

Using Dispute Adjudication Boards to Resolve Construction Disputes

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This stems primarily from the fact that the standard forms of contract of the Federation International des Ingenieurs-Conseils ('FIDIC') are the predominant forms used in the region, FIDIC's means of formal dispute resolution is by way of (ICC) arbitration.

There are clear benefits to arbitration (e.g. the parties can decide on the seat, applicable rules, the tribunal and the arbitral process allows for a detailed analysis of claims and defences), but those involved in the process will be familiar with its current misgivings.

Some say that arbitration takes too long and costs too much and even after an award has been issued there remains an uncertainty of how the local courts will act in terms of enforcement. For example, concerns about the Dubai Courts is making the 'offshore' Dubai International Financial Centre an increasingly more attractive potential seat and is now seen as a serious alternative to 'onshore' Dubai. Whilst their arguments may be legally sound, it is not unknown for a losing party to invoke technical legal arguments to challenge an arbitral award in an attempt to further delay its ultimate liability to make payment.

The above misgivings of arbitration are not unique to the region or the construction industry; indeed, these complaints are shared with the international arbitration community for both general commercial and investor state arbitrations.

Those familiar with statutory adjudication in the UK will recall that prior to the enactment of the Housing Grants, Construction and Regeneration Act 1996, domestic arbitration in the UK was suffering with the same complaints. Around that time the construction industry in the UK was in need of a credible form of alternative dispute resolution and it came along in the guise of statutory adjudication. Whilst contractual adjudication already existed in the UK, it needed the intervention of statute to provide the traction to take off. Its success is now well versed, so much so that its model was subsequently mirrored in Australia (1999), New Zealand (2002) and Singapore (2004). It may be said that statutory adjudication has become a short-form quasi-arbitration process, save that, amongst other things, unlike an arbitration award, an adjudication decision is only temporarily binding.

With the above in mind, should the region's construction industry be looking for an alternative means of resolving its disputes? The answer must be a resounding yes. According to FIDIC, internationally, contractual adjudication (in the guise of a Dispute Adjudication Board ('DAB')) works extremely well. However, there appears to be a genuine reluctance in the region to use DABs. Our experience is that the DAB provisions of most of the 'new' FIDIC contracts we encounter are either struck out or simply ignored. Leaving aside the fact that the benefits of DABs to projects and their participants are being lost, there is also a risk that construction professionals and the region's industry are falling behind international standard practice for dispute resolution.

This article seeks to provide a general overview of what the DAB process is, how the concept originated, how it works and highlight some of the benefits of the process.

What are DABs and what was their genesis?

Simply stated, DABs are a form of alternative dispute resolution ('ADR'). More specifically, DABs can be said to fall under the generic category of adjudication. ADR includes:

- **Mediation:** the parties agree to have a third party attempt to facilitate a settlement;
- **Conciliation:** often used interchangeably in the region with mediation, but in normal construction parlance it is generally taken to mean where the facilitator ends up issuing a recommendation if there is no settlement;
- **Mini-Trial:** both parties present their cases in a summary form to the senior management of both organizations with an independent third party acting as referee;
- **Med-Arb:** an individual first acts as a mediator and if a settlement is not achieved at he then goes on to sit as arbitrator (this may give rise to legal issues for the individual acting in both roles);
- **Early Neutral Evaluation:** the parties submit their respective cases to a neutral third party (e.g. a QC or judge) who then provides his opinion on the matter;
- **Expert Determination:** the parties agree to submit their (technical or valuation) dispute to a third party who then issues a binding determination; and
- **Adjudication:** contractual or statutory adjudication (including DAB or Dispute Review Boards ('DRBs')), the parties agree or are obliged to submit their respective claims to a third party who then makes a decision which is temporarily binding.

A benefit of ADR can be succinctly stated as being a means of resolving disputes by avoiding the cost, time and inflexibility of litigation or arbitration.

ADR should be less costly because there should not be the same level of involvement of lawyers and experts. The cost of arbitrators, institutions and tribunal secretaries can be avoided. It also avoids the waste of a party's valuable management time otherwise spent dealing with his continuous involvement in a dispute over many months, if not years, in the litigation or arbitration process. Speedy resolution of a dispute allows the managers to spend their time performing their primary day-to-day business duties rather than getting involved in ancillary dispute management.

Another benefit of ADR is that, if used properly, it should lead to the quicker resolution of a dispute. Mediations are often conducted in a single day, statutory adjudication in the UK requires a decision within 28 days and a DAB is required to render a decision within 84 days.

Because ADR is flexible and not as adversarial as litigation or arbitration, the parties should be able to agree upon the process for themselves, which should lead to maintaining working and commercial relationships.

The early involvement (and possible decision) of an independent third party allows the parties to seriously consider their respective positions before embarking on a possible lengthy and costly process of formal dispute resolution via the courts or arbitration.

