



Session 2/Introductory **Diplomacy and DBs: Compare and Contrast DBs in Civil and Common Law**



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Diplomacy and DBs: Compare and Contrast DBs in Civil & Common Law – A Mauritian Experience



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MAURITIUS – Economic background

1

Competitive and successful economy

2

Stable and democratic government

3

Well diversified and dynamic economy

4

Vibrant private sector



MAURITIUS – Economic background

5

Well educated population

6

Strong legal environment



Construction Industry

All aspects of construction have become complex

Technically, legally, financially

In speed and in size



Construction Industry

Construction has become a contentious sector of business

The construction industry is dispute-riddled

Sea view





Construction Industry

Community recognises it is beneficial to acknowledge the existence of potential disputes

from the beginning of any contractual relationship



Construction Industry

The goal must be to reduce their frequency

To make their settlement less contentious

To shorten the dispute settlement period



Construction Industry

Dispute resolution is a service industry

The industry seeks to provide a machinery for

the speedy, economical and just resolution



Construction Industry in Mauritius

No method of Dispute Resolution can deliver in equal measure a

- Just
- Quick
- Cheap outcome



Construction Industry

The construction industry community recognises that the best method of dispute resolution is the avoidance of disputes altogether.



Construction Industry

The construction industry community identifies the important role of Dispute Boards.

Aims to avoid differences between the parties from becoming disputes that need resolution.



Construction Industry

Contrary views were strongly held for the Proposal to adopt Dispute Boards

Opponents have voiced their fears that its adoption would represent an additional layer of cost to the project

A fine-tuning of conditions of contract would suffice



Construction Industry

Dispute Board would determine the powers of the Engineer and should be dropped altogether



Construction Industry

The turning point

- ◆ Systematic failures of public contracts
- ◆ mired in never-ending complaints of spiralling costs and ever-extending delays



Alternative ways of resolving disputes

1

Dispute Boards are a relatively recent development.

2

They are essentially a creature of contract.

3

FIDIC family of contracts occupies an important position.



Theme

- ◆ Where the dispute resolution community is today
- ◆ How it got there
- ◆ A modern Third Party assisted dispute resolution framework
- ◆ Challenges – The construction industry faces to resolve disputes efficiently



Legal Framework

Mauritius enjoys a hybrid legal system

It combines civil and common law practices

Duality of concepts is rooted in its history



Legal Framework

There is a predominantly Anglo-Saxon legal culture

Lawyers and judges draw from English and French jurisprudence

The French Code de Procedure Civil co-exists with the English Civil Procedure Rules



Processes for Dispute Resolution

1

Litigation

2

Arbitration

3

Adjudication

4

Conciliation



Processes for Dispute Resolution

5

Mediation

6

Negotiation



Understanding the method of Dispute Resolution

Two different types of dispute resolution techniques

- ◆ Litigation in national courts
- ◆ Arbitration designed to achieve a final outcome



Litigation and Arbitration

Litigation and arbitration share a common model:

Resolution of disputes after they have crystallized



Construction Industry

Lawyers secure a monopoly of control over dispute processes

No fault of their own



Culture of Dispute Resolution

Lawyers approach disputes in a distinctive way

The path towards the court at an early stage



Litigation

Going to the court: toss of the coin

The system is an unsettling and expensive procedure



Litigation

How have we created a system where a commercial dispute can cost thousands or millions of dollars to resolve?



Arbitration

Arbitration played a limited role for Dispute Resolution

Not only a technical issue but also a cultural one



Arbitration

Arbitration has become a specialised field of practice in its own right

Promoted as a refinement of state-provided dispute resolution processes



Arbitration

Efficiency cost and expedition: regarded as significant benefits

Objectives of arbitration are seldom achieved



Arbitration

Originally considered a form of ADR

Lengthy and costly experience



Arbitration and Litigation

Arbitration and litigation: two sides of the same coin

Outlook and working methods are different



Arbitration

Why have problems with arbitration efficiency been such a recurring theme for so many years?

Is 21st century arbitration too much like litigation?

Is it failing to deliver cost effective and timely decisions?



