

Standing Dispute Boards from the England and Wales perspective

Should they be adopted in England and Wales on major projects? And if so, would this require amending the legislation currently in force?

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What are standing Dispute Boards?

Dispute Boards in construction are bodies created by contract and composed of independent and impartial persons¹. In their standing mode, they are intended to operate from the outset and throughout the whole period of the contract, ‘not only to resolve disputes but also, if at all possible, to prevent them from happening’². They become part of the project administration³, and help the parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract⁴. They are a relatively new concept of dispute avoidance and resolution in major construction contracts, with a recognized pioneer experience being 40 years ago on the Eisenhower Memorial Tunnel project in the USA⁵. This was developed in order to address the deleterious effect of claims, disputes, and litigation upon the efficiency of the construction process, leading to rapidly escalating costs⁶.

Since then, recourse to Dispute Boards appears highly popular in the USA, with several thousand projects recorded using those⁷. As the success of this process became more apparent, it greatly expanded in North America as well as throughout the world⁸, in particular with its use under FIDIC forms of Contract and by some International Financing Institutions⁹.

At the time Dispute Boards started to develop internationally, England and Wales introduced statutory adjudication of construction disputes through the Housing Grants, Construction and Regeneration Act (HGCRA) 1996, later amended by the Local Democracy, Economic

¹ Chern (2015), 4.

² Bunni (2005), 599.

³ Chern (n 1), 4.

⁴ International Chamber of Commerce, *Dispute Board Rules* (2015), 2.

⁵ Dispute Review Board Foundation, *DRBF Practices and Procedures Manual*, ch 1.1.

⁶ DRBF (n 5), ch 1.1.

⁷ Mastin (2013).

⁸ DRBF (n 5) ch 1.1.

⁹ Gould (2011).

Development and Construction Act (LDEDCA) 2009, with the underlying Parliament intention to introduce a ‘speedy mechanism for settling disputes in construction contracts on a provisional interim basis’, as put forward by (as he then was) Justice Dyson in *Macob Civil Engineering Ltd v Morrison Construction Ltd*¹⁰, who further commented in 2011¹¹ that

...There was a public interest in claimants obtaining a swift decision from an adjudicator that was binding until the dispute could be finally resolved.

Dispute Boards and England and Wales statutory adjudication appear to share similar foundations: combatting the negative time and cost effect of protracted and unresolved disputes. But have they addressed this issue in similar terms, and if so to what extent? Do Dispute Boards bring additional benefits to statutory adjudication and should they be adopted in England and Wales, at least on major projects? And if so, would this require amending the legislation currently in force?

What comparison in between standing Dispute Boards (DB) and statutory adjudication in England and Wales?

As emphasized by Chern¹²:

What a dispute board does that UK statutory adjudication does not is to provide a regular and continuing forum for discussion of difficult or contentious matters...and to create valuable opportunities for the parties to avoid disputes by keeping proactive communication alive

Avoiding disputes, or settling them at an early stage, is a salient feature of standing DB¹³, while statutory adjudication is in essence only there to decide on disputes which have already crystallized.

Standing DB Rules give two hats to a DB – one of dispute avoidance and, if unsuccessful and a dispute ultimately emerges, one of dispute resolution. FIDIC forms of contract encompass provisions enabling construction parties to jointly refer any matter to the Dispute Adjudication Board (DAB) in the view of attempting to resolve any disagreement before it becomes a dispute¹⁴. Interestingly the dispute avoidance function of the DAB goes one step further – it becomes empowered to take proactive measures so as to ‘endeavour to prevent potential problems or claims from becoming Disputes’¹⁵. This is achieved through regular site visits by the DAB, typically held

¹⁰ [1999] B.L.R. 93 (TCC) [14].

¹¹ Dyson (2011), 14.

¹² Chern (n 1), 4.

¹³ Jaeger, Hök (2010), 400.

¹⁴ FIDIC Red Book, Sub-Clause 20.2, 7th paragraph.

¹⁵ (n 14), DAB Procedural Rule No.2.

every 3 to 4 months¹⁶, providing opportunities to meet and discuss with the parties while there might not even be any single dispute yet¹⁷.

Should a dispute later crystallize, the FIDIC DAB will already be formed¹⁸ while, under statutory adjudication, an adjudicator will have to be appointed within 7 days from a dispute notice¹⁹. The FIDIC DAB shall issue its decision within 84 days from a dispute referral²⁰, against 28 days for the adjudicator under statutory adjudication²¹, extendable to 42 days if the referring party so consents²², or within any other period as the parties may agree. The FIDIC DAB shall act impartially²³, and can take the initiative in ascertaining the facts and the law²⁴, in similar terms to statutory adjudication²⁵. Finally the DAB benefits from the same quasi full liability immunity²⁶ as given in statutory adjudication²⁷, equating the one given to arbitrators in England & Wales in section 29 of the Arbitration Act 1996.

