
Dispute boards and dispute resolution

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Key Points

- “Full term” dispute boards in Australia using “without prejudice” processes have been very effective in avoiding disputes.
- Dispute boards can also provide a quick and cost effective method of ADR.
- These dispute resolution capabilities can also be used by an ad hoc dispute board, set up to resolve a particular dispute.
- The dispute board process is flexible, and can be tailored to the needs of each individual dispute.
- A dispute board determination can be provisionally or finally binding by agreement.

Introduction

Dispute boards have increasingly been used in Australia on major construction projects. They have been very effective in assisting parties to avoid formal disputes. If a dispute does arise, the dispute board is available to provide an expeditious and cost-effective dispute resolution service. This paper discusses the role of the dispute board in such dispute resolution. It suggests that the techniques can also usefully be applied by an “ad hoc” dispute board, constituted to determine specific disputes after they have arisen.

The use of dispute boards has been growing in Australia on major infrastructure projects, particularly in NSW and Qld. Of the 30 or so dispute boards that have been implemented in Australia and New Zealand to date, there have only been around ten formal disputes that the boards have had to “determine”. To date, in all the projects in Australia that have had a full term dispute board, the disputes have been resolved within the dispute board process, and no dispute has progressed to arbitration or litigation.

Thus, dispute boards in Australia have been very effective in avoiding disputes, or where this has not been possible, in providing the parties with a speedy and cost-effective form of contractual adjudication. The reasons for the success of dispute boards are many, including the parties’ choice of and confidence in the dispute board members, the range of legal and technical skills amongst the dispute board members (typically a

three person board that includes both legal and technical expertise), and the familiarity of the dispute board with the parties, the contract and the project because of their involvement from the start of the project.

A dispute board’s dual role of dispute avoidance and dispute resolution can only be properly carried out by a “full term” dispute board, that is, one constituted at the beginning of a project, the members of which become and remain familiar with the contract and the project documents, and meet regularly with the parties during project execution. A dispute board’s “dispute avoidance” role has many similarities with mediation — a “without prejudice” process in which the dispute board assists the parties to find a “best for project” outcome (perhaps non-contractual) in relation to the inevitable issues that arise in any project. In this role the dispute board acts as a facilitator to promote good communication between the parties.

But, even with the best communication, issues may arise in an ongoing contract that cannot be resolved informally. The “without prejudice” process of dispute avoidance should not be unduly protracted if the parties are not making progress to a resolution of the issues. The parties may have irreconcilable views on the “facts”, the law applying to the “facts”, or the construction of the relevant contract terms. There may be probity issues that require an independent assessment of the legal merits before any payment can validly be made. A full term dispute board is well placed to make a formal decision (determination) on such a dispute: it is familiar with the parties, the project and the contract from its regular meetings. It is likely to have a thorough understanding of the issues resulting in a dispute because of the parties’ previous discussions in regular meetings.

How does a dispute board go about resolving or determining a dispute?

Unlike the dispute avoidance phase, there is some formality to the process of dispute resolution, but the process is not as formal as arbitration. General procedural rules are usually defined in the construction contract and in the tripartite agreement between the parties and the dispute board. These formal rules generally cover legal issues such as the preconditions for a formal dispute, the status of the determination under the contract and any time constraints.

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The preconditions usually include formalisation of a dispute by one party issuing a dispute notice, briefly defining the key issues in dispute, and their contractual basis. This may be required within a defined time from the engineer's determination objected to, ie unless a Notice of Dispute is issued within time, the engineer's determination is final and binding on the parties. The notice must be communicated to the other party and to the Dispute Board Chair, who can then initiate the dispute board dispute resolution process.

The provisions of the Dispute Adjudication Board (DAB) Procedural Rules in the Fédération Internationale des Ingénieurs-Conseils (FIDIC) Conditions of Contract for Plant and Design Build are typical of the wide powers given to a dispute board to determine a dispute. Paragraph 5 provides:

The employer and the contractor empower the DAB, among other things, to:

- (a) establish the procedure to be applied in deciding a dispute;
- (b) decide upon the DAB's own jurisdiction, and as to the scope of any dispute referred to it;
- (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the contract and these Rules;
- (d) take the initiative in ascertaining the facts and matters required for a decision;
- (e) make use of its own specialist knowledge, if any;
- (f) decide upon the payment of financing charges in accordance with the contract;
- (g) decide upon any provisional relief such as interim or conservatory measures; and
- (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.

The procedure implemented by a dispute board generally involves setting a timetable that would typically involve some or all of the following steps:

- one or both parties articulating the issues in dispute;
- each party making written submissions to the board, including factual material, expert evidence and submissions on the legal issues arising in the dispute;
- reply submissions from each party;
- a view of the relevant parts of the project;
- a hearing; and
- a written determination of the dispute board, including reasons.

If, under the contract, the dispute board has the power to determine the detailed procedure it will follow in determining a dispute, based on the perceived requirements of the particular dispute it will issue directions on issues such as: the order in which the parties serve their

lay evidence, expert evidence and submissions (simultaneously or serially), whether there will be a hearing, the extent of any legal representation at any hearing (the right to make submissions or observation only), and whether cross-examination of witnesses at a hearing will be permitted. In determining the procedural rules for any hearing, the dispute board may choose to make it inquisitorial rather than adversarial, as the board itself will be well briefed on the issues and the law, and will generally have considerable expertise and experience on the subject matter of the dispute.

