Dispute Avoidance and Dispute Boards

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PART 1
DISPUTE AVOIDANCE
WHAT IS A DISPUTE?

• Dictionary Definition:

“a disagreement between management and employees that leads to industrial action” *(Oxford)*

“a discussion, often heated, in which a difference of opinion is expressed” *(Oxford)*

“a regulated discussion of a proposition between two matched sides” *(Webster)*
WHAT IS A DISPUTE?

• Contract Definition:

“means any situation where (a) one Party makes a claim against another 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 to do so.”

(FIDIC Gold Book, 2008)
WHY DISPUTE AVOIDANCE?

“How to Stop a Simple Problem Spiraling from a Breeze to a Whirlwind”
Nael Bunni

- Disputes are costly in:
  - money
  - time
  - reputation
- Average 50% of all legal costs in the construction industry are dispute related.
- In 10% projects 10% of total project costs was “legal cost”.
- ICC Arbitration: A $10m dispute will cost about $300,000 in administrative and arbitrator’s fees plus the parties’ legal costs, and management time.
- That time and money could be spent on the project itself....
- .... or by improving margins and financial performance of the industry.
WHY DISPUTE AVOIDANCE?

• “There is a solution to every problem; the only problem is finding it”

• You have probably heard it said:
  “Hindsight is always 20/20”
  “Hindsight is an exact science”

• Proactive dispute avoidance reduces the need for hindsight:
  – By looking forward
  – By anticipating problems
DISPUTES AND DISAGREEMENT

IN COMPLEX PROJECTS....... 

- Recognize that disagreements always occur. 
- There is always more than one way of looking at something: two sides to the story. 
- Conflict can be positive and healthy and result in new ways of thinking. 
- Dispute avoidance aims to tackle differences before they become formal disputes which require a formal process of resolution.
DISPUTES AND DISAGREEMENT

- Disputes in construction typically about:
  - Contract Interpretation
  - Quality
  - Progress
  - Information (quality of or lack of)
  - Payment: ultimately (almost) all come down to money

- Disputes in construction commonly occur between:
  - employer and consultants
  - employer and main contractor
  - main contractor and subcontr/suppliers
DISPUTES ARISE OUT OF UNCERTAINTY

- Construction projects are not “products”
- Each project is a prototype
- Every site is different (geotechnical information)
- Weather and climate
- Political environment and change
- Inadequately defined design
- Ill considered procurement process
- Poor project management
DISPUTES ARISE OUT OF UNCERTAINTY

• Poor communications
• Inability to communicate
• Resorting to formal legal methods too quickly
• Cultural differences
• Dysfunctional team (personality problems)
• Uncertainty makes people defensive
• Uncertainty can lead to mistrust
• Uncertainty prevents proper assessment of risk
• These are all human traits......disputes are about people

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DISPUTES ARISE OUT OF COMMERCIAL INTERESTS

• Disagreements always occur
• Disagreements become disputes when they adversely impact on the commercial interests of one or other party
• Usually means it has a monetary impact
• Delays also mean money
• What about reputation?
DISPUTE AVOIDANCE TECHNIQUES

- There are two main types:
  - **Management Methods**: focuses on the process
  - **Non Escalation Methods**: focuses on containing disputes

- Management methods should begin pre-contract, as soon as possible (only one party at this stage).
- Non escalation methods applicable when second party is involved: during bidding stage onwards,
DISPUTE AVOIDANCE TECHNIQUES

• Management Methods
  • Starts Pre-Contract
  • Consider unpredictable scenarios
  • Learn from other projects
  • Be realistic: problems will arise
  • Reduce risk by good ground investigations and high quality production information
  • Select contract to promote dispute avoidance
  • Due diligence
  • Fair tender procedures
  • Is the contract price realistic?
  • Establish a collaborative, no blame regime
  • Active monitoring of progress and costs
  • Tackling problems as they arise
DISPUTE AVOIDANCE TECHNIQUES

• Non Escalation Methods
  • Negotiation between team members
  • Negotiation between management
  • “Fair” solutions outside contract terms
  • Independent third party (can be helpful for government employees)

• Reactive Techniques
  • Take place after a dispute has crystallised

• Proactive Techniques
  • Seek to deal with problems before they become disputes
DISPUTE AVOIDANCE TECHNIQUES

• Reactive Techniques
  • Usually Ad Hoc (but not always, eg contracted mediation)
  • Mediation: consensual but after parties have taken up positions
  • Ad hoc statutory adjudication (eg in UK, Australia, Singapore, etc)
  • **Ad hoc Dispute Board**

• Proactive Techniques
  • Dispute avoidance panel (eg London 2012 Olympics)
  • **Standing Dispute Board**
PART 2
DISPUTE BOARDS
WHAT IS A DISPUTE BOARD?

