Chapter 10

A Note on Dispute Boards

Whilst this book is primarily concerned with the preparation and review of claims, it is also appropriate to consider what happens in situations where the parties cannot agree on the matter and the claim is elevated into a dispute.

Most contracts have provisions whereby the Engineer, or his equivalent under other forms of contract, is required to make a fair determination of the claim; they also include a requirement that the parties attempt to reach amicable agreement in situations in which either party does not accept the Engineer's determination. If such agreement is not reached, then the contract usually provides a further procedure whereby the issue is referred to mediation, conciliation, arbitration or other form of dispute resolution and ultimately, of course, the parties may find themselves in litigation. Sub-Clause 3.5 *(Determinations)* of FIDIC has this to say on the subject of attempted agreement and the Engineer's determination:

> 'Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.
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> The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 *[Claims, Disputes and Arbitration].'*

Construction Claims & Responses: effective writing & presentation, First Edition. Andy Hewitt.

The traditional way of settling disputes is to refer the matter to arbitration with the rules of arbitration being described in the contract. A typical arbitration procedure requires each of the parties to propose one suitably-qualified arbitrator and for the two appointees to appoint a third member who is often delegated the responsibilities of the chairman of the arbitration panel. Given that the three arbitrators should be experts, to some extent at least, on the subject of the dispute and the construction industry in general, one would expect that most issues should be able to be reviewed and an arbitrator's determination issued fairly quickly. This is not usually the case, however, because it is necessary at this stage to agree on the members of the arbitration board who then need to be appointed formally by the parties. Rules and procedures have to be established; the arbitrators need to have time available to devote to the dispute; and they have to take the time to become familiar with the parties, the project and the issues surrounding the dispute. Given all this, it is easy to see why it may take several months before the arbitrators are able to even consider the matter of the actual dispute. More often than not, lawyers for both parties become involved somewhere during this process and, consequently, we now have a new set of people with a different level of understanding of the construction process adding their opinions to the mix. One must also consider that it may be to the advantage of one of the parties to delay the outcome of the arbitration and, in such a case, deliberate tactics may be adopted to delay and obfuscate the whole process. Of course, if, following the arbitration, the matter progresses to court proceedings, then lawyers definitely will need to become involved and the various proceedings, possibly including the additional involvement of expert witnesses, will serve to extend the time for the resolution of the dispute, quite possibly to years rather than months. It has been said that arbitration was a perfectly-good process until it was hijacked by lawyers. Whilst this may be a somewhat cynical point of view, it is certain that if matters do progress to this level, the resolution of the dispute will become both very protracted and extremely costly.

The industry recognised that such a situation was not desirable and provided little benefit to the project itself and that, consequently, what was needed was a relatively-easy procedure to settle disputes in a timely and cost-effective manner, in order that the parties could henceforth devote their energies to completing the project. One solution proposed was the appointment of dispute boards, otherwise known as dispute adjudication boards, dispute review boards or combined dispute boards, all of which are essentially the same thing. FIDIC, under Sub-Clause 20.2 *(Appointment of the Dispute Adjudication Board)*, has this to say on dispute boards:

'Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 *[Obtaining Dispute Adjudication Board's Decision]*. The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom DAB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.'

Thus, under FIDIC, the parties jointly appoint the dispute board, which may comprise either one or three members. The dispute board may, if necessary, consult with external experts in order to carry out their duties. In addition to referring disputes to the dispute boards for adjudication, the parties may also jointly refer a matter to the board for its opinion.

The dispute board is paid a monthly retainer fee for becoming familiar with the project and the Contract and for keeping abreast of progress and events; it is further compensated for actual time spent during site visits and dealing with matters that are referred to the board. The costs of the dispute board and any experts with whom the board engages are borne equally by both parties.

Sub-Clause 20.4 *(Obtaining Dispute Adjudication Board's Decision)* goes on to say:

'If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub- Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 *[Failure to Comply with Dispute Adjudication Board's Decision]* and Sub-Clause 20.8 *[Expiry of Dispute Adjudication Board's Appointment]*, neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.'

FIDIC thus provides that, should either party disagree with the dispute board's decision, then they may proceed to refer the matter to arbitration.

FIDIC also contains general conditions of the dispute-adjudication agreement and procedural rules from which the following provisions are summarised:

1. The agreement is a tripartite agreement between the Employer, the Contractor and the sole member or each of the members comprising the board.
2. The dispute adjudication board may be appointed at the commencement date of the main contract or as soon as practicable after this date.
3. The board is obliged to be impartial.
4. The board is obliged to have relevant experience in the type of work of the project and the interpretation of contract documentation.
5. The board is obliged to disclose any potential conflicts of interest or previous dealings with the parties.
6. The board shall visit the site at regular intervals and is obliged to make itself available for site visits, and to become acquainted with any potential problems or claims, be available for hearings and the like and to give advice and opinions on any matter relevant to the contract.
7. The parties are obliged to provide the board with copies of the Contract, progress reports, and other documents pertinent to the performance of the Contract, and the board is obliged to become conversant with the Contract and the progress of the works.

