The Use of Dispute Boards on Major Infrastructure Projects

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ABSTRACT

This article provides an overview of the use of Dispute Boards on major infrastructure projects, including a brief summary of the history of Dispute Boards, an examination of the rationale behind their use, considerations to be taken into account at various stages in their operation in practice and with respect to their composition, and an assessment of the likely growth in the use of Dispute Boards on future infrastructure projects.

I. WHAT IS A DISPUTE BOARD?

A Dispute Board (DB) is a 'job-site' dispute avoidance and adjudication process, typically comprising three independent and impartial persons selected by the contracting parties. The significant difference between DBs and most other alternative dispute resolution (ADR) techniques – and possibly the reason why DBs have had such success in recent years – is that many DBs are established at the commencement of a project and by undertaking regular visits to site, and are actively involved throughout the construction process (and possibly any ensuing concession period). The DB becomes a part of the project administration and, during the construction period, can influence the performance of the contracting parties thereby averting issues that could, if ignored, result in disputes. DBs thus have 'real-time' value. It is usual (but not compulsory) that an opportunity remains for the matter to be referred to arbitration or to the courts if a decision of the DB does not find acceptance by the parties. Thus a DB may be likened to UK adjudication, either under statutory-compliant contracts or under the scheme established by statute itself (i.e. The Housing Grants Construction and Regeneration Act 1996). What a DB does that UK statutory adjudication does not generally do is to provide a regular forum for discussion of difficult or contentious matters, to identify ways forward by acting in an informal capacity and to create valuable opportunities for the parties to avoid disputes by keeping proactive communication alive. Other benefits, particularly in situations where a single DB is appointed to operate across separate contracts (within a single project), include consistency in decisions and the possibility of

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applying decisions of the DB 'project-wide'.

The terms Dispute Board and Dispute Resolution Board are generic and include the Dispute Review Board (DRB) (a device originating in the USA that provides a non-binding recommendation), the Dispute Adjudication Board (DAB) (a device emerging from the earlier US model but which provides a decision that has interim-binding force), and the Combined Dispute Board (CDB) which is a hybrid of DRBs and DABs created under a dispute boards scheme published by the International Chamber of Commerce (ICC). Various other terms have been use such as Dispute Settlement Panel, Dispute Avoidance Panel and Dispute Conciliation Panel. These different varieties of dispute resolution devices are fundamentally the same, each providing a means of dispute avoidance and early adjudication based on the contractual agreements made by the parties.

A DB is therefore a creature of contract. The contracting parties establish and empower a DB with jurisdiction in connection with the resolution of disputes. Within the UK, the contracting parties may establish a DB to adjudicate construction contract disputes in compliance with the statutory requirement for adjudication, with the DB acting as Adjudicator.[1]

While the origins of DBs are found in the construction industry, their ambit is far wider than construction contracts, DBs now being found in the financial services industry, the insurance industry, the IT industry, long-term concession, operational and maintenance contracts and in consumer protection. The scope for DBs is wide. The emergence of the ICC as an active supporter of dispute boards (the ICC Dispute Board Procedure having been launched on 13 October 2004) makes it highly probable that dispute boards will be utilised in industries that have not, as yet, utilised dispute avoidance techniques or adjudication.

II. THE HISTORY OF DISPUTE BOARDS

DBs evolved to meet the construction industry's need for prompt, informal, cost-effective and impartial dispute resolution. The DB concept originated in the USA where it has now been used for over forty years as a means of avoiding and resolving disputes in civil engineering works, particularly those arising during the construction of dams, water management projects and contracts for underground construction. The earliest reported use was on Boundary Dam in Washington in the 1960s, where the technical 'Joint Consulting Board' was asked to make decisions regarding conflicts, etc. The idea worked well and the die was cast.

In 1972, a study was undertaken in the US by the National Committee on Tunnelling Technology into improved contracting practices. This led to a publication, in 1974, entitled '*Better Contracting for Underground Construction*' in which the undesirable consequences of claims, disputes and litigation were highlighted. As a result of the study and the consequent publication, a DB was established in 1975 for the Eisenhower Tunnel in Colorado. The benefits of the DB approach were recognised and appreciated by contracting parties and 'The Eisenhower' became an example that was followed with enthusiasm throughout the USA.