“A dispute board is a tribunal which is established to endeavour to avoid or resolve any disputes which may arise between the parties to a particular contract” (Brian Totterdill and Gwyn Owen)

- A tribunal that is:
  - Independent
  - Impartial
  - Proactive
  - Judicial
TYPES OF DISPUTE BOARDS

• Dispute Review Board (DRB)
  • non binding recommendations
  • The North American model
• Dispute Adjudication Board (DAB)
  • Informal opinions if requested
  • binding decisions
• Combined Dispute Board (CDB)
  • ICC Rules
  • recommendations, binding decision if requested by both parties
• DBs are a creature of contract
TYPES OF DISPUTE BOARDS

• **Adhoc DB – Advantages**
  – Lower cost
  – Members could (in some instances) be selected for their specialist knowledge to suit a specific dispute

• **Adhoc DB - Disadvantages**
  – Convened only after a dispute has crystallised
  – No provisions for dispute avoidance; seldom in a position to avoid; but hybrids exist
  – Receives only the documents relative to the specific dispute
  – No familiarisation with project
  – Setting up DB for specific dispute may result in delay
  – Procedure is akin to statutory adjudication
TYPES OF DISPUTE BOARDS

• Standing DB - Advantages
  – Formed at commencement of contract, no learning curve
  – Site visits, meetings
  – Dispute avoidance role and informal opinions
  – Promotes mutual resolution and relationships, facilitates communication and trust and cooperation
  – Early identification of issues
  – May reduce bid prices

• Standing DB – Disadvantages
  – More expensive
WHAT DO DISPUTES BOARDS DO?

• Monitor the Project
• Review documents and visit the site
• To help avoid disputes
• Maintain communications between the Parties
• Suggest ways of working out problems at an early stage
• Provides a high level forum for discussion of issues
• To resolve disputes
• Casts a “long shadow”
WHAT DO DISPUTES BOARDS DO?

- **Dispute Avoidance**
  - The primary role
  - Requires a standing board
  - Proactive involvement with the parties
  - Informal opinions
  - (not always acceptable to the parties)

- **Dispute Resolution**
  - Where a dispute cannot be avoided
  - Takes place after avoidance measures
  - A process of adjudication
  - Quick and relatively cheap
  - Some parties require a 3rd party **DECISION** to enable action to be taken
A SHORT HISTORY OF DBs - 1

• Started in the USA in 1970s
  • Large infrastructure projects
  • Suspicion about legal profession
  • Wanted to avoid time and cost implications

• In the US DBs are DRBs
  • DRB gives non binding recommendations

• WB promoted a Dispute Board on El Cajon hydro project in Honduras in 1980
  • DB resulted in successful settlement of disputes - WB grew to favour this approach

• 1995 – WB Standard Bidding Document published using modified FIDIC conditions
  • deleting the usual provision with the “Engineer” deciding disputes, giving this task to a Dispute Review Board (DRB), similar to those being used at the time in USA
WB rationale 1995:

- Disputes (that could not be settled by the parties themselves) to be submitted to DRB by either party for a written “DRB recommendation” which, if no objection lodged within 14 days, became final and binding
- In case of objections, parties free to negotiate or, ultimately take the matter to arbitration
- WB required all borrowers of >US$50m to establish a three-man DRB by contract
- Borrowers of between US$10m - $50m could use a one-man board or Dispute Review Expert (DRE)
- Other development fund banks, followed this example
- WB retained these provisions until 2000
A SHORT HISTORY OF DBs - 3

- **FIDIC 1995:**
  - Widely known as publishers of model forms used internationally for construction
  - 1995 – Design-Build Turnkey form published with a Dispute Adjudication Board (DAB) – (3 person or 1 person board) empowered to decide disputes referred by either party
  - NB “Decisions” were made interim binding i.e., coercive, not merely persuasive (like the 1995 WB DRB)

- **Why use a DAB rather than a DRB?**
  - In some parts of the world it is difficult to accept and implement a recommendation
  - It is more acceptable to have a decision imposed by a third party
A SHORT HISTORY OF DBs - 4

- FIDIC 1999 - Three major FIDIC model forms published, all involving DABs
  - Red Book: Conditions for Construction – standing DAB (3 person or 1 person boards)
  - Yellow Book: Plant & Design Build – ad hoc DAB
  - Silver Book: Engineer Procure & Construct (Turnkey) – ad hoc DAB

- FIDIC 2005:
  - WB (on behalf of all development banks) engaged FIDIC to draft and publish a harmonised set of conditions (MDB Conditions) for use in connection with all projects funded by the World Bank and other lending institutions. Determinations by the DB are coercive

- FIDIC 2011:
  - Gold Book (DBO), standing DAB
WHO SELECTS THE DB?

