

### **CONSTRUCTION DISPUTES AFTER COVID-19—JAW-JAW OR WAR-WAR?**

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#### **INTRODUCTION**

The rapid spread of COVID-19 in early 2020 has transformed economic life around the world. Many construction projects have seen massive impacts ranging from complete shutdown in some countries to stringent new work health and safety regulations required as a consequence of 'social distancing'. Virtually every project has been subject to delayed performance and increased costs. There will inevitably be many disputes as to which contracting party is to bear the time and cost risks that have eventuated. In this environment the availability and suitability of appropriate methods for resolution of international construction law disputes will undoubtedly receive increased scrutiny.

The disruption caused by COVID-19 has emphasised the extent to which the economies of the world are interconnected. Construction projects are a significant and important element of international trade, responsible for essential infrastructure, transfer of skills and technology and substantial employment. As with domestic construction projects, disputes are not unusual. However, an international contractor will generally be reluctant to submit disputes to the domestic courts of the country where the project is situated. This may be due to a perception of a bias by domestic courts (particularly where the employer is a government entity), or because of unfamiliarity with local law. For similar reasons the parties may have agreed to the governing law of the contract being that of a jurisdiction different to that of the site location.

Until a few years ago there was only one (almost) universally accepted method of dispute resolution suitable for international construction law disputes:

international arbitration subject to the New York Convention which entered into force in 1959. However, the formation of international courts in Dubai (2011) and Singapore (2015) now provide an alternative method of judicially determining legal rights. Since 2019 there is the further option of international mediation subject to the Singapore Convention. Dispute boards provide a further alternative means of resolving disputes that is gaining international traction from the widespread use of the International Federation of Consulting Engineers (FIDIC) contracts and the support of multilateral development banks such as the World Bank.

Whilst the types of construction disputes arising as a consequence of the impact of COVID-19 will mostly be well-recognised, the sheer scale of the economic fallout is an order of magnitude greater than that experienced by the current generation. Employers and contractors will be keen for projects to be restarted and completed expeditiously but may be subject to severe cash flow and other constraints arising from COVID-19. As many commentators have observed, the world will not be the same post the pandemic, and it is suggested that contracting parties will need to carefully consider the most appropriate method of resolving any disputes in this new world.

This paper discusses the challenges of using different methods of dispute resolution for international construction disputes in the post COVID-19 environment. Protagonists have the choice of 'jaw-jaw' methods involving discussion, negotiation and compromise (such as mediation) or 'war-war' adversarial methods in which an independent neutral will determine legal rights in a winner take all process, typically arbitration.<sup>1</sup>

## DISPUTES ARISING FROM THE IMPACT OF COVID-19

Governments around the world responded in a variety of ways to slow and halt the spread of COVID-19, particularly by restricting the congregation of people by means of 'social distancing' and prohibiting many types of economic activity. In addition to legal constraints on activities, some individuals took their own precautions against infection, such as not turning up for work even where it was not prohibited. The combination of legislated and voluntary restrictions had a significant impact on the normal operation of construction sites and their supply chains, inevitably leading to increased costs and delays.

The legal profession responded rapidly to the impacts on construction projects by identifying the issues that are likely to arise from the additional costs and delays. Many firms provided webinars and other guidance, emphasising the importance of following the requirements of the contract in matters such as health and safety obligations, mitigating the impacts of COVID-19 to the extent possible, the timely submission of claims and the requirement to maintain proper contemporaneous records.

FIDIC published a Guidance Memorandum for users of its standard form contracts, outlining several possible scenarios and relevant contract likely responses.<sup>2</sup> These scenarios include the impact of substantially enhanced health and safety precautions on operating construction sites, construction sites prevented from operating due to government regulations, and slow decision-making by the engineer or the employer's representative.

Many of the claims that will arise will be of the types generally familiar to construction practitioners, such as *force majeure* under the contract or under the law, change in laws or delays arising from circumstances beyond the contractor's control. However, it is suggested that the scale and number of claims will be significant, as will be the economic environment after 'normal' work has resumed. It should be borne in mind that a claim is not a dispute *per se*. A claim is an assertion of an entitlement to legal right in connection with or arising out of the contract or the execution of the works, whereas a dispute only arises from the rejection of a claim that is not accepted. The 2017 editions of the FIDIC 'rainbow suite' emphasise this clear distinction between claims and disputes by splitting clause 20 in the 1999 editions on claims and disputes into two separate clauses in the 2017 editions. The first opportunity that contracting parties have to avoid disputes is to negotiate an appropriate commercial outcome for properly articulated claims.