1 See the ICE Dispute Resolution Board Procedure, 2005.

The Fédération Internationale Des Ingénieurs-Conseils, the international organisation based in Geneva that represents consulting organisations and which is best known as 'FIDIC', publishes several forms of contract that are in popular use for international procurement. The FIDIC forms emanate from the standard form of contract published by the Institution of Civil Engineers in the UK. Both the ICE and FIDIC forms originally empowered the 'Engineer' to act in a quasi-judicial manner in deciding disputes that arose between the contracting parties. As suspicions grew over the true independence of an owner's agent (the Engineer) to determine disputes fairly (particularly as the powers of the Engineer to decide financial and programme extensions became further restricted by the Employer), and as costs in resolving claims by arbitration or the courts increased, there developed a need for a cheap and timely system of dispute resolution in large infrastructure projects, especially where parties of differing nationalities were involved.

In 1980, a DB was used on a large international project in Honduras – the El Cajon Dam and Hydropower station. This project was funded in part by the World Bank and involved an Italian contractor, a Swiss 'Engineer' and an owner – the Honduras Electricity Company – that had never before embarked on such a large project let alone one employing 'international' contractors. The World Bank, eager to see the project complete on time and to budget, instigated a US-style DB to assist in overcoming potential problems. The El Cajon DB was successful and the use of such devices on large international projects began.

In about 1990, the World Bank published '*Procurement of Works*' which comprised inter alia a modified FIDIC contract with provisions for DBs to publish non-binding recommendations. FIDIC followed suit in 1995/1996 with a new version of the Design-Build Contract and an optional amendment to its standard form construction contracts. In both these new documents Dispute Adjudication Boards or DABs were introduced. It was at this stage when the divide first occurred between the traditional DRBs, which give non-binding recommendations and DABs with their interim-binding decisions. Additionally, FIDIC – audaciously for an organisation that essentially represents the Engineer – removed the Engineer as the first-tier dispute decider if the DAB option was incorporated in the Contract.

In 1999, FIDIC revised its various forms of contract wherein the DAB was presented as the principal means of dispute resolution within the contractual mechanisms. In the Red Book (Construction), the DAB is to be established ab initio (thus being a true and 'standing' dispute board) whilst in the Yellow Book (Plant and Design/Build) and Silver Book (EPC/Turnkey), the establishment of the DAB may be deferred until disputes arise (although some enlightened owners have elected to use a standing dispute board despite using the Yellow and Silver Book contracts).

Then, in 2000, the World Bank produced a new edition of the '*Procurement of Works*'. This was a significant publication as the World Bank, for the first time, moved away from the US model of DRBs and towards the FIDIC-style DABs. The World Bank had thus adopted a contract whereby the DRB (the name and acronym were unchanged) gives recommendations that are interim-binding and which did not require the Engineer to act in the traditional quasi-judicial manner in deciding disputes arising between the parties.

In 2005 the World Bank and FIDIC embarked upon a process to harmonize and bring into alignment their differing DRB/DAB provisions. Other development banks (e.g. EBRD, Asian Development Bank, African Development Bank) supported this harmonisation process and in late 2005, a set of contract conditions known as the FIDIC Harmonised Edition of the Construction Contract for Multilateral Development Banks was published and which is to be adopted within construction contracts funded by the leading development banks. The Harmonised Conditions (as they are known) utilise standing dispute boards.

Finally in this historical catalogue, September 2008 saw the publication of the FIDIC Gold Book for 'Design, Build and Operate' which establishes a standing DAB.

Mention should here be made of the initiative by the UK Institution of Civil Engineers to devise a statute-compliant clause for its standard form construction contract whereby dispute boards may be established in compliance with the UK statutory provisions for adjudication (Housing Grants, Construction and Regeneration Act 1996). This provides contracting parties with the necessary contractual wording and procedures should they wish to adopt a dispute board for dispute avoidance and subsequent adjudication. The associated ICE DRB Procedure permits contracting parties to utilise a dispute board as part of an ICE contract.