- Depends on contractual provisions
- Normally each party nominates a member for approval by the other
- The two normal members nominate the chair
- Default provisions if no board formed or a lack of agreement as to composition of members
- Appointment by an appointing authority
- Tripartite agreement (each party and each member)
WHO IS THE DB?

- Normally one or three members
- May be any greater odd number
  - In which case two are normally selected from the pool to decide a dispute in conjunction with the chairman
- Professionals or lawyers?
- ...or both?
- Well respected and known in the industry
- Technical knowledge
- Legal knowledge
WHAT ARE THE QUALITIES OF THE DB?

- Experience (in the type of work)
- Contract experience
- Language of the contract
- Dispute resolution experience
- Procedural knowledge
- Availability
- Impartiality
- Independence
- Legal Knowledge
DISPUTE RESOLUTION ALTERNATIVES

TIME/COST

negotiation
contracting parties only
amicable settlement

facilitation

evaluation
third party neutral

determination
third party decision

ADR

“A coal face” negotiation
negotiation by expert negotiators
Senior Executive negotiators

mediation
conciliation

non-binding expert determination
early neutral evaluation

statutory adjudication
contractual adjudication

DRB
DAB

binding expert det.

ADR

conventional arbitration
fast track arbitration
litigation


FORMALITY

(hearings, natural justice, defined procedures etc)
CONTROL OF OUTCOME OF DISPUTE

CONTROL BY PARTIES
- Negotiation
- Mediation
- Early Neutral Evaluation

CONTROL BY THIRD PARTY
- Adjudication
- Litigation
- Arbitration
- Expert Determination

DRB
DAB
WHY USE A DISPUTE BOARD?

- Members familiar with the project
- Job Site Process
- Dispute Avoidance
- Choice of Board Members
- Less cost
- More control over the outcome
- Helps maintain relationships

THE PRIMARY ROLE OF THE DISPUTE BOARD IS THAT OF DISPUTE AVOIDANCE
WHY USE A DISPUTE BOARD?

- **THE PRIMARY ROLE OF THE DISPUTE BOARD IS THAT OF DISPUTE AVOIDANCE**
  - In some jurisdictions DABs are now referred to as “Dispute Avoidance Boards”
  - Sometimes “dispute” in the name puts people off
  - Should they be called something else?
DISPUTE AVOIDANCE IN THE CONTEXT OF DISPUTE BOARDS

• Assists in identifying the issues
  – What is disagreed?
  – Why is it disagreed?
  – What are the solutions?

• Articulation of the issues
  – The Parties themselves improve their knowledge/understanding of the matters in dispute

• Informal opinions
  – Preparing joint submissions to the DB (for an opinion), may enable the Parties to resolve their differences
DISPUTE AVOIDANCE IN THE CONTEXT OF DISPUTE BOARDS

• Informal discussion
  – informal discussion between the Parties, which may lead to resolution

• 3rd Party advice/opinion
  – can explain / clarify / put issues in a different light / perspective
  – can facilitate resolution
  – opinion prior to involvement of legal representation avoids potential procedural issues, legal point scoring and potential high jacking of the process

• Avoids disagreements becoming disputes
DISPUTE AVOIDANCE IN THE CONTEXT OF DISPUTE BOARDS

• Proactive approach
  – can positively influence project participant behaviour and improve relationships

• If the process does not depend on decisions that are binding, (DRB), there is less danger of relationships being damaged by a failure to implement or enforce them

• However not all parties can act on an opinion/recommendation

• Some parties need to act on a decision

• Most international projects using DBs use a DAB rather than DRB
HOW IS THE DISPUTE BOARD PROACTIVE?

