



# Dispute review boards

Dispute review boards are increasingly being used on international construction projects to resolve disputes in the first instance. This briefing addresses the rationale for the use of such boards and looks at the approach adopted by standard forms and institutions including the World Bank and the ICC.

On major construction projects, parties will ideally have a 'fast track' means of resolving their disputes in the first instance. This allows work on the project to continue until completion, with the opportunity for disputes to be finally resolved through litigation or, more often, arbitration proceedings (which can take months, often years, to conclude) independent of the project's timetable.

Many parties in international construction projects are increasingly providing for adjudication by a dispute review board in their dispute resolution provisions. Standard forms commonly used on international construction projects, such as those produced by Fédération Internationale des Ingénieurs-Conseils (FIDIC), provide for the use of dispute review boards as a precursor to litigation or arbitration, as do the World Bank's standard bidding documents.

Arbitral institutions have also endorsed such procedures. For example, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) have each issued procedural rules for dispute review boards. These are discussed below.

## Evolution

Dispute review boards, sometimes referred to as dispute boards or dispute adjudication boards, evolved from the role of the engineer as decision-maker in the first instance under various standard forms of construction contracts. For example, earlier editions of the FIDIC contracts provided that disputes were to be determined in the first instance by the engineer under the contract.

The engineer's decision was binding upon the parties until it was reversed by arbitration.

Contractors increasingly became cynical about the engineer's impartiality, particularly where the employer appointed an in-house engineer to fulfil the role. Lenders to major international construction projects (such as the World Bank) also became concerned over the potential lack of independence and pressed for alternative means of decision-making in the first instance. As a result, panels of experts with particular skills, expertise and familiarity with the type of project or industry in question began to be used during the 1980s and 1990s. These panels were first used on major international construction projects such as the Channel Tunnel project, the Hong Kong airport project and the Ertan project in Sichuan Province, China.

In the US, the concept of using a standing panel of impartial, qualified people to provide non-binding recommendations for resolving disputes developed during the 1970s and 1980s, when such boards were used on various construction projects, including the second bore of the Eisenhower Tunnel (Colorado), the Mount Baker Ridge Highway Tunnel (Washington) and the Chambers Creek Tunnel (Washington). Historically, these boards were used in the US largely for tunnel projects. However, by the mid-1990s they were being used on other types of heavy construction work (for instance, highways), and building and process contracts, involving a variety of employers including American Telephone & Telegraph, the Hawaiian Department of Transportation and the International Monetary Fund.

As noted above, most institutions and organisations involved in major international construction projects now include dispute review board provisions in their standard form contracts or in their terms and conditions. For example, each of the current editions of FIDIC's Red Book, Yellow Book and Silver Book include adjudication by a dispute review board as the first tier of binding dispute resolution prior to arbitration. The World Bank also includes dispute review board provisions in its *Standard Bidding Documents – Procurement of Works* (May 2005), which is the standard form of contract used on large-scale civil works projects funded by the World Bank where the estimated costs are more than \$10m. Additionally, the World Bank and other multilateral development banks and international financing institutions have prepared a *Master Bidding Document for Procurements of Works and User's Guide* (July 2005), which is intended to be used as a model for such organisations in issuing their own standard bidding documents relating to projects that they decide to finance. That document also includes dispute review board provisions and has been incorporated by various development banks (for instance, the Asian Development Bank and the European Bank for Reconstruction and Development) into their standard bidding documents.

The AAA publishes its own *Construction Industry Disputes Review Board Procedures* that parties can adopt. The ICC introduced its own *Dispute Board Rules* in September 2004. The ICC rules provide for 'dispute adjudication boards' (panels that make binding interim decisions); 'dispute review boards' (panels that make non-binding recommendations that become binding if neither party expresses dissatisfaction within 30 days of receiving the recommendation); and 'combined dispute boards', which usually issue recommendations as a 'dispute review board' but may in certain limited circumstances make interim binding determinations as a 'dispute adjudication board' (eg if one party requests that the panel do so, and the other party does not object).

Although dispute review boards have been primarily a feature of international construction projects to date, there has been increasing interest in extending their use to other industries/sectors. The ICC, for instance, has drafted its dispute review boards rules with a view to their being used on 'a wide range of contracts in different industries'.

## Key features of dispute review boards

### Composition

Dispute review boards can comprise a single person or a panel of three or five members. It is prudent to keep the number of members to an odd number, so that it is possible to achieve a majority decision where the panel cannot reach unanimity. Dispute review board members are often required to possess expertise and skills in the type of project/industry in question. The members are independent of the parties and are expected to be able to take the initiative in investigating and ascertaining the facts and law related to the dispute. It is usual to include provisions in the terms of appointment of each member of the dispute board that the panel's discussions are to remain confidential in respect of any non-parties or subsequent litigation or arbitration proceedings. In particular, the dispute review board members would generally be barred from participating in any subsequent litigation or arbitration proceedings.

### Standing/ad hoc

Parties may opt to appoint a standing dispute review board from the outset, which will remain in place until the end of the construction of the project, or appoint a board only if a dispute arises (ie on an ad hoc basis).

The primary advantage of a standing dispute review board is that whenever a dispute arises, the members of the panel will have a high degree of familiarity with, and understanding of, the project and its progress and the panel will generally be readily available to render a decision within a relatively short period of time. A standing panel may also be able, if desired by the parties, to act as an informal sounding board when issues first arise and before they are formally referred to dispute resolution.