By early 2007, well over 1,350 projects had been completed or were undergoing construction utilising DBs. The total value of these projects approached USD 140 billion. Although issues of confidentiality prevent an absolute determination, it is understood that almost 2,500 disputes have been the subject of DB decisions. There have been few occasions (under thirty cases reported) where a DB's decision or recommendation on a substantive dispute has been referred to arbitration or the courts. Of such referrals, very few decisions of a DB have been overruled. The Dispute Resolution Board Foundation has conducted research that indicates over 98% of disputes referred to dispute boards conclude the matter in issue, either directly or as a result of the parties using the DAB decision or DRB recommendation as a basis for settlement. Of the 2% referred on to arbitration or the courts, half of those that reach a determinate stage see the DB's decision upheld and well less that 1% overturn the DB decision.

DBs are currently known to be in operation in numerous countries (for example US, UK, Ireland, France, Sweden, Denmark, Lithuania, Bulgaria, Romania, Czech Republic, Iceland, Greece, Cyprus, Italy, Switzerland, Turkey, South Africa, Lesotho, the Sudan, Uganda, Tanzania, Mozambique, Swaziland, Ethiopia, Egypt, Hong Kong, China, Vietnam, India, Pakistan, Bangladesh, the Maldives, the Bahamas, St Lucia, New Zealand, and Australia). They are ideally suited to the larger projects, projects which are 'international' (i.e., contracting parties from differing domiciles) and multi-contract projects such as mass transit and high speed railways, large power stations and the like. A recent development is the establishment of DBs for major concession projects lasting over several decades (e.g. the Channel Tunnel Rail Link, UK hospitals, schools and private power plants) and to avoid and/or decide disputes arising between major contractors and its insurers.

DBs are undoubtedly set to grow in popularity and frequency of demand for several clear reasons. First is the support given by the World Bank, other development banks,

FIDIC, the ICC and the ICE. Secondly is the success shown by dispute boards in avoiding and resolving disputes in a fast and inexpensive manner with high quality (i.e. well-informed) decision making. Thirdly is the growth of adjudication as a first instance decision maker in construction disputes principally arising from the UK 'Adjudication' Act. Finally there is ever-growing need in construction for certainty and consistency in decision making during, rather than after, the period of construction.

III. WHAT ARE THE PARTIES HOPING TO ACHIEVE BY USING A DISPUTE BOARD?

The construction industry has a reputation for disputes and conflict. Anecdotal evidence from Australia (which estimates that AUD 8 billion per year is 'in dispute' between contractors and owners) indicates that 50% of all legal cost associated with construction is expended in connection with disputes. In almost 10% of projects between 8% and 10% of the total project cost was legal cost. Not surprisingly, these projects have a high incidence of disputes. This expenditure, which globally represents an enormous sum each year, does not begin to take into account the hidden costs of disputes, the damage to reputations and commercial relationships, the cost of time spent by executive personnel, and the cost of lost opportunities. The situation is aggravated by the increased use of joint ventures both in consulting and in contracting. Such organisations are less autonomous and perhaps less able to negotiate settlements of their contractual problems. By contrast, DBs can effectively operate for a fraction of overall project cost (see below).

Every construction project is unique and perhaps this is why there is a general absence of 'corporate memory' in the construction industry. Regrettably, similar disputes arise on many construction projects and dispute adjudicators and arbitrators are constantly being required to decide the same substantive dispute, albeit associated with differing factual backgrounds. It is naive to think that we can eradicate disputes through clever contract drafting alone. Differences in the interests of the parties will occur, many of which will be reflected in sizeable sums of money thus providing fertile ground for disputes. What parties want is a dispute resolution device that is considered fair and economic and one which will maximise the likelihood of due performance of the contract. This is especially true of large projects where contract periods are lengthy and good inter-party relationships and interface management are important for satisfactory performance. Certainty is sometimes as important as correctness.

Contracts do not always provide the necessary mechanisms for precise determination of entitlements. Many disputes concern 'non-absolute' matters, and in such cases, the DB can devise solutions which avoid 'win-lose' situations whilst keeping within the contractual boundaries.

There is much transatlantic debate over the benefits and shortcomings of non-binding recommendations and interim-binding decisions. Even if the DB recommendation is contractually 'non-binding' (as many still are – particularly in the US) this does not appear to impair the efficacy of the decision. It is suggested that there are two main reasons for this. First, that if the DB recommendation is admissible in later proceedings, as it often is, the parties know that an arbitrator or judge will be greatly influenced by a decision on the facts given by a panel of experienced, impartial construction experts who were familiar with the project during its construction. By

having witnessed the technical and physical conditions prevailing at the time, DBs can reduce the need for difficult ex post facto determinations and the expensive and time-consuming task of reconstructing historical events. Anticipating this, the parties are likely to accept a DB's recommendation – 'warts and all'.