• Monitors project
• Documents and reports provided by Parties
  • FIDIC Procedural Rule 4
• Watches and is aware of warning signs
• No learning curve: board understands the project
• Regular site visits and meetings
  • FIDIC Procedural Rule 1
• DB promotes discussion between Parties
• Informal opinions
  • FIDIC Sub Clause 20.2
IS DISPUTE AVOIDANCE WORTH IT?

- DB costs 0.05%-0.26% of the construction costs
  - Typically 0.1% (DRBF Conference NY, Oct 2012)
- About 99% of disputes referred to DBs are resolved in less than 90 days, the average cost is about 0.02% of the value of the dispute
- 98% of referred disputes end with the DB
- Of the 2%, half are subsequently upheld
- Of the 1% of decisions upset by arbitration/courts, almost always due to procedural irregularity, not on the substance of the decision
IS THE DISPUTE AVOIDANCE WORTH IT?

• Disputes are not inevitable
• When disputes occur they are disruptive and costly
• Dispute avoidance helps the industry to make savings in management time, legal costs and reputation
• Remember.....you have a choice!

OR
WHERE DOES A DB GET ITS POWERS?

- The DB gets its powers from:
  - The contract
  - Party agreement
  - Agreed Procedural Rules (FIDIC, ICC, CIArb, etc...)

- Some contracts have provisions for DBs incorporated into them (FIDIC)
- Contracts which don’t have such provisions:
  - May use a number of standalone rules by the ICC, CIArb, etc
  - Or of course use the FIDIC rules in other contracts

- Bespoke rules:
  - But ensure the procedures are flexible (a unique feature of DBs)
WHERE DOES THE DB GET ITS POWERS?

• Provisions for dispute resolution in the contract
  • Provides for appointment of DAB
  • Procedural rules
  • Provisions for institutional intervention for party default

• Procedural rules:
  • Are institutional rules required?
  • **Keep it simple and make the rules flexible**

• Works within each jurisdiction, eg is there a statutory adjudication regime?
AND IF THE DISPUTE CANNOT BE AVOIDED?

• Provisions for dispute resolution (eg FIDIC)
  – Depends on contract/rules adopted
• Dispute referred (sent to chair)
• Time period for a Decision (eg FIDIC = 84 days)
• Party submissions
• Site visit?
• Hearing
• Written Decision
AFTER THE DECISION

• Parties may serve a Notice of Dissatisfaction within 28 days (FIDIC)
• If no NOD(s) within 28 days DAB Decision is final and binding
• NODs must set out the matters in dispute and the reason(s) for dissatisfaction
• Neither Party may commence arbitration unless a NOD has been given
THE COOLING OFF PERIOD

- Amicable Settlement (optional)
- Arbitration will be stayed for 56 days
- No procedure is specified in FIDIC SC 20.5
- Amicable settlement can be at any time, eg: before referral to DAB
- Consult with the other Party
- Success will depend on whether there is a common intention to avoid arbitration
- DAB Decision may be persuasive
AMICABLE SETTLEMENT PROCEDURE

• What is Amicable Settlement?
  • Meetings between core group/senior managers
  • Mediation

• With/without legal advisers?

• Party/party meetings

• Meetings between legal advisers

• Is to be confidential?

• Is it to be Without Prejudice?

• Need to agree beforehand the procedure to adopt

• Is agreement possible?
AND IF THAT DOES NOT WORK?

- FIDIC SC 20.6: unless settled amicably any dispute where the DAB Decision has not become final and binding shall be settled by international arbitration
- Arbitration under the ICC Rules (default)
- May open up, revise any certificate or determination, instruction, opinion or valuation of Engineer: effectively starting again from scratch
- Engineer may be called as a witness
- Becoming more difficult to arbitrate before using the DB procedure
- Enforcement
DISPUTES AND DISAGREEMENT

• DBs have been very successful in:
  • minimising disputes
  • retention of relationships
  • retention of reputations
  • where they cannot be avoided by providing a rapid and cost effective method of dispute resolution
  • allowing parties to move on and work for the benefit of the project
  • often the mere presence of a DB may influence the parties to try to resolve problems for themselves
  • often the mere inclusion of a DB in a contract may result in lower bid prices
CONDITIONS CONDUCIVE TO THE USE OF DBs

- Contracts requiring complicated performance over the medium and long term
- Where “Real Time” dispute resolution can have an impact on dispute costs
- Where traditional disputes resolution can badly disrupt performance and relationships
- Where fear of protracted dispute resolution can increase tender amounts, or even discourage a tender
- This does not just apply to construction projects