The construction industry in Australia was allowed to keep operating during the pandemic, but the required social distancing and enhanced health and safety measures will inevitably have resulted in increased costs and delays. The entire construction industry was shut down for a period in a number of other countries. Many contracts will not recognise the impacts of COVID-19 as an employer's risk event, leaving contractors with liability for the costs, and perhaps even for the delays.

The international construction industry depends for its existence on reliable cash flow but is notorious for operating on low margins and subject to significant performance risks of time and quality. History is replete with the

examples of major contractors forced into liquidation as a consequence of unbudgeted project risks eventuating. It would be unsurprising if the costs and delays consequent on COVID-19 threatened the viability of some international contractors or prevented their resumption of work. The financial impact of COVID-19 may also threaten the financial viability of some employers.

Parties considering their options for avoiding or resolving disputes will need to keep these considerations in mind. Insisting on legal contractual rights in a dispute might ultimately be a pyrrhic victory if the counterparty has inadequate financial resources to continue in operation. Parties in dispute will need to focus even more than usual on what their real interests in the outcome are, in a very different commercial environment.

To quote the business-performance guru Stephen Covey:

*... we all need to start with the end in mind.*

In many cases the most appropriate end to have in mind will be what is best for the project. Avoiding disputes would undoubtedly be beneficial for any construction project.

In an ideal world the best method of avoiding disputes or resolving the inevitable disputes that will arise would be pragmatic commercial negotiation between representatives of the contracting parties with authority to settle. In the real world this will not happen in many cases, and an independent neutral (or neutrals) will be required to either assist the parties to come to a negotiated commercial settlement or to determine their legal rights in a way in which they can be enforced.

Dispute resolution procedures that are suitable for construction disputes are dispute boards, mediation, expert determination, adjudication, arbitration or litigation. This paper will focus on dispute boards, mediation and arbitration, all of which are frequently used for construction disputes.<sup>3</sup>

## DISPUTE BOARDS

Dispute boards (DBs) are now a well-established means of assisting the contracting parties to avoid disputes, or if disputes cannot be avoided, of determining legal and contractual rights in an expeditious and cost-effective way. The primary focus of DBs has shifted from their initial dispute resolution role to that of dispute avoidance. The Dispute Board Manual recently published by the Dispute Resolution Board Foundation (DRBF) devotes a chapter to dispute avoidance and management.<sup>4</sup> The 2017 editions of the FIDIC contracts include specific provisions on the avoidance of disputes, and renamed the previous Dispute Adjudication Board (DAB) to the Dispute Avoidance/Adjudication Board (DAAB) to reflect the importance of the dispute avoidance role.<sup>5</sup>

The dispute avoidance role of a DB is best provided by a standing DB, i.e. one appointed at the start of the project and meeting regularly with the contracting parties during its progress. FIDIC recognised the value of dispute avoidance by replacing the *ad hoc* DAB in the 1999 editions of the Yellow and Silver Books with a standing DAAB in the 2017 editions. A DB can assist parties to avoid disputes in its 'without prejudice' discussions and advice during a regular site visit, or if requested by the parties can issue an advisory opinion.

Such an advisory opinion may assist the parties to negotiate a commercial settlement in the

knowledge that the DB's opinion is probably a good indicator of its likely decision if it was required to decide the dispute formally.

The dispute avoidance and resolution roles of a standing DB are well suited to dealing with COVID-19 disputes. The DB is familiar with the parties, the project and the contract, and as a respected third-party neutral is well-placed to advise the parties on a best for project resolution of an issue before it becomes a dispute, or providing a 'black letter law' determination of a formal dispute. The DB can thus function effectively as a mediator in assisting the parties to avoid disputes, or as an adjudicator in deciding on the parties' legal rights.

