# **LONDON**: Dispute boards – modern approaches to dispute resolution in international projects

A recent ICC symposium hosted by White & Case considered the role of disputes boards in international construction projects. **Rebecca Shorter**, an associate in the firm's construction and engineering group in London, reports.

The ICC UK Arbitration Practitioners' Symposium, which took place on 13 June, addressed the theme of disputes boards as a developing trend in international dispute resolution, notably in the construction sector.

As White & Case partner Paul Cowan explained in his introductory remarks, the main concern of clients in international construction projects is typically how to avoid disputes arising in the first place. Dispute boards are increasingly used as a method of preventing disputes, or facilitating their early resolution. Consequently, they are of particular interest to clients involved in such projects and the practitioners advising them.

## Past, present and future

Christopher Seppälä, a partner at White & Case in Paris, set out the history and development of dispute boards and their use in projects across the world – drawing on his long experience, including his role of 13 years as legal adviser to the contracts committee of the International Federation of Consulting Engineers, or FIDIC.

In common law countries, from the late 18th century to the early 20th century, the engineer could, and did, act as the sole arbitrator of disputes under construction contracts. But, in the 20th century, more frequently construction contracts provided that the referral of disputes to "the engineer", who (though hired and paid by the employer) was expected to act impartially, was a condition precedent to arbitration.

As a result of disillusionment with the ability of the engineer to act impartially, but from this background of an impartial intermediary between the employer and contractor, the concept was developed of a dispute board that is independent of, but whose member(s) are approved by, the parties. Established at the outset of a project and maintained in place throughout its duration, two main types of disputes boards have developed: a dispute review board (DRB), which provides recommendations; and a dispute adjudication board (DAB), which provides binding decisions on disputes between the parties.

Originating in the United States, a DRB was first used on the Eisenhower Tunnel project in 1975. The use of DABs commenced slightly later, with an early success being their use on the Anglo-French Channel Tunnel project. Since then, the mandatory use of DRBs on World Bank-financed projects in the mid-1990s, coupled with the introduction of DABs into the FIDIC suite of contracts, has resulted in a significant increase in the use of dispute boards in international projects.

Using recent statistics released by the Dispute Review Board Federation, Seppälä reported that the international use of dispute boards increased by some 75 per cent between 2005 and 2012. Nevertheless, he observed that the use of dispute boards remains in its infancy. To increase their use further, Seppälä considers that an increase in awareness as to the benefits of dispute boards is required, particularly by employers, around the world.

## Practical perspectives

Andrew Burr, barrister at Atkin Chambers, chaired a panel providing a practical perspective on the use of dispute boards in modern international projects. The panel consisted of Wolf von Kumberg, European legal director and assistant general counsel of Northrop Grumman; Nabeel Khokhar, director of Driver Trett (and formerly of Strabag); and Gwyn Owen, arbitrator and dispute board member.

The panel as a whole was firmly in favour of the use of dispute boards, although Khokhar and Owen differed over the appointment of lawyers on them. Khokhar suggested that the fact a dispute board could progress without the involvement of lawyers was an advantage. However, Owen counselled caution on such an approach, commenting that, in his view, legal involvement was essential in order to give both parties confidence that their respective positions had been properly understood and considered.

The discussion turned to the establishment of a dispute board. Khokhar said that timing was key. Too often, he thought, in the initial "honeymoon" period of a project, the need to establish a dispute board is neglected. Subsequently, if left until a dispute has already arisen, it may be difficult for the parties to agree on even administrative matters. Owen agreed with this, adding that one of the main advantages of a dispute board was its ability to resolve issues in "real time" rather than after the event, with minimum disruption to the progress of the project. For this reason the panel agreed it was essential to have the board ready from the beginning of the project.

Having discussed the advantages of dispute boards, the panel considered what can be done to increase their use. von Kumberg emphasised that further awareness of dispute boards is required among clients and that this in part could be addressed by the lawyers advising those clients. However, in order to achieve that, further education amongst lawyers is required as well.

He also expressed the view that dispute boards would be well suited for use in a number of other industries beyond international construction projects, including: shipbuilding, telecommunications, long-term maintenance arrangements and his own industry, aerospace and defence.

## Enforcing dispute board decisions

The final session was chaired by Sir Vivian Ramsey of the English Technology and Construction Court, and consisted of two addresses on the enforcement of dispute board decisions. The first examined the legal means of enforcing a DAB decision through the arbitral process. The second considered the potential policy limitations on enforcement, including reference to analogous English adjudication case law.

## How to enforce in ICC arbitration proceedings?

Professor Antonio Crivellaro, counsel at Bonelli Erede Pappalardo in Milan, acted as counsel for the claimant in the first known ICC case (in 2001) in which an arbitral tribunal, sitting in Paris, enforced a binding (but not final) pre-arbitral decision of an engineer under a FIDIC contract. In that case, engineer's decisions had been given on disputes between the parties. Subsequently, arbitration proceedings had been commenced in which the claimant sought an interim award enforcing the engineer's decisions. Under the contract, those decisions were not "final and binding", but they were nonetheless "binding" pending any different final decision from the arbitral tribunal.

