

International experience with the use of Dispute Boards in infrastructure works

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Overview

- ▶ Dispute Boards in Australia
- ▶ Enforcement of Dispute Board decisions under FIDIC - the Singapore saga
- ▶ Interplay between Dispute Boards and statutory adjudication

Dispute Boards in Australia

- ▶ Dispute Adjudication Boards (**DABs**)
 - » A binding dispute resolution method.
 - » DABs derive their jurisdiction from the agreement of the parties, not from statute.

- ▶ Dispute Review Boards (**DRBs**)
 - » DRBs make non-binding recommendations.
 - » The Australian construction industry has been comparatively slow to embrace the use of DRBs compared to other parts of the world.
 - » However, they are starting to be used more commonly.

- ▶ Combined Dispute Boards (**CDBs**)
 - » By default, CDBs make non-binding recommendations.
 - » A party is able to specifically request a binding decision.
 - » CDBs are a concept established by the ICC Rules.

Australian Case Studies

- ▶ Sydney Desalination Plant (2007 - 2010)
 - » The project owner was the NSW Government corporation, Sydney Water.
 - » The contractor was the BlueWater Consortium.
 - » The contract value was near \$1.9bn but the project was delivered under budget by approximately \$60m.
 - » The DRB used in the project was highly successful, as no dispute progressed to hearing stage.

- ▶ Dispute Boards are currently used in some of Australia's largest infrastructure projects:
 - » Sydney Metro Northwest - \$8bn
 - » NorthConnex - \$2.65bn
 - » Gateway Motorway Upgrade - \$1bn

Enforcement of Dispute Board decisions under FIDIC

- Under a FIDIC contract, either party may, within 28 days of receiving the DAB's decision, give a Notice of Dissatisfaction (**NoD**).

- If a NoD has been served, the parties must attempt to settle the dispute amicably.
 - » If amicable settlement is not possible within 56 days after the issue of the NoD, arbitration may be commenced.
 - » The arbitral tribunal's decision would be enforceable under the New York Convention.

- If neither party issues a NoD within the 28 day time limit, the DAB's decision becomes final and binding.

Enforcement of Dispute Board decisions under FIDIC in Singapore

- The FIDIC disputes procedure has come under scrutiny in a series of Singaporean cases concerning CRW Joint Operation (**CRW**) and PT Perusahaan Gas Negara (**PGN**).
 - » DAB decision was made in favour of CRW.
 - » PGN failed to comply with the DAB's decision.

- Does a failure to comply with a DAB decision constitute a dispute referable to arbitration under the FIDIC contract?

- Arbitration proceedings (2009)
 - » The dispute referred to arbitration was not the underlying dispute which was the subject of the DAB decision.
 - » The new dispute was whether CRW was entitled to immediate payment by PGN of the sum awarded by the DAB.
 - » The tribunal found in favour of CRW stating that the DAB's decision is binding.

Enforcement of Dispute Board decisions under FIDIC in Singapore

➤ High Court (2010)

- » The High Court found in favour of PGN and held that:
 - (a) the 'dispute' regarding PGN's failure to comply with the DAB decision should have been submitted to a DAB before arbitration; and
 - (b) it was not within the tribunal's power to enforce the DAB's decision without considering the merits of the underlying dispute.

➤ Court of Appeal (2011)

- » The Court of Appeal dismissed CRW's appeal.
- » It disagreed with the High Court on (a).
- » However, it agreed with High Court on (b), that the DAB must consider the merits of the underlying dispute.

Enforcement of Dispute Board decisions under FIDIC in Singapore

➤ Arbitration proceedings (2011)

- » CRW commenced a second arbitration, following the procedure suggested by the Court of Appeal in 2011.
- » An interim award was issued requiring PGN to pay CRW promptly, pending the final resolution of the underlying dispute.

➤ High Court (2014)

- » The High Court upheld the interim award and dismissed claims by PGN that the award was 'provisional' and could not be enforced.

➤ Court of Appeal (2015)

- » The Court of Appeal disagreed with its earlier decision in 2011. It decided that the issue of payment alone could be referred to arbitration without needing to refer the merits of the underlying dispute.
- » The Court also held that interim awards ordering compliance with a DAB decision can be enforced separately from a final award on the merits.

Interplay between Dispute Boards and statutory adjudication

DABs

- DAB members are chosen directly by the parties.
- DABs can be established by the parties from the outset of the project.
- DABs have regular meetings and can identify issues that may give rise to disputes in their early stages.

Statutory Adjudication

- Statutory adjudicators are appointed by an authorised nominating authority.
- Statutory adjudicators are appointed on an ad hoc basis, in response to progress claim disputes that have already arisen.

Interplay between Dispute Boards and statutory adjudication

- Australian experience suggests that Dispute Boards and statutory adjudication schemes can successfully co-exist.

- The Australian statutory scheme only provides for adjudication of progress payment disputes.
 - » This is a narrower statutory position than that in the UK where a general right of adjudication exists for any dispute arising under the construction contract.
 - » Contractual DABs may be appointed to hear any type of dispute arising from a construction contract.

- The decision of a statutory adjudicator only operates to override a DAB decision if a party *chooses* to submit a dispute to statutory adjudication.

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