There are however several forms of DB, operating differently when it comes to handling a dispute. Dispute Review Boards (DRB), which is the model retained in the USA²⁸, and one of the options proposed by the ICC Rules²⁹, issue recommendations, which are not binding upon the parties. However they appear to be persuasive and are usually, in practice, accepted by the parties³⁰. Some rules also define that they become final and binding if no party expresses its dissatisfaction with a recommendation within 30 days of receiving it³¹. Dispute Adjudication Boards (DAB), which is the model retained by FIDIC, will on the other hand issue decisions which are immediately binding upon the parties unless and until revised through amicable settlement or arbitration³². Finally, the ICC has introduced a hybrid model being the Combined Dispute Board (CDB), issuing recommendations, or decisions at the election of one of the parties and if not objected by the other and/or confirmed by the CDB. In contrast, statutory adjudication provides for decisions which are

¹⁶ (n 15).

¹⁷ Bunni (n 2), 623.

¹⁸ (n 14), Sub-Clause 20.2.

¹⁹ HGCRA 1996, s 108(2)(b).

²⁰ (n 14), Sub-Clause 20.4.

²¹ HGCRA 1996, s 108(2)(c).

²² (n 2121), s 108(2)(d).

²³ (n 14), DAB Procedural Rule No.5(a).

²⁴ (n 14), Procedural Rule No.8(d).

²⁵ HGCRA 1996, s 108(2)(e),(f).

²⁶(n 14), General Conditions of Dispute Adjudication Agreement, Clause 5(c).

²⁷ HGCRA 1996, s 108(4).

²⁸ (n 7).

²⁹ (n 4), Article 4.

³⁰ Klee (2015), 245.

³¹ (n 4), Article 4.3.

³² (n 14), Sub-Clause 20.4.

binding only, until the dispute is finally determined by legal proceedings, arbitration or agreement³³. Decisions may however become final if the Parties so agree³⁴. As to other post-decision events, statutory adjudication enables the adjudicator to proceed with the correction of clerical or arithmetical errors in the decision, made by accident or omission³⁵. There was initially no similar express provision under the 1999 FIDIC Suite of Contracts, but such has been inserted in the latest FIDIC forms with, arguably, a wider scope since the DAB can correct ‘errors of fact or principle’³⁶.

Finally, statutory adjudication brings the advantage, against standing DB, of the courts support of the Parliament’s intention towards adjudication decisions³⁷. They can be enforced by means of a summary judgment³⁸, which can generally only be resisted on the grounds of a breach of natural justice or of a jurisdictional issue³⁹. The ‘need to have the ‘right’ answer has been subordinated to the need to have an answer quickly⁴⁰, and an error of fact and/or law in the decision will generally not be a valid reason to resist enforcement⁴¹. FIDIC or ICC DB Rules do not incorporate express provisions for challenging an DB decision on the grounds of natural justice or jurisdiction and, although this might be seen as ‘inherent to the concept of dispute adjudication’⁴², this would in effect leave this matter to be decided in accordance with the relevant curial law. Furthermore, enforcement of a FIDIC DAB decision against a reluctant party is to be done through arbitration, with difficulties which have become salient through, for instance, the recent *Persero*⁴³ case in Singapore which went through 2 arbitration awards and 4 court decisions to confirm that a binding but non-final DAB decision can be enforced through either an interim or a final arbitration award.⁴⁴

Should standing Dispute Boards be adopted in England and Wales on major projects?

Sir Latham stated in his report that, against the adversarial attitudes in the UK construction industry at the time, ‘the best solution is to avoid disputes’, although a certain number of disputes are inevitable⁴⁵. The statutory adjudication which emerged from Sir Latham’s report has however

³³ HGCRA 1996, s 108(3).

³⁴ (n 33).

³⁵ HGCRA 1996, s 108 (3A).

³⁶ FIDIC Gold Book, DAB Procedural Rule No.7.

³⁷ Dyson (n 11).

³⁸ *Macob* (n 10).

³⁹ *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358 [80].

⁴⁰ *Carillion* (n 39) [86].

⁴¹ *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] C.L.C 927 (CA).

⁴² *Jaeger* (n 13), 399.

⁴³ [2015] SGCA 30.

⁴⁴ *Seppälä* (2015).