Secondly, there are the swings and the roundabouts. Indeed it is unlikely that over the course of a large, lengthy project the DB will always find in favour of the same party. It is however probable that each party will be pleased with certain decisions and if they expect the other party to honour the favourable decisions, they would be obliged to accept those which are less than favourable.

Contrastingly, the interim-binding (FIDIC-style) decision has teeth, in that the DB decision must be implemented contractually and at once – even if one or other party is unhappy. Therefore a 'losing' party would be in breach of contract if it were not to perform in accordance with the DB decision.

In summary, there is no right or wrong answer whether the output from a DB should be a non-binding recommendation or an interim binding decision. Much depends upon circumstances, jurisdiction, the skills and identity of the board members and the needs of the parties as well as cultural considerations.

IV. THE COMPOSITION OF DISPUTE BOARDS

DB panels of three are usual, but this composition is not mandatory. For small projects which cannot justify the expense of a three-man panel, a DB of one person can be utilised. Both the World Bank and the FIDIC conditions encourage one-man boards for smaller contracts. Very large multi-discipline and multi-contract projects could necessitate a larger pool from which a panel of one or three (or more) members can be selected.

The Channel Tunnel project had a Disputes Review Board of five persons. Although the quorum was three, in practice all five members heard all disputes.

The Hong Kong Airport had a group (Disputes Review Group, DRG) of seven members plus a convenor to cover all the main contracts (about twenty) awarded by the Hong Kong Airport Authority. A panel of one or three members (at the referring party's choice) was selected to hear and determine a referred dispute depending on its nature or complexity. The members of the Hong Kong Airport DRG were chosen to provide the range of expertise that was considered likely to be required in order to comprehend the technical aspects of disputes that could arise.

Under the Channel Tunnel Rail Link project, a USD 5 billion concession project in the UK (construction started in October 1998 and took ten years to complete), two panels were envisaged; a technical panel comprising engineers who give decisions on construction related disputes and a finance panel who give decisions on disputes concerning the financial provisions of the concession agreement.

The UK Docklands Light Railway Extension to Lewisham, which opened to the public in about 2000, established technical and financial panels (each of three persons), chaired by the same individual. Interestingly, eleven years after public opening the parties called upon the DAB to hear and decide an operational issue that had arisen.

Numerous DBs have been established in Eastern Europe for long-term concession infrastructure projects. With concession projects, the notion is that the board will have a 'moving membership' to suit the various stages of the project (construction, operation and maintenance, tariff indexation, economic trends, etc.). Outside the concession environment, scores of traditional DBs have been established for infrastructure projects, funded by various EU initiatives, and aimed towards upgrading to European Union standards roads, water treatment plants, airports and the like.

V. APPOINTMENT AND MEMBERSHIP

Typically, each party selects one member of the DB, with the third member, who acts as chairman, being appointed either by the parties or by the first two members. For DBs to function well, the right to lodge (reasonable) objection over the other party's selection should be included. Despite the first two appointed members being party selections, each DB member is entirely independent. Appointment is *not* as party representative. The members are to serve both parties with total impartiality. Terms of appointment usually prohibit the appointment of persons who have previously worked for either of the parties and, in some cases, who are of the same nationality as the contracting parties. A DB that is perceived as partisan will not engender respect, and its recommendations or decisions are less likely to be accepted. Consequently, whenever possible, active participation by all parties in the selection of members should be encouraged.

Another method of selection is for the parties to agree upon the identity of the chairman who, once appointed, would work with the parties in selecting the other members.

DB members should be chosen with care because the success of a dispute board depends on the parties' confidence in the expertise of the members, particularly that of the chairman who must conduct the regular meetings and hearings fairly and firmly. In construction projects, the majority of issues brought to the attention of a DB have a technical content. In such cases, a member with little or no understanding of such matters may fail to appreciate the extent of the dispute and may thus be unable to contribute to the proceedings. Additionally, members need to be both well versed in contract administration and confident in their ability to understand and interpret contractual provisions. It is customary for the DB to publish its decisions alongside an account of its reasons. Confidence in the DB would disappear if the DB's interpretation of contractual provisions appeared bizarre or unsubstantiated. As much of the (best) work of a DB is dispute avoidance, those with practical experience of the construction industry are of great benefit to the DB.

