

ROUNDTABLE: DISPUTES BOARDS IN CONSTRUCTION AND INFRASTRUCTURE PROJECTS

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Legal Briefings

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CONTRACTUAL PROVISIONS

Doe started the debate by raising the simple question as to whether dispute adjudication board (DAB) provisions were, in fact, included in contracts.

From a disputes side, law firms were seeing more of these provisions recently but are provisions being actively put in, or taken out at drafting stage, depending on the form of contract being used at negotiations?

Healey said that generally the concept of DABs was seen as a good idea, performing useful functions, and the fact that the global construction industry body, FIDIC had hardwired it into its contracts was important, and illustrated the value placed on DABs.

He noted that, anecdotally speaking, DABs are popular in the United States, in Africa, thanks to the World Bank, perhaps reasonably so in the United Kingdom and the European Union, and rather less so in Asia.

Healey acknowledged that clients did not always focus on detailed dispute resolution aspects (including DABs) at project inception; where considered, there can be a perception that the costs of supporting DABs was still off-putting.

Hickey, noted that while costs were only an issue in a small proportion of cases, in being a much smaller fraction of the true cost of the dispute as a whole, the decision to use them was very much a question of trust, as to how lawyers will represent clients at a DAB.

Clients, noted Hickey, may not trust a DAB “to sit in a room and decide their issues”. Agreeing to the composition of a panel was often the problem – it can take time to agree a panel of advisers.

For Foster, he observed that clients still like processes with “a hard edge”, such as other industry standard methods of dispute resolution, including adjudication, the courts and arbitration, while Nitek pointed out that, however unfairly, clients felt that DABs were there to benefit contractors by providing a quick route to an extension of time or award of cost, making them initially reluctant to agree their use. However, as Schaafsma succinctly put it, the principal attraction for DABs is the perception of impartiality, when compared with the engineer’s determination process.

DISPUTES BOARDS DISSECTED

David Barry outlined his experience of DABs. Starting with the ad hoc version, the two next most common were the classic standing DAB, which held regular site visits and monitoring, while there was also a standing DAB, which sat without monitoring the project in question, acting as a hybrid of the first and second types. This third, hybrid, type was more common now.

Having sat on a number of these, including hybrid versions, he said the parties had appreciated their work, with reasonable discussions with all sides. What was sought was not some kind of mediator-cum-adjudicator; they wanted a decision, something Hickey agreed with, saying the concept had shifted from dispute prevention, to providing in-situ dispute decisions.

The idea of a permanent monitoring by DAB was unattractive; one panellist said “there was no real appetite for monitoring”, while another pointed out the binding nature of the award was its strength; advisory recommendations, they suggested, would not be abided by the parties.

For his part, Doe stressed the pragmatism of DABs, suggesting the DAB process had to be both realistic and pragmatic in how far they could go in finally resolving disputes, something echoed by Healey, who said that boards were intended as a quick form of dispute resolution, and keeping the process moving was essential. Again, there was consensus – led by Barry, but supported by his fellow guests – that DABs are a good thing if used properly, with suitably qualified engineers or other experts as members. Over time, said Barry, DABs would evolve to become far more cost-effective, dispelling some of the arguments against – and would be better for it.

ENFORCEMENT ENGAGEMENT

That led neatly to a discussion about enforcement. Doe explained that in the United Kingdom, DAB awards were likely to be treated in the same way as expert determinations when it came to enforcement. A DAB award was a contractual mechanism; the failure to adhere to an award was a breach of contract which could be enforced in the courts, potentially on a summary judgment basis. How does this differ in different jurisdictions, he asked?

The panel discussed the difficulties of enforcement. It was clear, as Schaafsma indicated, that in some jurisdictions, governments or state-owned enterprises will have difficulties in making additional payments pursuant to a DAB award as it may not be considered sufficient to obtain legislative approval for the additional budget. As for enforcing an arbitral award requiring payment against an interim binding DAB award, again, in some jurisdictions the courts may struggle to recognise the concept and be reluctant to cooperate.

The panel discussed the idea of some equivalent of the New York Convention (on the recognition and enforcement of arbitration awards) and the Singapore Convention on mediation (for mediated settlements), which might facilitate “buy-in to the process” as Schaafsma put it.

There was panel agreement with Schaafsma’s view that governments could be reluctant to entertain the concept of neutral opinions on disputes. From the client view, the classic mode of dispute resolution was very much adjudication working alongside arbitration, according to the contract, which included a board. Not many people have had DAB experience, although those that have had, had said it can work. As an in-house lawyer, they were neutral, but equally acknowledged DAB could be useful.

MEMBERSHIP AND PROCEDURE

Doe then raised the question of who should be part of a dispute board, arguing that it was necessary to consider who is best qualified to sit on one, and whether it be a mix of legally-qualified professionals and experts. What number of dispute board members would the panellists expect to have, he asked?

The panel was not prescriptive about which professions should make up a DAB. Suggestions ranged from senior engineers, expert consultants on delay issues, quantity surveyors, architects or senior non-lawyer arbitrators who had industry and project experience. This, explained Schaafsma, is not always an easy choice where there is to be a standing DAB appointed on a major, multifaceted, project where it may be difficult to conceive at the outset what nature of disputes could arise – and while panellists differed on whether having legally-qualified members was appropriate, legal experience certainly was.

What was needed, noted Barry, was some experience of DAB, which was valuable, as was the familiarity with being used to an adversarial setting. Flexibility was also seen as a virtue, possibly allowing for a larger standing panel and then selecting members of the panel according to the nature of the dispute in question.

That led the panel to a discussion on the proper procedure for a DAB and how that procedure should be set and the board created.