## MEDIATION

The advantages of mediation to achieve a commercial settlement of a construction dispute are well established and well known. Mediation is reported to resolve a high percentage of disputes, and in consequence mediation is a condition precedent to obtaining a court hearing date in many jurisdictions. Of relevance to the resolution of COVID-19 construction disputes, mediation requires limited preparation, can be implemented without delay, takes limited time, and is considerably cheaper than alternatives that determine the parties' legal rights. Most importantly the mediated outcome of a dispute does not have to be confined to the parties' legal rights; as a negotiated settlement agreed by the parties it can involve commercial compromises and other outcomes not achievable within the four walls of the relevant contract.

Mediation lacks certainty as a method of dispute resolution as it depends on the contracting parties' agreement to a proposed settlement. Nevertheless, in many

cases the 'jaw-jaw' in a mediation results in the disposition of a dispute between parties without them having to resort to the 'war-war' inherent in adversarial proceedings such as arbitration or litigation.

The commercial settlement achieved in a mediation does not come cost free. Although mediation is generally touted as 'win-win' it generally involves compromise by all sides as the price for a speedy and cost-effective process. For example, one party may accept a lower settlement sum than it expected to achieve in legal adversarial proceedings whilst other party may make a payment in circumstances where it considered it had a good defence. The flexibility inherent in a mediated settlement is one of mediation's most powerful features as it can make provision for non-contractual obligations that have real value. The win for both parties is the avoidance of costly, time-consuming adversarial proceedings that would otherwise distract senior personnel from the normal running of their business, and preservation of working relationships.

Mediated settlements are usually documented in the form of a binding agreement (often drawn up by lawyers) that the parties expect will be adhered to. In the event that one party does not comply with the terms of the settlement agreement, the other party will seek to enforce it through the courts, as it would do if a party did not comply with the terms of an arbitral award. That would not normally be problematic if enforcement of a domestic agreement was sought in Australia. However, the situation may be very different for enforcement of a settlement agreement where the agreement involves parties from different countries and/or where enforcement is sought in

a third country. There are many reasons for potential difficulties of enforcement of a contract in jurisdictions with a different legal environment, such as differences in contract law, court congestion or corruption, perceptions of home country bias or a lack of comity between courts. These issues may be compounded where enforcement is sought in a third country.

The potential problems of enforcement of international arbitral awards were resolved by the implementation of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention), the efficacy of which made international arbitration the only practical avenue of dispute resolution for international commercial contracts until the recent advent of International Courts. However, there is now an equivalent to the New York Convention for mediation: the 2019 United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention on Mediation (Singapore Convention).

The Singapore Convention establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. It has been signed by 52 countries including the United States and China and has already entered into force in four countries (Fiji, Qatar, Singapore and Saudi Arabia). The United Nations Convention on International Trade Law (UNCITRAL) prepared the Singapore Convention and summarises its value and importance in the following words:

*The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being*

*a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG) [sustainable development goals], mainly the SDG 16 [peace, justice and strong institutions].<sup>6</sup>*

The Singapore Convention applies to international written settlement agreements of commercial disputes resulting from mediation, which is defined as:

*A process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or third persons (the mediator) lacking the authority to impose a solution upon the parties to the dispute.<sup>7</sup>*

The Singapore Convention has many similarities with the New York Convention, and also some modern additions. For example, a settlement agreement 'in writing' can be in electronic form and a regional economic organisation can participate on behalf of its constituent States. Article 5 states limited grounds on which a competent authority 'may' refuse to grant relief, including legal impediments, procedural irregularities in the settlement agreement or the mediator's breach of relevant standards of conduct. In parallel with the New York Convention, enforcement can be refused where granting relief would be contrary to public policy.

The Singapore Convention has the potential to elevate mediation as a viable method to resolve international construction disputes in much less time and for much less cost than arbitration. At the present time that potential is limited by the Convention only being in force in four countries. It applies to settlement agreements concluded after the date when the

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Convention enters into force, so other signatory States still have the opportunity of bringing it into force to cope with the inevitable disputes arising from COVID-19.