Qualities essential for DB membership include open-mindedness and respect for the opinions and experience of the other members. For DBs on international projects, the members are in very close proximity throughout the site visits and during any hearings and subsequent deliberations. Harmonious relationships and mutual trust are vitally important. Whilst decisiveness may be a virtue, individuals possessing very dominant personalities may prove unsuitable as DB members. A successful DB is a team effort and it is therefore important that all members are thoroughly committed to the success of the process.

Appointment should be for the duration of the construction contract and termination of either a member or of the DB as a whole should only be 'for cause' and then by agreement between the parties.

There are several lists of 'qualified' dispute board members to which parties or their advisers may turn to for the purpose of finding suitable persons. FIDIC maintains a list of persons (President's List of Approved Dispute Adjudicators) who have been scrutinised and examined over a gruelling three-day assessment period and found properly experienced and qualified for DB appointments.[2] Similarly the Institution of Civil Engineers maintains a list of persons who also have been tested for suitability.[3] The Dispute Resolution Board Foundation – a US-based non-profit organisation that promotes the use of dispute boards – lists members' CVs which can be browsed by parties seeking to appoint DB members.[4]

VI. ROUTINE OPERATIONS

Experience indicates that the routine visits to the project of a DB become a focus for the parties and their professional advisers. Claims, potential claims and matters of concern are subject to regular (albeit general) review and are not permitted to lie and fester, surfacing again as major disputes some time later.

The frequency of site visits depends upon the nature of the work, the construction activities in process, and the number of potential or actual disputes. In technically complex construction projects, those where ground conditions are known to be suspect, or where contract interfaces and rates of progress could become issues, visits should be relatively frequent - perhaps three monthly. This frequency can reduce to, say, every six months as the work progresses. Whenever appropriate, site visits should be combined with hearings of disputes (which would normally be conducted on or near the site).

A typical programme for a visit would be for the DB to be given a brief progress update followed by a site inspection, particularly of those areas where potential difficulties exist, (e.g. rock quality in a tunnel drive). The parties would be given ample opportunity to provide the DB with further information on such issues, not by way of contractual argument but so that the DB can better appreciate the consequential impacts on the project and the steps the parties and their advisers could take in mitigation. Further site inspections of particular areas could take place in the light of information received. The DB will also convene sessions with the parties during which the DB asks questions or seeks additional information from the parties as to how they (the parties), are going about resolving their differences. These sessions often stimulate remarkable interaction between the parties, and it is not unusual for issues to be clarified and new understandings develop as a result.

One cannot emphasise enough the potential value of these informal review meetings during the routine visits. The parties are to be encouraged to prepare joint schedules of 'matters of concern' on a monthly basis wherein either party (and members

2 See <www.fidic.org>.

3 See <www.ice.org.uk>.

4 See <www.drb.org>.

of the professional teams) may list those issues that are causing concern – possibly sectionalised – such schedule (similar to a Scott Schedule used in arbitration or litigation but of wider ambit) being the basis for discussion at the DB meetings. This is where the magic of the DB is truly found. The DB can both extract from the parties the root causes of their various concerns, and ensure that these causes are communicated and explained to the other side so that positive ways forward are found to overcome the concerns thereby avoiding a crystallisation of the particular dispute. This might be viewed as 'assisted partnering' but whatever label it is given it is, without any doubt, a valuable means of dispute avoidance, consensual agreement and of providing more certainty for timely completion and budget adherence. If it is evident that a particular matter on the schedule is not becoming resolved, early reference to the DB can be made, often by mutual agreement, so that the matter might be determined by the DB and thereby be moved forward. Both parties and the DB feel a sense of achievement when, at the end of the project, every entry on the aforementioned schedule is noted as 'settled', enabling contract close-out to be achieved promptly and without costly, time-consuming and 'win-lose' arbitration or litigation.

In cases when a dispute has arisen, the hearing and adjudication of the dispute would commence on site once the routine visit is over. Hearings are described below.

