Society and Chartered Institute of Arbitrators recommend that if the adjudicator is to draw a substantial and central conclusion from matters said at a meeting which have not formed part of the parties' written submissions, then the party against whom the finding is to be made is given a full opportunity to address the basis of the adjudicator's conclusion.

Coulson concludes that, where elementary and basic principles of natural justice have not been observed, with a resulting serious effect upon the decision in question, the court will be prepared to refuse to enforce summarily that decision. Also, that any such prima facie failure to comply with the rules of natural justice must be both obvious and important. He arrived at this conclusion by analysis of the following:

- *Carillion v Devonport – Jackson J* concluded that an adjudicator's decision to decline to consider evidence which, on his analysis of the facts and/or the law, was irrelevant, was not a breach of the rules of natural justice and had not been shown to be significant (approved by the Court of Appeal).
- *Cantillon v Urvasco – Akenhead J* stated that, for it to make any difference on enforcement, a breach of the rules of natural justice must be more than peripheral; it must be a material breach. The breach would be material if it were one that was either decisive or of considerable potential importance to the outcome of the resolution of the dispute and was not peripheral or irrelevant.

It is also noted that in *CJP Builders v William Verry* and *ABB v Bam Nuttall*, Jackson J did not enforce the adjudicator's decisions, because the breaches of natural justice by the adjudicators were material.

It would thus serve a DB, which is forced by circumstances to sail close to the wind as to complying with the

rules of natural justice, to not lose sight of the consequences and materiality of any departure from the rules. In short, any breach must not have demonstrable consequences or be material.

However, considering the following points, it is submitted that a DB should be vigilant in complying with the rules of natural justice as far as possible:

- The time for a DB within which to give its decision is generally longer than that provided for in adjudication under, for example, the HGCRA, and that the time can be extended by agreement of the DB and parties.
- The objectives of a DB decision are considered different to that of adjudication, i.e. to convince the parties that they will not achieve a different outcome at the next level of dispute resolution.

EXCEEDING THE TIME LIMIT TO GIVE A DECISION

Exceeding the time limit to give a decision is probably the most common reason for the DB to lose its jurisdiction. Generally, the contract between the parties or the DAA would state the time within which the DB must give its decision. Typical time frames for the DB to give its decisions are as follows:

- FIDIC 1999 Red Book SC20.4 – within 84 days after receiving the reference
- GCC 2015 Clause 7.1 – within 28 days of the submission of the last document on the matter to the Adjudication Board, or the conclusion of the hearing
- FIDIC 2017 Red, Yellow and Silver Books SC21.4.3 – within 84 days after receiving the reference.

In all the examples the period can be extended, but only by agreement (in writing) of the parties.

Should the DB not give its decision within the period stated in the contract, or as extended by agreement, any

decision given out of time would not be enforceable. This is so as the DB's jurisdiction ceases on the expiry of the time limit (as may have been extended).

DECIDING ON THE WRONG DISPUTE

If a DB answers a question which has not been referred to it, the enforcement of its decision is open to a successful challenge.

Unless there is an express agreement by the parties and the DB, either to widen or to narrow the extent of the dispute referred to it, it is that dispute alone that a DB has jurisdiction to decide. In other words, the DB cannot stray beyond the dispute that is referred to it. Coulson cautions adjudicators as follows:

The adjudicator is obliged to decide that dispute and cannot seek to widen his jurisdiction, without the parties' consent, to deal with other matters that are not referred to, either expressly or by implication, in the notice of adjudication.

An exception to the above would be where a particular element of the dispute, although not covered in the referral to the DB, was argued in full in the DB proceedings, by which process the respondent waived its right (unless reserved, see below) to raise any jurisdictional challenge.

It is not unusual for a DB to be tempted to exceed its jurisdiction because it can see an opportunity for assisting the parties by resolving a dispute wider than which has been referred to it. However, unless the parties expressly consent to such an exercise, the DB has no jurisdiction to proceed in this manner.

DBs must balance its vigilance to avoid expanding the scope of the dispute on the

one hand, with failing to deal with the entirety of the dispute referred to it, on the other, i.e. as much as a DB needs to be vigilant against expanding the scope of a dispute, it needs to guard against taking a narrow view and not fully answering the matter referred to it.

Coulson remarks, however, that objections regarding the scope of a dispute repeatedly fail, because the challenger fails to differentiate between the substance of the dispute and the evidence in support, which could properly be new or changed; or between a new dispute, which cannot be raised, and a new argument, which can; or between the underlying dispute between the parties and the issues/arguments relied on in support of either party's position, which may legitimately alter; or between the substantive defence and the material in support of that defence.