⁴⁵ Latham (1994) [9.3], [9.4].

arguably only addressed dispute resolution, but not dispute avoidance. It was held in *AWG Construction Services Limited v Rockingham Motor Speedway Limited* that adjudication has ‘developed into an elaborate and expensive procedure which is wholly confrontational’⁴⁶, and Armes notes that, contrary to Latham’s aims, adjudication is increasingly being used after work completion rather than while works progress⁴⁷.

As per the database held by the Dispute Resolution Board Foundation (DRBF) on their website⁴⁸, 98% of disputes end with a DB recommendation or decision⁴⁹. But arguably that may not differ greatly from statutory adjudication decisions, as it is said that parties in England and Wales prominently accept those⁵⁰. However those supporting DB tend to highlight many project examples where no disputes were referred to the standing DB, allocating such achievement to the operation of the DB⁵¹ due, inter alia, to its capacity to have concern or disagreements of the parties addressed, professionally and while they emerge, by entrusted impartial experts, and to prevent personality conflicts in the project team, and escalation to formal disputes⁵². For Klee, ‘simply naming a dispute board in a project can be one of the strongest tools to avoid the dispute’⁵³. The DB is meant to act in a positive way to help prevent a claim from becoming a dispute⁵⁴, and under a DB parties are deprived of any opportunity to posture, knowing they work under the monitoring of respected professionals⁵⁵. ‘The accumulation of claims is minimised and there is generally not an ever growing backlog of unresolved issues’⁵⁶ creating an acrimonious atmosphere which would be detrimental to the execution of the construction operations.

The construction industry indeed appears to show an appetite for this mechanism on major projects, as evidenced with the 2012 Olympics Games in London where the experience of a Dispute Avoidance Panel (DAP) is said to have been successful⁵⁷. However the causation link in between the presence of the DB and the avoidance of disputes seems hard to establish –can it be said that but for the DAP, the Olympics would not have been a success? Nevertheless this has inspired Transport for London in setting-up as of 2014 a Conflict Avoidance Panel for some of its

⁴⁶ [2004] EWHC 88 (TCC) [122].

⁴⁷ Armes (2011a), 19.

⁴⁸ DRBF < http://drb.org/database_intro.htm>, accessed 16 January 2016.

⁴⁹ Armes (2011b), 9.

⁵⁰ Armes (2011a), 20.

⁵¹ Chern (n 1), 3.

⁵² Beaumont (2013).

⁵³ Klee (n 30), 238.

⁵⁴ Owen, Totterdill (2007), 5.

⁵⁵ Chern (n 1), 27.

⁵⁶ Owen (n 54), 47.

⁵⁷ Choat (2013).

larger projects⁵⁸ Other recent mega projects carried out internationally have also adopted standing DB – the high-speed railway Tours-Bordeaux project, or the ITER nuclear fusion project in France⁵⁹ being some first-hand examples.

Sir Latham gave specific consideration to large projects, emphasizing that they may require specific dispute resolution mechanisms, and highlighting the success of DRB in the USA⁶⁰. Indeed under a major project with multiples contracts being carried out in parallel, a standing DB will introduce convenience and economy since DB site visits and meetings can be held at the same time for each of the contracts under the project⁶¹ – the benefit-cost ratio of the DB is then greatly increased. International DB members' fees are in the region of USD 3,000 per working day, leading to an average cost of around USD 100,000 per year for a sole DB Member⁶². That would be a significant financial weight on low capital value contracts, hence the larger the project the easier it is to justify the expense⁶³. The Japanese International Cooperation Agency recommends a 3-member DAB on contracts of capital value greater than USD 50 million⁶⁴, and the World Bank would have standing DB on contracts greater than USD 10 million⁶⁵.

If standing Dispute Boards were to be adopted in England and Wales, would this require amending the legislation currently in force?

As put forward by J. Coulson⁶⁶

Provisions that add to the basic requirements of the Act are perfectly acceptable; provisions that alter or omit those basic requirements are not.

Standing DB rules would then need to be compliant, under their decision hat, with section 108 of the HGCRA, as otherwise they would be overridden by the provisions of the Scheme for Construction Contracts⁶⁷. The Institution of Civil Engineers (ICE) has published in 2005 Dispute Board Procedural Rules – Procedure one for international projects, and Procedure two for use on contracts in the UK which are subject to the HGCRA. Would this be the demonstration that there

⁵⁸ < <http://content.tfl.gov.uk/tfl-management-response-to-annual-report-2014-2015.pdf> > accessed 12 January 2016.

⁵⁹ Leloup (2013).

⁶⁰ Latham (n 45) [9.4].

⁶¹ Owen (n 54), 141.

⁶² JICA (2012), Appendix 3.

⁶³ Chern (n 1), 25.

⁶⁴ JICA (n 62).