The tribunal made its decision on the "plain and unambiguous" wording of the agreement, finding the decisions to be immediately enforceable notwithstanding that they could subsequently be revised or set aside in the arbitration.

Crivellaro explained that what should have been a clear precedent for the enforcement of interim decisions has subsequently been confused by a judgment of the Singapore courts in the *Persero* case, in relation to an ICC final award issued in 2009.

In this well-reported case, an arbitral tribunal, with its seat in Singapore, enforced a DAB decision applying similar reasoning to the ICC case of 2001. Their award was, however, subsequently set aside by the Singapore High Court, which held that the tribunal had exceeded its jurisdiction by ruling on the immediate enforcement of a DAB decision, a "new" dispute which had not been referred to the DAB; and making the DAB decision "final" by its enforcement, without hearing the merits underlying the decision. That decision was confirmed by the Singapore Court of Appeal.

Following the *Persero* case, a more cautious approach was taken in the final case discussed by Professor Crivellaro, an arbitral award made by an ICC tribunal in Bucharest in 2011.

In addition to the DAB decisions in its favour on the substantive issues in dispute, the claimant obtained an additional decision from the DAB that its preceding decisions were binding and enforceable. In subsequent arbitration proceedings, the claimant sought immediate enforcement of the DAB decisions, which was awarded by the tribunal.

Although the respondent subsequently challenged that decision, the Romanian Court of Appeal found that no procedural provisions had been violated and dismissed the application.

Crivellaro said that the Singaporean courts appeared to have failed to recognise that the power of an ICC tribunal is limited to the claims and counterclaims before it (that is, it has no inherent power to examine the underlying substantive merits if the parties have not referred this question to the tribunal). He also questioned whether the "unsatisfactory double referral" was in fact necessary; expressing that, in his opinion, a fully comprehensive DAB decision (that is, one which awards compensation and contains a declaration that it is immediately enforceable) should be capable of immediate enforcement.

### Policy limitations on enforcing DAB decisions

Paul Cowan examined the circumstances in which a tribunal may be persuaded to enforce a DAB decision as a matter of policy and by reference to the nature and circumstances of the DAB decision itself.

Cowan suggested that it should be presumed, as a starting point, that a DAB decision should be enforced. The process is intended to provide swift and binding dispute resolution in ongoing projects and, without enforcement, the authority of the DAB will be undermined. In the UK, the principles for enforcing construction adjudication decisions are very similar, albeit this has the benefit of being underpinned by statute law and the inherent powers of the English courts.

In the UK, it has been accepted that there may be imperfections in adjudication decisions due to the intrinsic limitations in the adjudication process, but that this should not prevent the decision from being binding. This was confirmed in the 1999 case of *Macob Engineering v Morrison Construction*. Cowan submitted that the same logic should be applied in the context of DAB decisions. He continued by setting out, by reference to case law, the two main categories of exception to the principle that an adjudicator's decision is enforceable: jurisdictional errors; and serious breaches of the rules of natural justice.

He went on to draw attention to the cultural differences in approaches to disputes: whereas an adjudicator is appointed in the event of a dispute, a DAB should be in place from the outset of a project. Under both the ICC and FIDIC rules, the DAB is expected to visit the site regularly and be informed of ongoing issues and claims. DAB board members will therefore potentially have a longer and wider-ranging role with both the project and the parties, instead of simply resolving a discrete issue in isolation.

In this context, he drew attention to the English case of *Glencot Development v Ben Barrett & Son* in 2001, where an adjudicator's decision was not enforced due to the perceived risks of his lack of impartiality after the adjudicator had already acted in a quasi-mediator capacity. This is a marker for how things can go wrong and is relevant to DABs, whose members are required to remain independent and impartial over long periods (and are encouraged by the board rules of the ICC and FIDIC to engage in informal dispute avoidance and resolution).

In conclusion, Cowan submitted that most, if not all, of the logic from English adjudication case law could be applied to the enforcement of DAB decisions. However, as creatures of contract rather than of statute, it may be that DAB decisions still need a clear and authoritative "*Macob* moment" before enforcement becomes accepted by arbitral tribunals as a matter of course. Moreover, it can be expected that the overall burden of persuasion would be higher for a party seeking enforcement of a DAB decision in arbitration than it is for a party seeking summary judgment in the English courts from an adjudicator's decision.

Closing remarks came from Ellis Baker, head of the construction practice at White & Case in London. He said dispute boards are now established in the international project landscape, and are popular for being quicker and cheaper than other methods of dispute resolution. However, the type of board should be considered carefully, as it was observed that "one size does not fit all". Careful selection of members is also essential, not just for their experience and expertise but also for their availability. Used appropriately, a dispute board "can prevent a dispute from turning into a disaster".