In setting the procedural rules for a specific dispute, the board will endeavour to minimise formality, and will be guided by the principles of avoiding unnecessary delay and expense. Clearly, the process should not mimic arbitration; the contracting parties have chosen it as a lower cost and faster method of dispute resolution, and the procedural rules should be directed to that end. Perhaps the clearest distinction from arbitration is that the parties do not have to be afforded the full measure of procedural fairness that is intrinsic to arbitration. In a dispute board process, the parties will be entitled to the measure of procedural fairness that is implied by the provisions of the contract that establishes the Board.

How does the dispute board process differ from expert determination?

As a form of contractual adjudication, a dispute board determination has many features in common with expert determination. The parties have appointed the dispute board for their legal and technical expertise, and empower them to use their own experience and knowledge in determining the dispute.

The dispute board process has a number of advantages over traditional expert determination. In a full term dispute board, the board is already familiar with the project, the contract and the parties before it is called on to determine a formal dispute. Such a board can be constituted in dispute resolution mode quickly, as it is generally a requirement of membership of a dispute board that the members make themselves available at short notice to determine disputes. The board will require minimal background documentation on the dispute, reducing the resources required for preparation by the parties.

A three person dispute board will usually have the range of legal and technical skills required to determine the dispute in accordance with the law and the contract. The dispute board usually determines whether or not a hearing is necessary. In any event, the formality of the process can be kept to the minimum consistent with giving the parties a fair opportunity to present their case and rebut the other party's case.

One key advantage of the dispute board process is that the board itself can tailor the procedural rules to the requirements of the dispute after it has crystallised. Given the dispute board's expertise and its familiarity with the contract and the issues in dispute, it is in the best position to specify a procedure that will lead to a determination of a dispute in the most efficient and cost effective way. Such rules will generally be more appropriate than expert determination rules built into a contract from its inception, before the parameters of any dispute are known.

What if either party is unhappy with a dispute board determination?

Dispute Board determinations are generally not intended to be final and binding per se, although they are frequently provisionally binding. That is, they are binding on the contracting parties unless and until they are overturned by agreement or arbitration or litigation. The contractual provisions for a dispute board usually make provision for either party to issue a Notice of Dissatisfaction with a dispute board determination within a defined time. If neither party issues such a notice within the time limit, the decision then becomes final and binding.

A Notice of Dissatisfaction may trigger a time period in which the parties are to attempt to settle the dispute amicably, e.g. by mediation. At the end of the period, whether or not the parties have engaged in amicable settlement negotiations, either party can generally refer the dispute to litigation or arbitration as provided for in the contract. Any arbitration or litigation is not an appeal from the dispute board's decision, but a *de novo* hearing. The dispute board decision can usually be adduced as evidence, but it is hard to see what real evidentiary value it is likely to have.

A variant on the "provisionally binding" approach may be to make the dispute board determination final and binding for amounts in dispute below a defined threshold value, for example, \$500,000. This would preserve arbitration or litigation for major disputes, but use the dispute board skills to finally adjudicate smaller disputes cost effectively.

The FIDIC contracts, widely used for international construction projects, have a well defined process for the use of a dispute board and its role in a provisionally binding determination of a dispute whilst preserving the parties' ultimate option of International Chamber of Commerce arbitration. The 1999 edition of the "Red

Book" (Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer) is based on the use of a full term DAB, whereas the "Yellow Book" (Conditions of Contract for Plant and Design Build) and the "Silver Book" (Conditions of Contract for EPC/Turnkey Projects) provide for an ad-hoc DAB, established only when a formal dispute has arisen.

The use of an ad-hoc dispute board for dispute resolution

The dispute board approach to dispute resolution has the potential to be applied to a wider range of disputes than in those projects that have a full term dispute board. Nor are the advantages confined to construction contracts.

A properly constituted dispute board, operating under minimal contractual procedural rules, has the ability to determine a dispute on its legal merits cost effectively and in a limited time period. As with any method of dispute resolution, the ultimate acceptability of the determination will depend on the calibre of the persons constituting the Board. The contracting parties can choose a board for the range of skills and expertise it can bring to bear. Typically, each contracting party selects a board member, subject to the approval of the other party, and the two chosen members nominate a third member (usually the Chair) for the approval of the parties. It is necessary to have a default nominating authority defined in the contract in the event that the parties cannot agree on the constitution of the board, but it is preferable for the board to be chosen by the parties. This will ensure that both contracting parties have confidence in the board members, and their ability to come to a fair determination in accordance with the law and the contract.

Many of the features outlined above will apply to such an ad-hoc board, although it will inevitably take longer to reach a determination than a full term board that was implemented at the outset of a project. The parties will have to prepare more material to brief an ad-hoc Board on the project and the contract, and the board will require time to digest this background material. Nevertheless, the board's expertise in legal and technical matters, and its ability to tailor the detailed procedural rules to the needs of the specific dispute will usually result in a dispute resolution process that is timely, cost effective and delivers a quality of outcome acceptable to the contracting parties.

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Lawyers looking for guidance in this type of process would benefit from a perusal of the DAB provisions in the FIDIC Yellow or Silver Book.



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