Those familiar with the history of FIDIC's dispute provisions will be aware that when it published its 1st Edition (1957) a dispute was, in the first instance, to be referred to the Engineer for his decision and any dissatisfied party had to wait until the works were completed before it could start an ad hoc arbitration. The FIDIC 2nd Edition (1969) moved from an ad hoc arbitration to an ICC arbitration (which still remains the position today), whilst the 3rd Edition (1977) allowed for an arbitration to be started before the works had been completed. The FIDIC 4th (1987), colloquially known as the 'Red Book', introduced the requirement for a 56 day amicable settlement period before starting an arbitration.

The genesis of DABs can be said to be the use of DRBs on large civil engineering projects in the USA in the 1960s. The primary difference between a DRB and a DAB is that the former makes a recommendation which can become binding whilst the latter issues a decision which is immediately binding, albeit temporarily. In short, therefore, a DRB is advisory; whereas, a DAB is adjudicatory.

Subsequently, in the 1980s the World Bank included the use of DRBs in its standard conditions for contracts above a certain value. FIDIC first included for a DAB in its 1985 'Orange Book'.

When the 'new' FIDIC contracts first came on the scene in 1999 they included somewhat radical changes to the dispute provisions of the previous FIDIC standard forms, which until 1999 had pretty much mirrored the dispute provisions of the English ICE forms of contract. Despite these 'new' forms now being over 15 years old, we still regularly encounter the 'Red Book', the 'Orange Book' and, to a lesser extent, the FIDIC 3rd Edition.

One of the most fundamental changes in the 'new' FIDIC contracts was the mandatory obligation in Clause 20 to refer a dispute to a DAB before going to arbitration. As mentioned above, in the previous FIDIC contracts (save for the 'Orange Book' (and Section A of the 1996 Supplement to the 'Red Book' which provided an option to use a DAB)), a dispute had to be referred to the Engineer for his decision before it could be referred to arbitration. When drafting its new suite of contracts FIDIC took on board the concerns raised by the contractors that the previous Engineer decision process was not working.

As an aside, in 2004 the ICC introduced its new Dispute Board Rules, which included for both DRBs and DABs and also a hybrid between the two known as a Combined Dispute Board ('CDB').

How does a DAB work?

FIDIC provides for two different types of DAB: a standing DAB (Red, Pink and Gold Books) and an ad hoc DAB (Yellow and Silver Books).

With a standing DAB, the DAB is named in the contract and appointed at the outset. In this way the DAB will be involved in a project from its start. The DAB will make regular site visits, contemporaneously read important communications, become familiar with the parties and key individuals and deal with issues as and when they arise. A standing DAB may be called upon to issue an opinion on a matter and will issue a report after each site visit.

With an ad hoc DAB, the DAB will be appointed only after a dispute has arisen and will deal with the dispute accordingly.

If there is to be a three member DAB each party will appoint its own DAB member and the third member (chairman) will be agreed upon. The FIDIC contracts provide a mechanism in case there is a deadlock in the DAB's appointment process. Just like arbitration, the parties should give careful consideration as to who they will nominate as their chosen DAB member and should have regard to the following when making that choice:

- Independence
- Impartiality
- Qualifications
- Experience
- Availability

Depending on whether a standing or ad hoc DAB is used, the DAB members will enter into a DAB agreement with the contracting parties either at the start of the project or when the dispute arises.

As for remuneration, the way in which the DAB is paid depends on whether it is a standing or ad hoc.

A standing DAB will be paid a monthly retainer, a daily fee for site visits and/or dealing with a dispute, and also its reasonable expenses. Whilst the DAB's fee will be shared equally between the parties, the DAB will invoice the Contractor who will make payment and then seek 50% recovery by way of the interim payment certificate process. Payment is due to the standing DAB within 56 days of its invoice.

An ad hoc DAB will be paid for its daily fee and reasonable expenses. It will not receive a monthly retainer because it only gets appointed after a dispute has arisen. The ad hoc DAB can request an advance of up to 25% of its estimated daily fees and can expect payment within 28 days of its invoice.

Generally, the process will start when the chairman receives the referral (however, the time starts from the date of response in the Gold Book (note that the 84 days will be extended to 105 days if no response is served), or the date when the 25% advance is paid in the case of an ad hoc DAB.

Whichever start date applies, the DAB will usually have 84 days in which to make its decision. Taking into account the usual referral, response, reply, rejoinder, reading time, preparation for and attending meetings, preparation and writing of a decision, this 84 day period will quickly evaporate. Indeed, it would not be unusual for the DAB to request at the very outset that this 84 day period be extended. It would be a brave party to object to the request for such an extension by the decision maker.

Once faced with a referral the DAB will (or should) quickly determine the procedural steps to be implemented. Helpfully, the FIDIC Guide provides a format for a DAB process along the following lines:

- Referral
- Response
- Reply
- Rejoinder
- Hearing
- Claimant's case
- Respondent's case
- Claimant's response
- Respondent's response
- DAB questions

The DAB is free to act in an inquisitorial manner and can decide who will attend the meetings. Therefore, provided that the DAB acts fairly and impartially, it can pretty much decide for itself how it wishes the process to flow. Another important issue is that the DAB is empowered to decide on its own jurisdiction (in arbitration the ability of a tribunal to decide upon its own jurisdiction is known as the Kompetenz – Kompetenz principle).

