An Introduction to Dispute Boards

Dispute Boards are often used in major projects, and construction lawyers need to understand them

The term 'Dispute Board' is a general usage of international construction law and practice that connotes the form of dispute resolution or appraisal in which a panel of between one and three people, usually technical rather than legal in their qualifications, is convened (either at the outset of a project on a standing basis or on an ad hoc basis when a dispute arises) to conduct first (or second) instance review of disputes that arise between the project participants, and depending on their mandate make either a non-binding recommendation or a binding interim determination in respect of the issues in dispute.

This post is by Dr Sam Luttrell. It sets out the key features of the Dispute Board process and summarises the differences between the leading sets of Dispute Board rules

Main Forms

There are three 'species' of Dispute Board:

1. Dispute Review Board (DRB) – the DRB reviews the matters in dispute and makes a non-binding recommendation to the parties. DRBs are common in the United States, and contracts of the Federation of international Consulting Engineers (FIDIC) series also provide for a DRB option, as do the Dispute Board Rules (DB Rules) of the International Chamber of Commerce (ICC).
2. Dispute Adjudication Board (DAB) – the DAB adjudicates and makes a binding interim determination in respect of the matters in dispute. The ICC DB Rules provide a DAB option as an alternative to the DRB option discussed above. Contracts of the FIDIC series also contain a DAB option.
3. Combined Dispute Board (CDB) – the CDB reviews the matters in dispute and makes a non-binding recommendation to the parties, but if either party requests (and no party objects) the CDB acquires the power to make a binding interim determination. The CDB is a hybrid option available under the ICC DR Rules.

As is evident from this list, the key distinguishing feature of the three species is the mandate of the board to make a binding decision. A Dispute Board that has a mandate to make a binding decision is a DAB; a dispute board that only has the power to make a recommendation is a DRB.
Key Features

At a high level, the unifying characteristics of a Dispute Board in all three of these main models are:

1. Number of members – most Dispute Boards are comprised of three members, with each party appointing one member and the two party-appointees selecting the chairman. In very large disputes, five members are sometimes used, although this is fairly rare.

2. Independence and impartiality – although there is considerable variation in the extent to which municipal laws impose obligations of natural justice on the members of a Dispute Board, it is settled that all members must be impartial and independent, and this is an express requirement under all of the leading rules.

3. Confidentiality – Dispute Board proceedings and outcomes are usually confidential and are not able to be disclosed to third parties.

4. Current Knowledge – the members of the Dispute Board are usually obliged to keep themselves informed of the progress of the project, including but not limited to the performance of the parties to the dispute, for example by reading progress reports and visiting the site.

5. Expertise – the members are usually required to possess the technical qualifications or skills necessary to review or determine the matters in dispute, and more often than not this translates into a requirements that they be engineers, programming specialists or quantity surveyors. The presence of one member that has legal qualifications is increasingly common, especially in high value projects.

6. Inquisitorial procedure – the members of the Dispute Board are not bound by the rules of evidence, and are free to inform themselves in any manner necessary to properly evaluate the matters in dispute. They can question witnesses directly, conduct site visits *sua sponte*, and call for the production of documents.

7. Short time frames – the period for ‘hearing’ the dispute and rendering the written recommendation or determination is usually short, being typically three months from the date of referral of the dispute to the board.

8. Continuity of performance – the parties are obliged to continue to perform their obligations while the dispute is before the Dispute Board. This is especially significant in the context of a large scale construction project.

Because a Dispute Board is a creature of contract, party autonomy applies, with the result that there are any number of variants of these three main species. For example, it is open to the parties to specify the qualifications of the members, the time frame for their deliberations, the extent to which principles of evidence and natural justice will apply, and the form and effect of the determination that the members reach. Some caution should be taken in this area because, at least in Anglo-common law jurisdictions, if there is sufficient attention paid in the contract to the rules of natural justice and evidence, it may be that the Dispute Board acquires the character of an arbitral tribunal. This may affect the way the proceedings are regulated and their product policed.

Scale has also led to structural innovations in the use of Dispute Boards. For example, it is also possible to have separate Dispute boards with separate factual mandates. The Channel Tunnel Rail Link project used two Dispute Boards, one composed of engineers with a technical mandate; and another composed project finance specialists with a mandate to determine disputes relating to the financial provisions of the Build-Own-Operate-Transfer concession agreement. In the context of a high value, multi-party project, this model may be appropriate, along with other project-specific rules.

Rather than by creation of a bespoke body of rules, the most efficient way of making these modifications is by reference to a body of established Dispute Board rules, such as the ICC DB Rules or the American Arbitration Association (*AAA*) Dispute Review Board Guide Specifications (*AAA DRB Guide*).
**Origins of Dispute Boards**

The earliest uses of Dispute Boards were in the United States in the 70s and 80s, particularly in the context of large scale public works projects such as tunnels and dams. The practice developed out of a concern that the use of an engineer to perform the role of first instance dispute resolution was biased in favour of the employer, who is typically responsible for the engineer’s remuneration.

The adoption of FIDIC form contracts in the bidding documents for World Bank-funded projects saw the practice of using Dispute Boards gain traction in other jurisdictions, the first of which was Honduras (for the El Cajon Hydroelectric Project). Since the mid-90s, a number of very large international projects have made successful use of Dispute Boards, including

1. Channel Tunnel Project, where a standing five member DAB was used;
2. Hong Kong Airport Project, where a seven member DAB was used; and
3. Ertan Hydroelectric Power Project in China, where a three member DRB was used.