The above provisions may at first seem very similar to those of arbitration, but there are some very important differences between the two procedures. The dispute board is appointed early in the contract period and is obliged to become familiar and remain acquainted with the project and the Contract by regular site visits and through the review of documentation. By this very process, it is natural that the board will also become familiar with the parties and the project personnel. The fact that the board has already been appointed and is acquainted with the Contract, the site and any areas of potential dispute, ensures that it may deal with disputes and provide adjudication in a much reduced period than would be the case if the matter were referred to arbitration. The dispute board is, in fact, obliged to provide a reasoned decision on a matter that is referred to the board within 84 days. I would suggest that such a period could easily be equal to, or less than, the time it would take to make the necessary arrangements to commence arbitration proceedings, and much less than the time required for the arbitrators to provide a decision.

The Dispute Resolution Board Foundation has gathered statistics over many years from projects on which dispute boards have been employed and these make impressive reading.

On construction projects having dispute boards, the average number of disputes referred to the boards is 1.2 per project. This is fewer than the average number of disputes taken to arbitration or to court on projects without dispute boards, and this supports the opinion that the very

presence of a board that is able to provide relatively-quick decisions prevents the submission of spurious claims and unreasonable determinations and reduces posturing by both parties. On projects having dispute boards, an impressive 98% of disputes are resolved at dispute-board level. Additionally, of the 2% of disputes where one of the parties did not accept the board's decision and proceeded to arbitration, almost all of the arbitrations supported the dispute board's decisions. FIDIC, for example, allows a party to proceed to arbitration if it does not agree with the board's decision but, given these statistics, such a party would have to give very serious consideration as to whether to accept the board's decision on the matter or to proceed to arbitration in the hope that a new panel of experts would arrive at a different decision. All this, of course, has an added advantage that the parties can concentrate on construction issues rather than on claims and disputes, with the obvious benefit that this brings to the project.

According to the Dispute Resolution Board Foundation, the cost of employing dispute boards is between 0.05% of the construction cost on dispute-free projects and 0.25% for more difficult projects and it must be remembered that these costs are shared equally between the parties. I would suggest that if it were possible to insure against disputes at such costs, the parties would be rushing to their insurance brokers, especially if these costs are compared to typical costs of arbitration or court proceedings. Additionally, if the Contractor has comfort in the knowledge that his claims will be dealt with fairly and reasonably and that any disputes will be decided in an impartial and timely manner, it would be reasonable to assume that he would consider that such a situation would remove a certain amount of risk for which he would otherwise need to include within his price. From this, it is also reasonable to assume that projects with dispute-board provisions would result in potentially lower bids.

Another significant advantage available to the project through the use of dispute boards is that in addition to referring disputes to the board, the parties can ask the board to provide an opinion on a matter. If one considers that disputes are often caused by differences in the interpretation of the Contract, an opinion on the correct interpretation by the board could very well head off a potential claim or, alternatively, provide enough confidence in the potential merits of a claim situation to gainfully pursue the matter. As it was once put to the delegates at a Dispute Resolution Board Foundation seminar which I attended: if three grey-haired father figures, who are experts in their individual fields of construction, advise the parties that, in their opinion and having carefully considered the matter in question, the outcome of an arbitration would be this or that, most people would accept it as being good advice. I can certainly think of several instances in my career, before I became a grey-haired father figure myself, where I would have welcomed such advice.

The advantages of dispute boards have been recognised by many institutions internationally and their usage is becoming more widespread through all parts of the world, with significant usage in the USA, where, probably unsurprisingly, given the USA's penchant for litigation, dispute

boards have been seen by government agencies as a significant dispute-avoidance tool. The World Bank and other banks such as the European Investment Bank, the European Bank for Reconstruction and Development, and the Asian Development Bank now insist on the inclusion of dispute boards in contracts for any project funded by them, as does the European Union. The International Chamber of Commerce also recommends their use. As we have already discussed, FIDIC has incorporated provisions for dispute boards in the 1999 editions of their standard forms of construction contracts, as has the Institution of Civil Engineers.

Given the impressive track record of this form of dispute resolution along with the many advantages associated with dispute boards and the endorsement of so many respected international agencies, it seems that dispute boards are set to make significant contributions to the industry.