It can be advantageous for the DB to prepare a report at the conclusion of each regular site visit. This should state what occurred and make suggestions as to how matters of concern could be progressed to settlement. Generally bad news travels up the corporate hierarchy slowly so the higher up the command chain the DB report reaches, the greater the chance an issue will be settled amicably and promptly.

Apart from the regular visits to the site, DB members should be kept informed of construction progress on a regular basis, usually by being sent copies of, or extracts from the routine progress reports. It is vital that the DB member takes the trouble to read and digest the contents of these reports and to keep them accessible for later reference should a dispute arise. The amount of time (and storage space) required should not be underestimated. Total familiarity with the project is essential when visiting the job-site, and a member who has not read the reports will soon be discovered. But a member's obligation is not just to read reports; DB members must be available at short notice to review dispute submissions, convene hearings and prepare decisions. This availability is paramount and warrants the retainers which members are usually paid. The DB agreements might specify a period from notification within which the hearing is to be convened. For the members of the DB to request deferrals of the hearings because of inflexible schedules defeats a principal benefit of the DB. Consequently, individuals should not accept invitations to serve on DBs unless they have the availability to fulfil these important obligations. Those with heavy professional commitments (for example senior partners of consultants, directors of construction companies and the like) should think carefully before seeking DB appointments, and refrain from offering their services unless they feel entirely sure that they can drop everything at short notice in order to spend a week at a hearing in a remote part of the world where even the latest iPhone is of little utility.

Construction disputes often originate within the sub-contract. A DB established under a contract between an owner and main contractor (or concessionaire) can be

empowered to hear disputes arising at lower tiers of the contracting hierarchy. Clearly, such arrangements need to be structured at the time sub-contractors are engaged and thus ensure the subs 'buy-in' to the DB process and accept the DB members.

VII. THE COSTS

Compared to the likely costs of arbitration, DBs do seem to offer good value. It has been estimated that three-man DBs can cost (overall) between 0.05% and 0.3% of total project costs. Clearly, the larger the project the easier it is to justify the expense of a DB but one-man 'local' boards can be considered for the smaller projects at very modest costs. It is usual that the cost of a DB is shared equally by the contracting parties, some users viewing the expense of a DB as an insurance premium against more costly resolution procedures. Within multi-contract projects and when using the same DB for all the contracts, it is not unusual for the employer/owner to appoint the DB in consultation and with the agreement of a local contractor's association or professional institution (such as has been done for London 2012 with the assistance of a number of UK professional institutions, principally the Institution of Civil Engineers) such that the DB is established before the first of a series of contracts is awarded. Payment for the routine operations of the DB may then be paid entirely by the employer/owner, the rationale being that these costs are project costs in any event. The costs of the DB activities in connection with formal referrals are, however, split equally between the parties thereby preventing excessive use of the DB by a party that has no obligation to pay for the proceedings.

Research by the Dispute Resolution Board Foundation (the DRBF) has shown that the costs of a DB are offset by the lower bid prices that are known to result when contractors prepare tenders on DB contracts, particularly when working overseas. Obviously, a tenderer will include DB costs in their tender but they should not need to inflate their prices to cover what, without the DB, may be a risk of injustice or delay. In cases where the DB actually replaces the owner's Engineer as the first-tier adjudicator, the terms of reference under which the Engineer is appointed may omit certain of the dispute resolution functions, thus producing some savings which to an extent off-set the cost of the DB.

One of the most significant aspects in considering the expense of a DB is perhaps the significant difference in time (and therefore costs) between preparing a dispute for a DB hearing and in assembling the voluminous trial documentation to put before an arbitrator or a judge – costs that are never recovered in full, even by the winning party.

Notwithstanding the cost of resolving a particular dispute being considerably less by DB than by arbitration or litigation, the parties do expect something for their money, and a proactive, enthusiastic and well-informed DB will achieve far more and give better value than one that is entirely passive or reactive.

VIII. HEARINGS

When either party considers that a dispute should be put to the DB, that party, (usually the Contractor, but not always), initiates an application.

A hearing before a DB is far less formal than an arbitration hearing or an action in court. It is more like a site meeting. Typically, although there are many variations,

each party would have presented 'position papers' to the DB and to the other party some days before the hearing date. These position papers should not attempt to be legal 'pleadings'. The objective is for each party to commit to paper its own understanding of the disputed issues (of fact and contractual entitlement) and to state reasons why it considers its opinions are correct. By this means, the issues should become crystallised, for the benefit of the DB and the parties themselves. The position papers should avoid the 'attack-defence' routine, which inevitably leads to confrontation and can result in the real issues of the dispute being lost in procedural skirmishes.