Inevitability of change

A movement away from the two classical forms of third party intervention

Away from the judge in his court

Away from the arbitrator in his conference room



Arbitration

Parties opting out of the state court system:
expect a more efficient system of dispute resolution

Not a system which is less time and cost efficient.



Looking forward: the emergence of DABs in Mauritius

Disenchantment with litigation and arbitration

Emergence of Dispute Adjudication Board

Mechanism to overcome deficiencies of classical forms of dispute resolution



Dispute Adjudication Board

Demand for:

Dispute management specialists rather than

Dispute resolution experts



Dispute Adjudication Board

Dispute management

Dispute Avoidance

Structured process for a formal decision

Use of DAB in Mauritius

The construction and upgrading of the
Dr A G Jeetoo Hospital, Port Louis





Use of DAB in Mauritius

The construction and upgrading of the Dr A G Jeetoo Hospital, Port Louis

- ◆ It was rated as a substantial success
- ◆ The DAB was able to issue advisory opinions rapidly. The project continued with as little disruption as possible.



Use of DAB in Mauritius

The construction and upgrading of the Dr A G Jeetoo Hospital, Port Louis

- Provision of informal assistance was at the heart of the DAB intervention
- Parties were able to take advantage of the pragmatic advice of someone with construction experience

Use of DAB in Mauritius

The SSR International Airport Expansion





Use of DAB in Mauritius

The SSR International Airport Expansion

- ◆ The potential for conflicts over design, workmanship, delays, co-ordination was enormous



Use of DAB in Mauritius

The SSR International Airport Expansion

- ◆ The DAB was perceived as an organ of the project
- ◆ The DAB members performed functions which were largely creative
- ◆ Disputes were disposed fairly, speedily and economically



Use of DAB in Mauritius

The SSR International Airport Expansion

- The structure put in place 'sniffed out' potential conflicts
- No disputes were referred to the board
- DAB only issued advisory opinions



Real Time Dispute Resolution

The SSR International Airport Expansion

- The procedure had 'real time' value
- A defined mechanism for conflict avoidance
- Resolving disputes during the currency for the project

Use of DAB in Mauritius

The construction of New Security Prison at Melrose





Use of DAB in Mauritius

The construction of New Security Prison at Melrose

- Low number of dispute decisions for a project of this scale and complexity provides a convincing endorsement of the effectiveness of DAB.



DAB - a structural change

- Not simply another ADR
- Emergence of a structural change
- Aimed at the prevention of disputes



DAB- a structural change

- ◆ Change the attitudes and behaviour of the parties
- ◆ New attitude in the way parties perceive disputes
- ◆ The way in which they relate to one another
- ◆ The way they act in resolving disputes



DAB- a structural change

- ◆ Mutual trust and co-operation
- ◆ Good working relationship



The Challenge

Most commercial lawyers are trained in

- ◆ Litigation in national courts
- ◆ Arbitration, designed to achieve a final and enforceable outcome



The Challenge

Radical Change in

- ◆ Attitude
- ◆ Skills



Construction Industry

Winning is more important

Contrary to finding a fair solution at a minimum cost

Focus on rights, not interest

On victories, not continuing business relationships



Attitude

Rights and obligations are often not the best pointer to an interest-based outcome to a dispute between people



Attitude

Young generation of lawyers
to develop an attitude that is
consistent with the real
interests of their clients



Skills

Skills of legal profession

Acquisition of dispute management skills

Involvement in preventing potential disputes



Conclusion

Construction industry dealt with dispute resolution through arbitration and litigation

Both processes have played an essential role



Conclusion

- 1 Neither litigation nor arbitration is truly innovative.....
- 2 It is no more a refinement applied to a system that has been used for hundred of years.....
- 3 Focus on third party intervention model will not last very far.....
- 4 Emphasis is on dispute management.....



CONCLUSION

DAB: Model appears to be a worthwhile candidate for dispute avoidance

Merits of DAB is easier to evaluate than predicting how rapidly the business community will react to it



CONCLUSION

Lawyers must take a constructive part in the development of dispute avoidance

How far and how fast the lawyers will run with it is another debate



THANK YOU FOR LISTENING