As mentioned above, the DAB is usually obliged to issue its decision within 84 days. This time period must be strictly adhered to, as must the other formalities expressly provided in Clause 20.

If a party is unhappy with the DAB's decision then it must issue a notice of dissatisfaction within 28 days of receiving the decision.

If a decision is acted upon then there are no further issues. If the decision is not complied with then steps will have to be taken by the successful party to enforce the decision.

Whilst there are provisions provided within the FIDIC conditions to assist the successful party in terms of enforcing a decision, some legal commentators identified a lacuna in Sub-Clause 20.7 in that it failed to deal with how to enforce a DAB decision which had been challenged in the 28 day period (this problem did not apply to the Gold Book). Those familiar with the recent Persero cases will be aware of the problems caused by this lacuna. Consequently, in 2013 FIDIC issued a Guidance Memorandum (2013) recommending that future users of the 'new' FIDIC contracts amend the existing Sub-Clause 20.7.

Notwithstanding that the most recent Persero case ([2015] SGCA 30) resulted in a majority judgment to enforce the DAB decision, it will be interesting to see if the points promulgated in the dissenting judgment will be developed further in other legal jurisdictions if and when enforcement proceedings are brought there, especially if the instant FIDIC contract has not been amended in the manner suggested above.

Whilst there are provisions in the laws of the UAE that could possibly be relied upon in the local courts in an attempt to directly enforce a DAB decision, it remains to be seen how receptive these courts will be when faced with an application to enforce a DAB decision in the manner prescribed by FIDIC and the Persero cases, i.e. an interim arbitral award regarding the DAB decision, whilst the main arbitral proceedings relating to the underlying dispute and subsequent challenge to the DAB decision remain undecided. What is clear, however, is that just like their brethren common law courts, the local courts are likely to uphold FIDIC's pre-conditions to arbitrate if, that is, the DAB provision has not been struck out.

The benefits of using Dispute Adjudication Boards

So what are the benefits of using a DAB?

If a standing DAB is used (which is the preferred option of the many legal commentators on the subject) then the DAB members become fully familiar with issues that have the potential to manifest themselves into disputes. They can, therefore, take measures early on in attempt to nip these potential disputes in the bud, i.e. this can be seen to be proactive dispute avoidance as opposed to reactive dispute resolution. Indeed, having a standing DAB in place is probably the only method of ADR which is in place before a dispute arises.

The DAB members will visit site and also review key correspondence. The DAB will become familiar with the main individuals involved on the project and, importantly, identify personality issues/clashes which can itself often lead to disputes.

It also allows the parties to have an independent third party involved and observe the actions of others, which should provide confidence that both parties will adhere to their obligations from the outset and behave properly, knowing that their respective actions are being constantly observed and monitored.

Clause 20 provides that the DAB is to make its decision within 84 days. Compare this with the usual 18 – 24 months to get an arbitration award in construction arbitrations.

The DAB controls the process. There should not be the need for extensive use of lawyers, experts and witnesses, therefore, the costs should be significantly reduced compared to litigation or arbitration.

If there is to be a meeting, as opposed to a formal hearing, then it will often take place on site, which can eliminate the costs for a venue which are incurred in arbitration.

Importantly, because of the flexibility of the process and because it should operate quickly and cost effectively, there should be a greater opportunity to maintain working and commercial relationships.

Summary

Both regionally and internationally, the reputation and image of arbitration is suffering. There are complaints (possibly justifiable in some cases) that it takes too long and costs too much.

Therefore, those involved in disputes in the region's construction industry may wish to consider alternative methods of dispute resolution.

There are reports from both FIDIC and legal commentators alike that standing DABs often lead to the speedy resolution of disputes without the need to resort to arbitration.

It is suggested that, if used properly, standing DABs can add value to a project in terms of real life dispute avoidance. Factoring in the cost of a DAB at the outset should be seen as a proactive step towards dispute avoidance, rather than the alternative negative step of waiting for an issue to manifest itself into a fully blown dispute necessitating formal, costly and lengthy arbitration proceedings.

It remains the case that DABs are not being used in the region to the extent they are in other parts of the

world. Whilst there is no clear reason for this lack of uptake, it may be that employers continue to dictate the allocation of risk in contract negotiations, which includes the risk associated with dispute resolution provisions, and they may be concerned that DABs could issue adverse decisions in terms of time and/or money. There may also be a perception that the additional up-front costs of a standing DAB are not warranted as part of the overall project cost. Finally, even if a DAB decision is rendered and subsequently challenged, given it would not be final and binding, and leaving aside possible contractual ways for its enforcement, there remains an uncertainty of how such a decision would be dealt with by the local court leading to ancillary litigation and wasted time and costs.

In light of the above, it appears that a cultural shift in the mindset of employers is required and, possibly like the UK before it, maybe statutory intervention with a subsequent groundswell of judgments from the local courts if DABs are to gain any traction in the region.