## **INTERNATIONAL ARBITRATION**

In the event that disputing parties to an international construction contract cannot agree to 'jaw-jaw' methods of dispute resolution, the usual 'war-war' method of choice is arbitration. Arbitration has many features that make it well-suited to the resolution of intractable international construction disputes. The recent Queen Mary University survey of international construction disputes found the following top ten reasons why parties chose international construction arbitration over litigation:

- avoiding legal systems/national courts;
- ability to select arbitrators;
- confidentiality and privacy;
- avoiding local political pressure/intimidation;
- enforceability of award;
- ability to select technical (non-legal) arbitrators;
- speed;
- ability to appoint party experts;
- neutrality; and
- flexibility.<sup>8</sup>

A significant advantage of international arbitration is the widespread acceptance of the New York Convention. It is in force in 163 States—the majority of the 193 member States of the United Nations. The Convention ensures that a properly constituted arbitral award will be recognised and enforced in most countries of the world. The grounds for refusing enforcement are very limited, perhaps the most widely used being where the arbitral award is contrary to public policy where enforcement is sought.

Governments around the world have responded to the economic impact of COVID-19 by passing laws that have provided substantial restrictions to freedom of contract. It is suggested that these laws will provide fruitful grounds to argue for the application of the public policy exception to enforcement.

## **JAW-JAW OR WAR-WAR?**

### **CONSTRUCTION DISPUTES POST COVID-19**

To provide some context for discussing the appropriate resolution of construction disputes arising from the impact of COVID-19, the following discussion is confined to an international construction contract based on the General Conditions of the 1999 or 2017 FIDIC contracts.<sup>9</sup> The 1999 Yellow and Silver Books provide for an *ad hoc* Dispute Adjudication Board, the 1999 Red Book provides for a standing Dispute Adjudication Board and the 2017 editions of all three books provide for a standing Dispute Avoidance/Adjudication Board. It is assumed that the contractor has submitted a claim to the engineer (Red and Yellow Books) or the employer's representative (Silver Book) for delay and/or additional payment based on circumstances arising out of the COVID-19 pandemic.

The extent to which governments injected money into their economies in an endeavour to preserve as many jobs and businesses as possible highlights the fragility of the environment for resumption of normal project work. Many businesses, both employers and contractors, will have significant cash flow problems. Due to the different times the pandemic impacted different countries there may be ongoing availability issues with the supply chain or with obtaining labour. Governments and multilateral

development banks may be fast tracking new infrastructure projects to revive hard-hit economies, leading to increased competition for resources. Or the costs of dealing with the pandemic may adversely impact the progress of existing projects. The cliché that cash flow is the lifeblood of the construction industry will be truer than ever.

The intense interest that has been shown in structuring claims arising from the impact of COVID-19 over recent months is, in this writer's view (and confirmed by anecdotal evidence), a harbinger of a greater number of disputes than normal. Employers and contractors will want to know who is to bear the liability for delay and increased cost; in some cases the resolution of these issues may mean the difference between a going concern and insolvency. It is suggested that in the post COVID-19 environment parties will be more concerned than ever to resolve their disputes with celerity and with certainty so that projects can proceed with the minimum of disruption. If there is a significant increase in the number of disputes to be resolved quickly, this will put considerable pressure on the existing facilities for dispute resolution. As has been shown by many surveys of consumers of dispute resolution services, arbitration is often considered to be too time-consuming and costly. If the usual proportion of an increased number of disputes proceed to arbitration, some of them will inevitably take a considerable time to resolve. For some protagonists that time may be fatal.

What can be done to speed the process up? Our experiences during the pandemic have demonstrated that much commercial life can be conducted remotely via appropriate communication technology. For

instance, the courts in Australia have generally been able to proceed with the conduct of commercial trials without the physical presence of counsel, witnesses and experts in the courtroom. Arbitral institutions have provided detailed guidance on the conduct of 'virtual' arbitrations. For example, the American Arbitration Association/International Centre for Dispute Resolution have published 'Model Order and Procedures for a Virtual Hearing via Videoconference'.<sup>10</sup> With our new-found skills in remote working there is every reason to expect that resolution of construction disputes can proceed even in a world with social distancing and travel bans. Conferences, DB meetings and hearings, mediations and arbitrations can generally be conducted using one of a number of widely available platforms based on internet communication. There is significant potential for this new method of working to result in significant efficiencies and flexibility and consequent cost savings by not requiring the parties, their counsel, witnesses and independent neutrals to travel to an international destination. No doubt there will still be some hearings that will need to be conducted face to face, but recent experience has shown these to be in the minority.