The position papers may cite contract provisions and refer to relevant documents but they should be relatively slim submissions. A bundle of supporting 'reliance' documents, preferably agreed by the parties (common bundle), can be provided. If the need arises, further information can be supplied. If a dispute concerns both principle and quantum, these matters can be heard separately. This separation (which is a feature of the US-style DB process) can be particularly beneficial in cases where an employer has not evaluated quantum or has neglected to analyse the contractor's proposed quantification on the grounds that the claim is considered as having no contractual merit. In such cases, a decision on the principle alone may be the first stage in what may become a two-stage process. This often encourages the parties to resolve the quantum issue themselves, without further involvement of the DB. It is, however, sensible for the DB to have an idea of the quantum involved when considering principle alone.

Both parties should be present throughout the hearings and the DB should not receive confidential information on a dispute from either party. Adjudication, by DB or other means, differs from mediation in this important respect.

At the commencement of the hearing, each party would be required to outline its position paper to the DB, possibly agreeing to certain facts contained in the other party's paper. The DB would then raise initial questions and may ask a party to respond to particular points. Usually, each party would be given an opportunity to submit a brief rebuttal paper, but the hearing should not become confrontational and the DB needs to be quick in controlling a party shaping up for a fight. Witnesses of fact may be called, but cross-examination would generally be through the DB. In certain situations there may be benefit in cross-questioning by the other party, particularly if technical matters are in issue. Use of expert witnesses is unusual as the DB members are themselves usually construction professionals who bring wide experience to the project. However, party experts are not unknown in DB proceedings and may, in certain circumstances, add value. By way of example, a taxation expert was engaged by a DB on a project in China where the parties were in dispute over the application of Chinese taxation decrees.

After the position papers and rebuttals, the DB would normally adjourn the hearing in order to hold private discussions, possibly reconvening to make further enquiries until such time as the DB feels adequately informed of the issues and of the facts. It is important that each party feels satisfied that it has been given adequate opportunity to present its case. The DB must however be firm in preventing repetition and be prepared to tell a presenter who likes the sound of his or her own voice or who wishes always to have the last word on every subject, to rest his, or her, case.

Particularly when decisions are non-binding, eventual acceptance of the DB decision

depends on the parties' confidence in the DB process. This process is inquisitorial and thus in contrast to the adversarial processes of arbitration and litigation. It can be argued that the DB is under a positive obligation to make any necessary inquiries before reaching its decision.

Once the hearings are closed, the DB sets about preparing its written decision. The DB will, before publishing the decision, deliberate on all it has heard and read during the hearing, review the contract documentation and consider the particular circumstances of the dispute. It is not unrealistic for a DB to hear a dispute and publish its decision whilst still on site. Some decisions may take longer, particularly where quantification of time and costs are involved, but the touchstone of DB adjudication is prompt settlement.

It is clearly preferable for the DB to act as a single entity and give unanimous decisions. Whilst provisions may allow the DB to give majority decisions (with minority opinions), this would be unusual and unsatisfactory. If differing views are held by the members, these can often be incorporated within the decision without adversely affecting the final outcome. Unanimous decisions engender confidence in the DB process and are more likely to result in a settlement. Under some DB provisions, arbitration is only permitted in the event of a non-unanimous DB decision.

The DB's 'product' is its decision document and this should be drawn up carefully, and with particular attention towards ensuring that a party knows why it has failed on a point or issue. As a general rule, the decision should be written for the unsuccessful party's benefit (not forgetting that both parties can win and lose issues within a DB decision). DB decisions are often useful to the parties in settling future disputes where the same or similar matters arise.

IX. DISPUTE BOARD PROCEDURES

To achieve maximum benefit from a DB, the procedures adopted for the hearing of any formal referral should be simple, easily understood, fair and efficient. To impose multiple steps of review and negotiation prior to or during the DB hearing might lessen the likelihood of success by increasing confrontation. In particular, procedures should facilitate the prompt adjudication reference of the dispute to the DB if dispute avoidance fails.

