

## Using dispute boards to avoid and resolve construction disputes

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The third in a series of articles looking at the major issues facing construction today

DISPUTE boards are a form of dispute resolution procedure which is increasingly being promoted by standard form construction contracts and institutions. In the first article of this series, we identified that construction disputes are increasing in value and number as projects become more complex, but that innovation is allowing them to be resolved more quickly. Dispute boards are an example of this type of innovation, and have the potential to enable parties to avoid and resolve disputes more cost and time efficiently.



The adoption of dispute boards varies from jurisdiction to jurisdiction and project to project. However, it is clear that they will have an increasingly important role to play in resolving the disputes that inevitably arise in the context of ever more complex global projects. They also align with the industry's drive towards better collaboration and dispute avoidance.

### What is a dispute board?

A dispute board is a contractual form of dispute resolution procedure. It typically consists of one or three members, whose powers to resolve disputes are set out in the contract or relevant dispute board rules. The dispute board may be formed on an 'ad hoc' basis when a dispute arises, or at the outset of a project as a 'standing' dispute board. Dispute boards typically fall into one of three broad categories:

- A dispute review board (DRB), which issues informal advice and non-binding recommendations;
- A dispute adjudication board (DAB), which issues binding decisions;
- A combined dispute board, which carries out both functions – for example, the FIDIC (the International Federation of Consulting Engineers) 'DAAB' – a dispute avoidance/adjudication board.

### Dispute boards in standard form contracts

DABs (dispute adjudication boards) rose to prominence with their inclusion in the FIDIC 1999 forms of contract. However, their use in practice was inconsistent. In some cases, the contract provisions providing for DABs were deleted or the parties did not constitute them even where the contract provided for their use. In others, the DAB was used on an ad hoc basis, to provide decisions in respect of disputes that had long since crystallised, as a mandatory precondition to referring those same disputes to arbitration or a court for final determination. However, this trend is now beginning to shift.

### Dispute boards in FIDIC contracts

FIDIC, in its 2017 forms, has now introduced DAAB, a standing dispute board with dual roles – to issue decisions, like a DAB; and, importantly, to help the parties to resolve issues before they turn into formal disputes in the first place. Carrying out this role effectively depends on the parties moving away from viewing a dispute board as simply a disconnected decision-making body. Instead, the DAAB needs to be viewed as an objective and engaged partner that helps the parties to avoid and overcome disputes.

Used to its full potential, the DAAB has a much greater role than simply issuing decisions. Recognising this potential, the World Bank has recently confirmed its intention for the DAAB to have a role in monitoring compliance by contractors, and their supply chains, with gender-based violence obligations on World Bank-funded projects.

### Dispute boards in other contexts

Provision for dispute boards is no longer the preserve of the FIDIC forms of contract. Other contract forms have followed suit:

- The New Engineering Contract (NEC) now includes an additional dispute resolution clause in its NEC4 contracts providing for the use of a dispute avoidance board (option W3) – albeit NEC advises that this is not suitable for use in the UK, where work is covered by the construction act;
- The Joint Contracts Tribunal (JCT) has now issued its 2021 dispute adjudication board document, which is construction act compliant.

As well as the standard forms, a number of major institutions have also developed their own dispute board rules. These include:

- The 2012 ICE Dispute Board Procedure;
- The 2014 CIARB Dispute Board Rules;
- The updated 2015/2018 ICC Dispute Board Rules; and
- The Cairo Regional Centre for International Commercial Arbitration (CRCICA) dispute board rules, which were launched earlier this year.

### **The case for dispute boards**

There are clear benefits to using dispute boards. They provide a method for resolving disputes without recourse to the expense and time-consuming process of arbitration or litigation. They also have a key role to play in preserving relationships and ensuring contracts are managed properly, by helping the parties to avoid disputes before they even crystallise.

Concerns are sometimes raised about the perceived expense of dispute boards, the enforceability of their decisions and potential conflict issues where a dispute board carries out a dispute avoidance as well as decision-making function.

However, the cost savings generated by an experienced dispute board resolving and avoiding disputes should, at least in principle, far outweigh the comparatively modest cost of the board members' fees.

A dispute board made up of experienced members should also be capable of avoiding circumstances which might call into question their impartiality and independence. On enforceability, the 2017 FIDIC forms now expressly permit a party to refer non-compliance with a binding, but not final, decision straight to arbitration.

### **Global use of dispute boards**

#### **UK**

Dispute boards are not commonly used in the UK given the availability of statutory adjudication to provide a quick temporary binding and enforceable decision in respect of construction disputes. However, the two processes are not necessarily mutually exclusive. Indeed, a form of dispute resolution board – the Independent Dispute Avoidance Panel (IDAP) – was used to great success on the London 2012 Olympics project, alongside a separate adjudication panel. As mentioned above, JCT has also recently published its construction act compliant dispute adjudication board document.

#### **Middle East**

Despite the wide use of FIDIC in the Middle East, the use of dispute boards is less common. Dispute board clauses are often struck out during contract negotiations because they are seen as an unnecessary additional step before arbitration or litigation, and are not necessarily seen as a rapid dispute resolution method.

Standing dispute boards are rare in the region, as parties tend to take a more conservative approach and prefer to have their disputes dealt with in a more adversarial manner – arbitration or litigation. If the parties do use a dispute board, this is likely to be on an ad hoc basis. That said, we are starting to see an increase in dispute boards being set up to resolve claims arising from the COVID-19 pandemic.

#### **Europe**

Dispute boards are not often used in Western Europe. Construction disputes in public or governmental projects are sometimes heard under a special jurisdiction in the local administrative courts, and private projects are largely submitted to arbitration or the civil jurisdiction of local courts. A number of European jurisdictions are instead looking to mediation as an alternative to, and intermediate step prior to, arbitration or litigation.

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In certain Central and Eastern European (CEE) countries, there have historically been issues around the enforcement in local courts of arbitral awards dealing with non-compliance with dispute board decisions.

That said, dispute boards are beginning to be used on a number of projects in CEE and Western Europe. It is expected that their use will continue to increase given the uptick in their use in other parts of the world and adoption in standard form contracts and by certain institutions.

### **Africa**

The uptake and success of dispute boards varies in different African countries.

In South Africa, dispute boards are a popular and successful mechanism for resolving construction-related disputes. There is a wealth of local knowledge and experience. Enforcement of a DAB decision is relatively straightforward, and the courts are keen to act accordingly.

Uptake is more limited in the northern part of the continent. While alternative dispute resolution mechanisms are entrenched in certain jurisdictions such as Kenya, the focus appears to be more on arbitration and mediation. Likewise, in countries like Botswana and Zambia, DABs are a known method for resolving construction disputes, but no statutory framework exists to enforce decisions rendered. Again, other mechanisms like arbitration and mediation tend to be the preferred methods for resolving construction disputes.

### **Asia Pacific**

The value of Australian and New Zealand projects using dispute boards is close to \$60 billion, according to the Dispute Resolution Board Foundation. However, dispute boards do not seem to have been embraced equally across all jurisdictions in the APAC region.

Many Asian countries still seem to be reluctant to use dispute boards as a means of avoiding and resolving disputes. The reasons for this reluctance range from the costs involved in setting up a dispute board, to a shortage of available board members and lack of expertise in those that are available. That said, with the recent revisions to the FIDIC president's list of adjudicators this year increasing the geographical diversity of adjudications, it is hoped that this will encourage more uptake in the region.

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