The main agent in the export of the Dispute Board model was initially the World Bank, and more recently FIDIC has played a significant role. Outside the United States, the majority of known or reported Dispute Boards have been convened in construction projects governed by FIDIC Red, Silver and Yellow Books.

The dispute resolution clauses of the Red, Silver and Yellow Books all provide for DAB as the first instance tier, and ICC Rules arbitration as the final tier. The FIDIC contracts, therefore, incorporate the ICC DB Rules by reference, and this has given the ICC something of a lead in the market for Dispute Board services. It has also caused a body of ICC jurisprudence to develop in key areas of Dispute Board law and practice, including the admissibility of Dispute Board recommendations and determinations in subsequent arbitral proceedings.

**Leading Rules**

A number of institutions have rules specifically designed to regulate the conduct and outcome of proceedings before Dispute Boards. These institutions include FIDIC, the AAA, the ICC, the London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre (HKIAC). There is now a growing interest in Dispute Boards at these institutions, and an emerging willingness to use Dispute Boards outside of strictly construction project contexts.

The ICC, FIDIC and AAA rules are the most commonly used rules of this group. It is appropriate to compare these rules at a high level.

1. ICC DB Rules – the ICC system allows the parties to use a DRB, DAB or CDB. The main distinguishing feature of the ICC DB Rules is that it contains an optional review model: the determination or recommendation of the Board may be reviewed by the ICC before it is transmitted to the parties. The ICC DB Rules also contain provisions directed at encouraging the parties to resolve the dispute amicably, and a provision allowing adaptation of the rules by the Dispute Board where there are multiple parties.

2. AAA DRB Guide – the AAA model is the most 'institutional' of all of the various Dispute Board systems. Under the AAA DRB Guide, the AAA administers the proceedings, assisting in the process of appointing members and acting more or less like a registry. Whilst the parties can contract out of this model to some extent, the preference of the AAA is that the institutional character of the proceedings be maintained. The other thing that separates the AAA system from the ICC system is the manner in which the Dispute Board is constituted: under the AAA DRB Guide, the parties can veto one another's appointments, and this can make the process of forming an ad hoc Dispute Board drawn out. The AAA
DRB Guide is also unique in that it contains a joinder and consolidation provision. Under the AAA system, the recommendation of the DRB is not binding. The AAA DRB Guide allows the parties to agree on any form of dispute resolution as the next or final tier after the Dispute Board, and do not require AAA Rules arbitration.

3. FIDIC Dispute Board Procedure Rules – the FIDIC system allows for the use of standing or ad hoc DABs. The decision of the DAB is final unless the parties agree otherwise or it is revised by arbitral award. Similarly, the decision of the DAB is binding unless it is taken to arbitration within 28 days. Only the Red Book requires a standing DAB – the Silver and Yellow books provide for ad hoc or standing boards – and only the Red Book requires that the members of the DAB monitor the project.

These three systems generally require an exchange of statements, typically framed as claim and defence, and a subsequent factual inquiry by the members of the Dispute Board. Hearings are by no means the rule, and it is very rare to use witnesses (at least in the adversarial way of Anglo-American procedure). Party representatives with actual knowledge are the main source of fact when a hearing is held. In practice, the Dispute Board process looks a lot like a 'desk arbitration', with most (if not all) of the argument and case presentation being done 'on the papers'.

The three main systems vary in respect of their approach to the involvement of lawyers. Generally, it is within the power of the Dispute Board to regulate its own proceedings, and this includes the power to deny audience to anybody other than the representatives of the parties. The ICC DB Rules allow for the use of lawyers as assistants only, and not as advocates. The AAA DRB Guide expressly limits the involvement of lawyers.

**Relationship to Arbitration**

A Dispute Board is not an arbitral tribunal. It is a body with a mandate and function similar to either that of a conciliator (in the case of a DRB) or a statutory adjudicator in the English or Australian legal systems (in the case of a DAB). At present, no country has passed a law specifically regulating Dispute Boards, and as such the law applicable to the Dispute Board is the contract law of the state that is most closely connected to it, which will normally be the law of the state in which the project is located. The substantive governing law of the contract will, if it is the law of a different country, also play a role.

Although depending on the terms of the contract and the rules applicable to the formation and procedure of the Dispute Board its decision may be binding, its determination or recommendation is not an award for the purposes of international or domestic arbitration law. If the rules do provide that the determination or recommendation of the Dispute Board is final and binding, then it is enforceable only to the extent that non-compliance with it may be characterised as a breach of contract. It must be prosecuted as such in accordance with the final dispute resolution arrangements in the contract.

In practice, arbitration often functions as a quasi-appellate process or long-stop to the Dispute Board procedure, and it is only where the arbitral process is carried to a conclusion consistent with the determination or recommendation of the Dispute Board that that determination or recommendation acquires the force and currency or an enforceable arbitral award.

One of the main issues that arises where Dispute Boards are used is what effect the determination or recommendation should have, and whether the determination of recommendation should be admissible, in subsequent final dispute resolution proceedings. It is not possible to generalise on this issue, other than to say that it will depend on the words of the contract. The decision of a Dispute Board is final and binding only to extent that the parties have agreed it will be final and binding in their contract (or subsequently), and so where the determination is (or has become) final and binding, an issue estoppel would lie against a party if it sought to raise those issues again in another proceeding. This would not be the case where, to use the FIDIC example,
the decision of the DAB is handed down but contested by proper notice of arbitration within 28 days.

Similarly, the decision of Dispute Board has no value as a precedent. The safest answer to the question of admissibility is that the determination or recommendation is admissible as evidence in arbitration or litigation, but only between the same parties. The weight to be given to the determination or recommendation is a matter for the arbitrators or judge.