The World Bank, FIDIC, ICC and the ICE publish standard procedures for use by DBs and, in the main, empower the DB to adopt whatever procedure it considers necessary to conduct its business in a fair and efficient manner.

Strict rules of evidence are not followed in DB hearings. All documents that are to be referred to during the hearings should have been provided for the DB and the other party prior to the hearing. For a party suddenly to produce a stack of correspondence upon which it relies without having given due notice, will inevitably delay the procedure. In practice, there are occasions when discussions or questions at the hearing require a party to produce further evidence. In such cases, the DB should allow the other party an opportunity to consider and reply to the new material. This is normally possible after a few hours recess, or perhaps by the next morning. If more difficult questions arise, the DB can reserve its decision, pending receipt of written responses. The DB should ensure that neither party is prejudiced by an 'ambush' but, at the same time, try to prevent

the submission of non-essential material that carries no substantive weight and merely confuses the issues. This judgement is one of the most difficult aspects of the DB's operation. The balance between fairness and expedition is not always easy.

X. THE CHAIRMAN'S ROLE

The role of the chairman is paramount to the success of a DB. He must control all meetings and know precisely which issues should receive most attention during the limited time in which the members and the parties are together. He must understand both the contractual and the technical issues involved and be prepared to lead discussions between the parties (during informal meetings and during hearings) and between DB members (during board deliberations). He must strive for consensus and be prepared to view the issues through the minds of his fellow board members (who will, inevitably, have different experiences and bring different perspectives to bear on the matters in question). During the hearings he must ensure fair play and enable a party that is poorly represented to have adequate opportunity to present and to defend its case. He must not be arrogant, short-tempered, over-familiar, garrulous or effusive, patronising or inconsiderate – particularly where parties are conducting the proceedings in a language that is not their mother tongue. He must be firm but not autocratic. The parties have not set up a DB to have their knuckles rapped for omitting to take an action that, with the benefit of hindsight, appears sensible. The chairman should not permit a 'blame-culture' developing.

Nor should a chairman undertake all the work, or attempt to be a 'one-man-board' by ignoring the others. He should share the work between the members, reserving for himself those areas where he feels he is best able to contribute, delegating other matters to his colleagues in knowing accordance with their capabilities.

The chairman's role is not easy, but it is absolutely vital that it is undertaken with integrity, dignity and competence. If a DB fails to provide the service expected by the parties, much of the blame will rightly fall on the chairman.

XI. INTERNATIONAL ASPECTS

On international projects (i.e., those where the contractor is not of the same domicile as the employer and is working outside his country of origin) it is very probable that the members of the DB will be of different nationalities. Translation of all written and spoken material into a foreign (non-English) language is not unusual and it does not take much imagination to foresee the difficulties in communication. It does however take patience and consideration on the part of the DB to ensure that the parties, party representatives and each member of the DB fully understands every step of the proceedings. In many instances, (certainly during the development of DBs), many of the participants in the DB process will lack experience. Guidance and assistance from the tribunal will be essential.

There are strong arguments in favour of the members of the DB not being of the same nationality as the project owner, the contractor or of the consultant. In certain jurisdictions, feelings of patriotism have been thought to influence members' behaviour. Whether this is true is difficult to prove but the risk is clearly perceived and can be simply avoided. Some DB provisions specifically exclude members of the DB being of the same nationality as the owner, the contractor (or indeed any member of a construction joint

venture) or the consultant.

XII. THE FUTURE

Adjudication is growing in prominence in the construction dispute arena. DBs will continue to be established and will, hopefully, prove successful in avoiding, reducing and resolving construction disputes. The merits of this form of adjudication are already evident. The costs of arbitration and litigation remain very high (despite the welcome changes in the UK under the Arbitration Act 1996 and under the Civil Procedure Rules 1999), and commercial pressures alone will encourage more economic and effective settlement options such as DBs. The UK Government is eager for British industry to police its own business relationships and to provide its own checks and balances – leaving the organs of government (such as the courts) merely to supervise and review. A DB serves as an excellent vehicle to provide such self-policing.

Furthermore, the DB concept does provide a practical and effective method of dispute control and conflict-limitation that, if used sensibly, can avoid the excesses prevalent in some other dispute resolution techniques. But it will be up to the DB members and those at the forefront of construction procurement and dispute resolution to ensure that standards endure and the objectives of adjudication by DB are safeguarded.