⁶⁵ World Bank (2015).

⁶⁶ Coulson (2015) [5.03].

⁶⁷ HGCRA, s 108(5).

is no need to amend the legislation when using standing DB? However the ICE Rules – Procedure two arguably appears to remove all features of a standing DB which could contribute to dispute avoidance, such as the regular site visits which are reflected in the ICE Rules – Procedure one – Rule 5. It might possibly be difficult, if not impossible, for the DB to then take proactive measures to prevent disputes if it is not allowed to have pre-dispute input.

This might be a reflection of the 2001 *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*⁶⁸ case, where it was held that the adjudicator, if entering into the arena of mediation in between the parties, could see his later decision being undermined and challenged on the ground of a breach of natural justice, due to an apparent bias caused by his holding of private discussions with the parties where he/she may have had access to privy and confidential information which could subsequently influence his decision⁶⁹. Accordingly, a DB having attempted to prevent a dispute in between the parties, and because in doing so it has obvious similarities to non-evaluative mediation⁷⁰, could well see its capacity to act as adjudicator under the HGCRA 1996 compromised. This might however not be an unsurmountable difficulty, providing that the DB rules expressly address this matter. It is interesting in this respect to note that the default position for dispute avoidance proceedings under the FIDIC Gold Book is that they are to be conducted in the presence of both parties, hence with no meeting in caucus, unless otherwise agreed by the parties⁷¹. Arguably, this could mitigate a *Glencot's* perceived risk.

Glencot's influence is further evidenced through the latest DB experiences in England and Wales. For the 2012 Olympics, a Dispute Adjudication Panel was set to solely perform statutory adjudication, and acted separately from the Dispute Avoidance Panel as it was feared that otherwise an adjudicator's decision enforcement might be challenged because of any earlier dispute avoidance involvement⁷². The Conflict Avoidance Panel established by Transport for London is also solely there to 'avoid matters escalating into formal dispute resolution procedures such as litigation, arbitration or adjudication'⁷³, hence would not enter into the arena of adjudication.

Beside the *Glencot's* hurdle, if standing DB were to be imposed on major projects this would require legally defining what are major projects. Capital value might be a selection criterion, as done by

⁶⁸ [2001] BLR 207 (TCC).

⁶⁹ *Glencot* (n 68), [24], [38].

⁷⁰ Chern (n 1), 22.

⁷¹(n 36), Sub-Clause 20.5.

⁷² Miers (2015).

⁷³ Burns (2015).

some international institutions⁷⁴, but this might in any case prove as difficult as with defining construction operations falling under the HGCRA 1996 when the related Bill was prepared.⁷⁵

Accordingly, it could well be that using standing DB rules, such as the one used by the FIDIC Gold Book, would serve a valuable dispute avoidance purpose without requiring any change in the current legislation. This would require a couple of procedural changes within the said DB Rules so as to cope with the requirements of section 108 of the HGCRA, and an insistence that the DB always meet the parties jointly and never in caucus so as to avoid any *Glencot's* risk. This would also bring other merits, such as having decisions becoming final and binding if not challenged within a certain number of days⁷⁶. Although this matter was the subject of extensive debates in the preparation of the Scheme for Construction Contracts⁷⁷, and decision was at the time taken to preserve a temporary finality only, this could help overcome controversial situations recently encountered such as in the *Aspect v Higgins*⁷⁸ case.

Conclusion

Although a clear causation link in between the presence of a standing DB and the avoidance of disputes is arguably not established yet, practitioners in the construction industry tend to increasingly mobilize those on major projects, both internationally and even recently in England and Wales. However having them to perform both dispute avoidance and dispute resolution has raised legal concerns in England and Wales. In particular under the potential natural justice challenge that any decision of the DB may suffer if and when acting under a quasi-mediation role to prevent disputes in between the parties, and following the *Glencot* case. This suspicion seems to have led recent major projects in England to split dispute avoidance and dispute resolution roles into two distinct panels. Arguably it could well be possible to have instead a single panel performing both roles and working under existing standing DB Rules, duly amended so as to complement and ensure compliance with England and Wales's statutory adjudication requirements, and their interpretation under the common law, rather than for the current legislation to be amended. Indeed even in the USA where the DB process is highly popular it is however not reflected in the legislation yet; and after 40 years of a widespread use in the American construction industry, it still remains a creature of contract only⁷⁹.

⁷⁴ (n 62).

⁷⁵ Coulson (n 66) [1.21]ff.

⁷⁶ (n 36), Sub-Clause 20.6.

⁷⁷ Coulson (n 66), [1.31]ff.

⁷⁸ [2015] UKSC 38

⁷⁹ Rubin (2015).

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