Doe led the debate by taking parties through the FIDIC contract, which, he pointed out, gave quite a lot of power to the board but with strict time restraints imposed. He asked his guests if they preferred the procedure to be that prescriptive – or would it work better if used more flexibly?

One point, endorsed by Barry, but again, discussed and agreed by Hickey, Schaafsma and Doe, was the need for, and the importance of, clear and proper terms of reference. This, noted Barry, was really important, as enforcement issues were bound to arise if there was an absence of procedure, and could undo the good work done by DAB members – procedural fairness was significant, but so too was flexibility, and a good DAB would set out the parameters under how it would work and discuss matters as to the extent witnesses were used, the principles under which evidence was taken, and the like.

Barry stressed the need to comply with the essence of a fair process and to avoid the danger, cited by Hickey, of bullying of the panel by the parties. To Barry, however, the answer was clear: “That’s why you want a chair with credentials and experience,” preferably a lawyer.

LAWYERS AND ADVOCACY

Nitek had had experience of working on a matter where the parties could not be represented by lawyers in DAB hearings and outlined how that had affected matters, including how that had worked in practice and how inconvenient it might be for sophisticated parties in large disputes.

This prompted a flurry of debate across the table, with Barry pointing out those questions of law can, and sometimes did, arise in DABs, while there was real scepticism as to whether this was practical, or indeed, desirable. A non-lawyer, Barry made a great point that as a DAB member, if a question of law arose, he himself would want to be able to hear from and question a lawyer.

Two very valid points came from Schaafsma and Hickey: one was that, under the rules, parties before, and members of, a DAB are always fully aware that the proceedings could be used as evidence in arbitration.

That meant, Schaafsma said: “You are setting out your stall in the DAB and you need to make the right arguments,” which lawyers were equipped to do – something that in-house lawyers also firmly agreed with.

In addition, she noted, the process benefits from the fact that evidence is given by staff on site with fresh recollections and documentation readily at hand, which lawyers can take advantage of more easily than in an arbitration commenced months after demobilisation.

Equally, Hickey acknowledged that the intention was – at least initially – that in the beginning, appearances before any DAB were supposed to be “lawyer-light”. He rightly pointed out, supported by the panel as a whole – that “people didn’t like it” and that the involvement of lawyers was now taken as a given.

There then followed a discussion on presentation styles before DAB, which led to lively, and at times, amusing exchanges as to the different modes and experiences of advocacy that panellists had experienced, which can be summarised in saying that the best advocates would adjust their style and nature to test the evidence, while also recognising the nature of the tribunal before them.

ENFORCEMENT AND FUNDING

There then followed a further discussion on enforcement and the relative nature and merits of adjudication in this context. It was commonly acknowledged this was an important factor – the merits of the Gulf Co-operation Council countries, such as the UAE, were praised for positive enforcement, as was the United Kingdom and the European Union – and the interim nature of boards was also given its proper step, but it was not without consideration of how the courts viewed enforcement issues – including the Technology and Construction Court.

The discussion led naturally to consideration of litigation funding, on which Foster spoke. Having contributed to the interplay between the panellists utilising his own practice experience, he carefully compared and contrasted the use of DAB with adjudication.

Funders like Augusta, he said, like adjudication because it is quick, the dispute in question does not involve a binary win/lose situation, but rather a question of nuance related to the quantum of any loss, so the client would often get some sort of return, and most crucially, it was enforceable.

DABs, noted Foster, had the advantages of speed of process and the reasonable expectation of some form of return. However, enforcement raises its own question marks. Showing the sophistication that funders have cultivated in this market, he proposed a balanced solution; a funder might fund a DAB as a first step in a proposed arbitration, but then, to manage the process properly for all sides, need a break clause afterwards, if the DAB decision was unfavourable to the claimant.

Foster rightly made the point that it was clear, from his experience and those of others, that a favourable DAB decision might lead to settlement, and that funders prefer an early resolution, making the process attractive to them. While Augusta had not funded a DAB so far, he believed it would do so at some point.

Discussion then moved to the question of what would be necessary to enforce a favourable DAB decision? Foster made the point that a claimant with an unchallenged DAB decision may not need further funding, because it was in a strong position to recover, while if the decision was contested in arbitration, a funder would stay with the client until the question was finally settled.

COSTS AND THE FUTURE

Doe then took the opportunity to raise some broader points on costs where it was common practice that litigation and arbitration were added to overall project development costs, rather than coming out of central funds.

This made project directors very cost conscious when it came to dispute resolution. In that context, the use of DABs might be seen as an unnecessary additional step towards arbitration, while Schaafsma suggested that increasingly, clients had clear strategies on costs which they expected firms to follow through in arbitration, of which the effective use of DAB is a part.

One panellist noted that “funding balances the books” and was “no longer a sign of impecuniosity”, and while enforcement in certain jurisdictions was questionable, the market for funding was internationally vibrant and growing, a point detailed by Nitek.

It was left to Doe to ask the panellists to sum up the future. Did the panel feel that DABs are a process which people are going to engage more, or less, with going forward?

There were industries, it was acknowledged, where DAB could make a real impact - the nuclear energy industry, for example - in which the absence of a parallel system of adjudication made their use beneficial, while the use of the concept as an alternative to proposals like directed arbitration and mediation, for example, in Belt & Road cases, was also discussed.

While some industries, for example energy, and the oil and gas sector in particular, would be less likely to adopt the same, international infrastructure, power generation and heavy industrial plant projects had scope for DABs - as did construction projects. To Barry went the final word, saying “there's a fantastic future for DABs”, on which note proceedings closed.

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