## **DISPUTE AVOIDANCE**

Under a FIDIC contract the engineer/employer's representative (contract administrator) is required to consult with each party in an endeavour to reach agreement on a claim, and only if agreement is not achieved does the contract administrator make a fair determination in accordance with the contract. Whilst the contract administrator is required to make a determination strictly in accordance with the provisions of the contract, the same constraints do not apply to the parties.

Irrespective of strict legal rights, a commercial negotiation to determine a fair resolution of a claim may be able to achieve a resumption of normal work as soon as possible in a way that the parties can live with. This would have the further benefit of avoiding a dispute and all the uncertainty, time and cost entailed.

Contracts that have a standing dispute board are in the best position to deal with claims and disputes in the most expeditious and cost-effective manner. The DB is familiar with the project, the parties and the contract and can operate in both 'jaw-jaw' and 'war-war' mode. Before issues have crystallised into disputes a standing DB can provide informal advice in its regular 'without prejudice' meetings to provide the parties with a way forward. Even if an issue has crystallised into a dispute, a standing DB can, on the request of the parties or at the suggestion of the DB, issue an advisory opinion before the parties resort to the 'war-war' of a dispute formally referred to the DB for a decision.

An *ad hoc* DB is only appointed after a dispute has crystallised and therefore cannot assist the parties in dispute avoidance to the extent possible with a standing DB. For this reason, both the DRBF and FIDIC strongly recommend the appointment of a standing DB. Nevertheless, with the agreement of the parties, an *ad hoc* DB could still provide an advisory opinion for the parties' consideration prior to embarking on making a decision on a formal dispute.

The legal restrictions and the factual circumstances of the impact of COVID-19 on the parties' performance will be key parameters of a dispute. In addition, the prevailing economic climate as it impacts on the parties may be of overwhelming importance in determining whether

a resolution based on legal and contractual rights is feasible, or whether a negotiated commercial solution is necessary to enable the project to proceed. This is not a unique situation, but the scale and extent of disruption to economic life as a consequence of COVID-19 brings these issues into sharp focus in assessing the most appropriate form of dispute resolution.

The parties' agreement to resolve a dispute by accepting the DB's advisory opinion would normally be documented and signed by the parties. Notwithstanding voluntarily entering into such a settlement agreement, there is no guarantee that it will be adhered to. The recent Queen Mary survey on international construction disputes found that only 28 per cent of the respondents reported frequent compliance with pre-arbitral decisions, 31 per cent reported compliance 'half of the time' and 41 per cent experienced parties not voluntarily complying.<sup>11</sup> The enforceability of a settlement agreement is therefore a significant issue for a dispute resolution process other than arbitration. This is the issue that the Singapore Convention was designed to address and could provide the required enforcement certainty in those limited jurisdictions where it is in force. It is suggested that a settlement agreement signed in response to a DB advisory opinion would come within the definition of mediation in the Singapore Convention, provided the appropriate formalities in Article 4 were complied with, in particular evidence that the DB acted as 'mediator'.

## **ADJUDICATION**

Whilst the decision of a DB must be based on legal rights under the contract and the law, this form of 'war-war' does not involve the heavy artillery required for arbitration. The DB process

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involves a war of limited scope: it is limited in time and may not involve a hearing or the involvement of lawyers or external experts. A standing DB is already familiar with the contract and the issues and requires far less information and preparation from the parties to understand the dispute than an arbitral panel would. It is suggested that as the parties typically have an established relationship with and respect for the DB, a DB decision does not involve the extent of adversarialism and destruction of commercial relationships that often occurs with arbitration. This is supported by the recent Queen Mary survey which found that a decision by a standing DB was more likely to be complied with than that of an *ad hoc* DB, especially if the standing DB was appointed at the outset of the works.<sup>12</sup>

A DB decision under a FIDIC contract is immediately binding on the parties and is final unless a Notice of Dissatisfaction is served within 28 days of the decision. Nevertheless, as the long–running saga of the *PT Perusahaan Gas Negara (PGN) (Persero) TBK v CRW Joint Venture Operation* cases in Singapore between 2010 and 2015 demonstrated, enforcing a binding DB decision under the 1999 editions may be problematic. FIDIC endeavoured to resolve this issue in the 2017 editions by a comprehensive rewording of the clause on failure to comply with the DAAB's decision; this provides for an expedited arbitral award on enforcement of the decision without prejudice to the final disposition of the underlying dispute.

