

CI Arb Ireland Branch Annual Conference March 2024

Session 1 - Dispute Avoidance – Is it realistic?

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Dispute avoidance is very much in vogue these days for construction contracts worldwide and for good reason. Construction disputes can be costly, time consuming, bad for relationships and rarely are a positive development for project. Better it is that resources are focused on project deliverables and milestones and thus a model whereby disputes that typically arise on construction projects (whether typical or of a more bespoke nature) can be taken out of the equation and dealt with off line so to speak or in some other non-adjudicative forum.

The most common vehicle for delivery of dispute avoidance is through the involvement of a Dispute Board (DB) which is appointed at the start of the project – ie a Standing Dispute Board. The FIDIC forms of contract have really pioneered the way over say the last 10 to 15 years in terms of dispute avoidance and indeed the most recent versions to their FIDIC Red, Yellow and Silver books (2017 with a 2022 reprint) have even seen the terminology evolve from the 1999 version of a Dispute Adjudication Board (DAB) to a Dispute Avoidance and Adjudication Board (DAAB) (See Clause 21.3 FIDIC Yellow/RED/Silver 2017/2022). The General Conditions of Dispute Avoidance/Adjudication Agreement at Appendix 1 and the DAAB Procedural Rules at Annex 1 to the Contract govern the arrangement and the powers of the DAAB.

Both the ICC and the CI Arb have dispute board rules all of which comprises an element of dispute avoidance procedures and guidelines.

The most common approach towards dispute avoidance is through the provision of informal assistance by the DB upon the request of both parties. Clause 21.3 FIDIC 2017/2022 indicates that “*Such informal assistance may take place during any meeting , Site Visit or otherwise*” However importantly “*the parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process*”.

In December 2023 the FIDIC Dispute Avoidance and Adjudication Forum published *Practice Note 1 Dispute Avoidance* which provides valuable guidance as to how a dispute board should address the matter of dispute avoidance as is well worth a read for anyone interested in the topic (<https://fidic.org/publications/practice-notes>)

Key Ingredients for Success

As a member of the Engineers Ireland Conciliation Panel and the FIDIC Presidents List of Adjudicators and hence with considerable practical experience of Standing Conciliation under the Public Works Contracts in Ireland and the DAB/DAAB arrangements under FIDIC, I make some general observations as to what I consider the key ingredients for success as follows;

- The DB must be appointed from the start of the project to properly understand the project issues and personnel dynamics ie a Standing DAAB or Standing Conciliator

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- The parties must have trust in the DAAB /Standing Conciliator – integrity and impartiality is a given but real “trust” comes with interaction over a period of time – need to know that your Standing Conciliator is a safe pair of hands that can be relied upon
- The parties must have confidence in the DAAB /Standing Conciliator’s expertise – technical, legal, financial
- The DAAB/Standing Conciliator must be a good listener
- Once the first four bullet points are established the most important element of all is to ask the right question at the right time and in the right tone – done properly it can be remarkably successful in fostering discussions and moving things along - done poorly then it could be disastrous and all the rapport and confidence built up with the parties could evaporate.

Does it work ?/ Is it realistic?

The Dispute Resolution Board Foundation (DRBF www.drb.org) provides assistance with the worldwide application of DB practices, provides training for DB practitioners and maintains a large data base of publications, articles and webinars on the topic. In particular the DRBF maintains statistics based on returns from both DB members and contractor/employer representatives bodies around the world relating to the use of and success of DB generally. It is clear that the use of DB worldwide is increasing and for good reason. By way of headline statistics the DRBF point to data from 2018 that indicates that where a DB was in situ and issued a decision only 6% of said decisions were rejected and subsequently referred to arbitration for final resolution. Of the 6% referred to arbitration only in 22% was a different decision reached. So the DB process works and hence the increasing popularity.

Specifically in relation to dispute avoidance a detailed survey and analysis was carried out by the DRBF in 2018. The results are summarised in Appendix 1.

The main takeaways from this survey generally are as follows:

- A Standing DB is considerably more effective generally than an Ad-Hoc Board which is only established once a dispute has arisen and is referred. Of the total number of issues that came before an Ad-Hoc board as shown over 14% were subsequently referred to arbitration against an average figure for a Standing DB of 1.75%
- Where a Standing DB engages proactively in dispute avoidance the outcome indicates that a significant number of disputes that may arise can be avoided from engagement around the issues and further that where a decision is ultimately required from the Standing DB that the subsequent referral to arbitration metrics are at 0.5% approximately presumably on the basis that many of the issues have been flushed out at the dispute avoidance phase and hence the decisions do not generally come as a surprise and are therefore broadly accepted.

The key takeaway is that dispute avoidance can only (and by definition) be achieved where a DAAB is appointed at project commencement (ie a Standing DAAB or Standing Conciliator in the Irish Public Works Context) and further where the DAAB or Standing Conciliator proactively engages with the parties on the matters and issues before they crystallise into disputes.

The Positive Effect Of Dispute Boards

	Standing Boards			Ad-Hoc Boards									
	Dispute Avoidance Yes		Dispute Avoidance No	Dispute Avoidance Yes		Dispute Avoidance No							
Tot Projects	Nr. Boards	Opinions	Decisions ⇒ Arbitration	Nr. Boards	Opinions	Decisions ⇒ Arbitration							
MDB	107	59	95	184	3	26	8	75	3	22	5	66	16
Bilateral Loan	37	17	76	48	0	3	0	1	0	17	0	20	7
Government	47	30	81	22	0	9	0	7	0	8	5	19	0
Private	11	5	15	15	0	0	0	0	0	6	16	30	1
Other	29	16	13	14	0	6	7	3	0	7	16	8	2
		Issues	280	283	Issues	15	101	3	Issues	42	143	26	
		Σ Issues	563	563	3	Σ Issues	101	3	Σ Issues	185	143	26	14.05%
													2.97%
													0.53%

Source: Geoffrey Smith and Leo Grutters, DRBF Conference Tokyo 2018. www.drb.org