However, the disadvantages of using standing panels are the cost, as the members will generally expect to be paid an annual retainer, and the difficulty in identifying suitably qualified people who may have the expertise to consider the full range of potential disputes that may arise.

### Time limits

Parties submit their disputes to the dispute review board for quick decisions. Therefore, it is important to specify a

time limit within which the dispute review board is to reach its decision. Time limits prescribed in the commonly used standard forms and institutional procedural rules range from 14 days (AAA), 84 days (World Bank and FIDIC) to 90 days (ICC). It is prudent for parties to reserve the right to extend this period where appropriate, to avoid the argument that the decision is of no effect if it is delivered outside the prescribed time.

### **Jurisdiction and procedure**

Parties are free to determine the jurisdiction of the dispute review board and the rules of procedure it should follow in resolving disputes. It is common to restrict the dispute review board's jurisdiction to disputes formally referred to it by the parties. Most of the standard forms/institutional rules (with the exception of the AAA) do not empower the dispute review board to require disputes arising under different contracts to be joined or consolidated with disputes arising under the contract in question, even if the same parties are involved in both disputes or the disputes arise out of the same events or circumstances (eg disputes in relation to a main contract and a sub-contract dispute). However, parties are free to include provisions in their contracts for joinder and/or consolidation of related disputes before one panel and avoid the risk of inconsistent decisions.

Where the parties have not adopted a standard form or a set of institutional rules, and have instead opted for bespoke provisions, they will need to set out the dispute review board's procedure. Procedural matters to be considered include: starting proceedings (making the reference, notifying the dispute review board and the other party etc); exchanging of statements, requesting clarification or additional information; conducting oral hearings and convening meetings; using legal advisors; the dispute review board's powers to appoint its own advisors on matters of legal interpretation or technical expertise outside its expertise; and powers to open up, review and revise any decision, notice or certificate etc given in the administration of the contract.

Parties are also free to allow the dispute review board to determine its own procedure. However, it is important to bear in mind that dispute review boards are not acting in a judicial capacity but as experts. As experts, the dispute review board can adopt an inquisitorial, investigative

approach and need not refer the results to the parties before making the decision. They are not required to follow the rules of natural justice and there is no objective standard of fairness that must be complied with. Therefore, it is still sensible for parties, where they have given the dispute review board a free reign on procedure, to at least outline limited parameters within which they are comfortable for the dispute review board to operate.

### **Decision/recommendation**

Depending on the jurisdiction, the parties' agreement or procedural rules adopted, the dispute review board's decision may be binding pending final determination of the dispute by the court or an arbitral tribunal (as provided for in the standard form contracts of FIDIC, the World Bank and dispute review boards created under the ICC DB Rules), or a mere recommendation which the parties are free to comply with or reject and proceed directly to arbitration or litigation for resolution of the dispute (as is common in the US and with dispute review boards created under ICC DB Rules). Again, depending on the contractual provisions or institutional rules, the dispute review board's decision may need to be either unanimous, or a majority decision only may suffice. For example, the ICC rules require a three-member dispute review board to make every effort to reach a unanimous decision. Where this cannot be achieved, a majority decision is permissible.

### **Enforcing the dispute review board's decision**

The dispute review board's decision is neither an arbitral award capable of enforcement under the New York Convention, nor does it have the status of a court judgment. Instead, the decision is binding only as a matter of contract between the parties and the appropriate method of enforcing a dispute review board's decision is by way of an action for breach of contract. Accordingly, the provisions of the parties' bespoke agreement, standard form or institutional rules will govern its effect. As noted above, it may, should the contractual provisions or rules so provide, constitute only a recommendation which is not binding on the parties at all and as such is not enforceable. Typically, the decision will be binding unless and until reversed in

arbitration or litigation. Generally, the contractual provisions or rules will say that the decision must be complied with in the meantime. Indeed, this is the very essence of the value of dispute review boards – they provide a means of resolving disputes in the first instance to enable the project to continue even if, following arbitration or litigation, the result may be reversed or modified in some way.

In enforcement proceedings, the arbitral tribunal/courts will not revisit the merits of the claim and there is very limited room for the defaulting party to resist enforcement. Examination of the merits of the original claim may, of course, be the subject of separate set of arbitral or court proceedings brought according to the contractual provisions or institutional rules to finally determine the dispute. A defendant may be able to resist enforcement where it can establish that the dispute review board has exceeded its jurisdiction, for example, where the dispute review board has issued a decision on a matter not referred to it or has issued a provisional decision where the parties have only authorised it to issue a final determination.

## Conclusion

It is clear that dispute review boards are here to stay as an alternative means of resolving disputes and are particularly suitable for use on major construction projects. However, given the relatively summary process, parties rarely choose dispute review boards as the only mechanism for resolving disputes. Arbitration is generally retained as the fallback even if in practice the parties may be prepared to live with and abide by the decisions of the dispute review board without recourse to arbitration. Where the financial implications are substantial, or where there is a sense that the dispute review board has tended to ‘split the baby’ rather than rigorously analysing the contractual position, a party may want to refer the matter to an arbitral tribunal that will approach the issues without the benefit of knowledge of the full history of the project, for better or for worse.

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