HOW TO DEAL WITH JURISDICTIONAL MATTERS – PARTIES

Notwithstanding a challenge to the DB's jurisdiction by a party, the parties can agree to be bound by implied agreement, or that the right to take the objection has been waived, e.g. where the dispute has been referred to the DB for a decision and no objection or reservation was made at the time of the appointment of the DB (ad hoc) or at the time the matter was referred to the DB.

Accordingly, a party that wishes to preserve its right to challenge a DB decision on the grounds of lack of jurisdiction, while continuing to take part in the proceedings, needs to tread carefully.

How does a party preserve its rights to challenge a DB's jurisdiction?

Good guidance can be had from The

Project Consultancy, in which the responding party made clear how and why the adjudicator had no jurisdiction, and that its continued participation in the process of adjudication was subject to this fundamental objection. If it is difficult to raise an objection on a specific ground, a general objection to jurisdiction might suffice. However, it should be noted that it has also been held that, where a particular ground has not been given, a jurisdictional challenge on that ground had thus been waived.

In summary, the objector should raise the objection as soon as the jurisdictional issue becomes apparent and never depart from its position (of objecting to the jurisdiction of the DB), while continuing to participate in the DB process.

HOW TO DEAL WITH JURISDICTIONAL CHALLENGES – DISPUTE BOARD

Where the DB is confronted with a jurisdictional objection, it would be well advised to keep at the forefront of its mind its obligation to adopt a procedure in coming to its decision that is suitable to the dispute, avoiding unnecessary delay and/or expense (FIDIC 2017 PR 6.2(b), FIDIC 1999 PR 5(b)) or to achieve a fair, quick and inexpensive settlement of a dispute (GCC 2015 Rule 2.2).

Often an objection to DB jurisdiction is the only defence raised by a respondent, while not responding on the merits or the quantum of the case.

An example of a proactive and effective approach by a DB in such circumstances is to, on receipt of the objection, seek a response to the objection from the other party, within a reasonable time which it directs.

On receipt of the response it considers the positions of the parties and forthwith

gives its ruling. Hearings are seldom necessary for matters of jurisdiction, thus it can generally be decided on documents only.

If the DB upholds the objection, it gives a written decision to that effect right there and then. Should it dismiss the objection, it advises that the reasoning would be included in its decision. At the same time of giving its ruling, it also directs the objector to submit its response on the merits and the quantum by a specific date. If the objector fails to do so, it is on the objector, having been given an opportunity, and the DB may then continue with the proceedings, notwithstanding the absence of the objector's responses (FIDIC 2017 PR 5.1(l), FIDIC 1999 PR 7, GCC 2015 Rule 6.4.12) – without fear or favour.

Notwithstanding that the DB had ruled on a challenge to its jurisdiction should the matter proceed and a hearing be held, it is good practice for the DB to confirm the extent of its jurisdiction at the start of the hearing.

An example of a passive and ineffective approach by a DB in such circumstances is where, on receipt of the objection, it does not investigate the matter, leaving it for any hearing, or worse, for the decision. If the objection is then dismissed, the objector is unlikely to consider the approach to be fair, unlikely to accept the decision and likely to challenge the enforceability of the DB decision on the basis of lack of jurisdiction. Also, where the objection is upheld, the referral would not have been fully heard, and where the objection is dismissed, further costs may have been incurred which would have been wasted.

SUMMARY AND CONCLUSION

Whatever the position may be in law as to conflicts of interest and rules of natural justice, etc., it is submitted that for a DB

decision to achieve its objectives, i.e. to convince the parties that they will not achieve a different outcome at the next level of the dispute resolution (generally arbitration) process, a DB needs to be perceived to be impartial (acting without bias) and to comply (at least materially and seen to be complying) with the rules of natural justice in making its decision.

In order to comply with its obligation to achieve an expeditious, efficient and cost-effective resolution of any dispute that is referred to it, a DB must act proactively, decisively and expeditiously on matters of jurisdiction.

If a party perceives or considers that it has been prejudiced by a conflict of interest or breach of natural justice, the risk of the DB not succeeding in its ultimate objective is high.

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Welcome to New DRBF Representatives

The DRBF Region 2 Board has appointed new DRBF Representatives for countries around the globe. The representatives work in their respective countries to build awareness of the Dispute Board process among all constituencies and support active engagement of members. Future issues of the *Forum* will feature profiles of their activities. In the meantime, reach out to share your support; contact details for all representatives are available on the Leadership page of the DRBF website under the Country Representatives tab.

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*Thanks to **Yasemin Cetinel** for her years of service in this role; she now serves on the R2 Board.*

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*Thanks go to **Martyn Bould** for his years of service in this role..*



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