

## PREVENTION IS BETTER THAN A CURE: USE OF DISPUTE BOARDS ON THE RISE

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Construction projects are traditionally bedevilled by disputes. The multitude of parties, the large scale of the workforce, the complexity of technical specifications, and the exposure to risks outside the control of the parties (such as weather induced delay), are all factors contributing to disputes in major projects. A 'zero-sum' approach is structurally enshrined in many construction contracts, as owners gain from lowest-cost completion and contractors seek to maximise revenue and profits. In this context, Dispute Boards (DBs) and their several sub-species have proven to be a useful and cost-effective method not only for resolving live disputes as they arise, but more importantly, for avoiding them altogether.

### The Dispute Board concept

With their roots in the United States' construction industry, DBs consist of a panel of neutral third-party experts that is assembled at the commencement of a project. The panel has a general mandate to assist the parties in resolving and avoiding disputes that may occur throughout the course of the project. The panel will usually consist of three members, although for smaller projects, a single expert can be used to reduce costs. For construction projects, the board members should have the relevant experience in navigating the various technical or legal issues that tend to arise. It is common, and advisable, that DBs draw upon the skills of both lawyers and experienced industry professionals to deliver the most satisfactory results.

Often meeting on-site to reduce delay, DBs are involved in dispute *avoidance* throughout the whole project life cycle so as to avoid formal disputes actually arising. This is the case regardless of whether a dispute has already arisen. Only when disagreements cannot be resolved through negotiations will the dispute *resolution* functions of the DB be engaged by following a more formalised procedure. When exercising its dispute resolution functions, the advantage of a DB is its familiarity with the project, which increases the likelihood that the DB will 'get it right' the first time. By applying the medical adage 'prevention is better than cure', DBs are able to intervene at the early stages of divergence before an issue has become a fully-fledged dispute.

Within this framework, various emanations of DBs have emerged over time. This includes the Dispute Review Board, or DRB, which are limited to providing non-binding recommendations at the end of any dispute resolution process. Another variant is the Dispute Adjudication Board, or DAB, which, instead of issuing non-binding recommendations, issues interim decisions that are binding on the parties as a term of the contract unless and until overturned by a formal dispute process such as arbitration or litigation. Outside the realm of the construction industry, the International Chamber of Commerce (ICC) introduced the ICC Dispute Board Rules in 2004. From what was once exclusively a feature of the US domestic construction industry, the ICC rules represent a significant shift in the use of DBs to an international and non-industry specific approach.

### The success of Dispute Boards

The statistical track record shows that DBs have had enormous success. In the US, 1373 construction projects utilised a DRB in the period from 1975 to 2007, of which 97 percent were settled by the parties without ever needing to resort to a formal method of resolution such as arbitration (Gerber and Ong 2011, p 13). Similarly, the Dispute Review Board Foundation database (2005) records that, of the 1860 disputes recorded worldwide, only 52 progressed to other dispute resolution methods. In the Australasian context, of the 47 DRB and DAB contracts on record since 1987, only nine were formally referred to the panel, every single one of which was resolved within the DRB/DAB process.

These high rates of successful amicable dispute resolution demonstrate the effectiveness of DBs in construction projects. Indeed, similar levels of efficiency are likely to be unattainable with arbitration or litigation, or with the various ADR options.

### **Are Dispute Boards always the right choice?**

The potential for a DB to resolve issues before they become disputes in an efficient, informal manner delivers significant cost-savings to a project. However, the cost of retaining a DB can be greater than that of most other dispute mechanisms due to its extensive and ongoing duties throughout the course of a project. Where a project is smaller, less complex or otherwise less likely to give rise to disputes, a DB may not pass the cost-benefit test.

Where a DB is used throughout a project, the costs include: (i) a fixed retainer for each DB member (usually three members) to ensure availability; (ii) fees to DB members for site visits, with reimbursement of travel expenses; (iii) fees to DB members for other duties including reviewing documents and correspondence, attending and conducting hearings, and writing recommendations; and (iv) indirect internal expenses incurred by each party for tasks including preparation for DB meetings, maintaining documentation and ongoing correspondence between the parties and the board.

A rule of thumb base cost price for a DB is between 0.1-0.2 percent per year of the total project cost. For a \$100m project, the use of a DB would therefore cost between \$100,000 and \$200,000. By contrast, it is highly likely that the total costs of a major arbitration in a large project would grossly exceed this amount. This is because such costs would include fees to legal counsel, experts and arbitrators. Add to this the indirect costs of an arbitration – lost management time and productivity costs – and it clearly becomes a far more expensive process.

In this way, DBs should be viewed as a type of insurance policy against disputes. Their costs should not be compared against arbitration and litigation as a simple comparative dollar figure for the cost of dispute resolution in any given project. Rather, their value lies in the arbitration or litigation costs that they circumvent by avoiding disputes in the first place. Seen in this light, DBs can provide a very effective safeguard against disputes that is well worth the initial outlay when used in projects that are complex or high risk. For maximum cost-effectiveness, it is advisable that a three person DB be used where the contract value exceeds \$75m, whereas a one person DB can be effective for projects valued between \$10m and \$100m (Finlay 2011).

Despite prevailing views in the past which have tended to regard DBs as a tool only for big projects, DBs

have been gaining strong popularity in smaller projects. For example, during 2001-2006 over half of the total DBs used were in projects valued at less than \$20m, compared to less than a third between 1975-1990 (Peck and Dallard 2007, p 22). Evidently, DBs are increasingly being accepted as a viable option for projects across a range of contract values.

## Conclusion

DBs and their several variations have a valuable role to play in the minimisation of dispute costs, both in the construction industry and more broadly. While DBs do not yet enjoy universal acceptance, they are a useful tool in the inventory of any party seeking to improve outcomes in the projects they undertake. Their obvious benefits merit a genuine consideration by parties contemplating dispute resolution options. Increased industry-wide familiarity with new and innovative DB solutions should thus be encouraged.

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