A DB decision or an arbitral award is a matter of contract, and its enforcement is ultimately an issue for a court in the jurisdiction where enforcement is sought. However, unlike arbitration a DB decision does not have the

same international recognition or support from legislation (with a few notable exceptions such as Indonesia). The enforcement of a binding DB decision by a court will therefore be subject to local law. The following are examples of jurisdictions where direct enforcement of a DB decision by a court may be problematic:

**Brazil:** A DAAB may not have the power to issue a final and binding decision.

**Czech Republic:** A DAAB decision may not be binding unless it is an *ad hoc* arbitration.

**Italy:** The obligation to accept a DAB decision as binding requires approval in writing.

**Peru:** FIDIC DAAB clauses need to be reviewed for conformity with legislation.

**Switzerland:** A DAAB decision is not directly enforceable.

**UAE:** An arbitration award is required for a DAAB decision to be enforceable.<sup>13</sup>

## MEDIATION

In the majority of cases a DB decision is probably a good indicator of the likely result of an arbitration.<sup>14</sup> Once the parties are in possession of the DB decision, they are well–placed to make critical choice: accept and comply with it, negotiate a commercial settlement, or mobilise for arbitration.

FIDIC contracts provide for the parties to attempt amicable settlement after a DB decision that is subject to a Notice of Dissatisfaction. No process is specified, but mediation would be an obvious choice if the parties are inclined to further 'jaw–jaw' after their limited scope 'war–war'. As the United States experience with non–binding dispute resolution board decisions has shown, a reasoned decision on the merits, prepared by a knowledgeable

and respected DB can often assist parties to reach a negotiated commercial solution.

Mediation after receipt of a DB decision should involve little preparation or cost: the parties have already considered and articulated their position for the DB, and they have the DB's view of the legal outcome and their reasons for it. However, the essence of amicable settlement is a compromise of legal rights: each party accepts something different to its preferred outcome in order to resolve the dispute and move forward without the further time and cost commitments of preparing for arbitration.

As noted above, there may be difficulties in enforcing a mediated settlement agreement in many of the jurisdictions where the Singapore Convention does not apply.

## ARBITRATION

Notwithstanding the time, cost and other benefits of pre-arbitral methods of dispute resolution, inevitably some disputes will require the detailed scrutiny and finality of arbitration. In some cases, this will be because of complexity or importance of the issues, or because of the value of the dispute. In some jurisdictions an arbitral award will be essential to ensure finality.

The efficacy of a DB adjudication depends on whether it is accepted and complied with by the parties, or there is an effective enforcement mechanism through the courts. As illustrated by the above examples, in some jurisdictions an arbitral award may be a necessary precondition to enforcement in court. Thus, for some intractable disputes and some jurisdictions the most efficient method of dispute resolution may be expedited arbitration without the precursor of a DB decision.

However, if the parties choose this route, it would be appropriate to amend the FIDIC General Conditions to ensure that a DB decision is not subsequently found to be a condition precedent to arbitration.<sup>15</sup>

Irrespective of the reasons for arbitration, the parties will be concerned to ensure the most efficient and cost-effective process, particularly in an environment where there is likely to be an increased number of disputes. This is an issue which was considered in detail by the 2019 Queen Mary survey. Respondents were asked, *inter alia*, to identify factors that make international construction arbitration inefficient, what due process elements they would be prepared to forego to save time and money, and what aspects of arbitral procedure offer the greatest potential to improve efficiency. Some of these issues are within the control of the arbitral panel such as limits on submissions and oral arguments, and some are within the control of the parties such as party tactics, unclear expert evidence and defective arbitration provisions. That survey provides a valuable checklist of issues that parties should take account of before embarking on an international arbitration or selecting an arbitrator. Substantial efficiencies can be achieved by refining procedures in known ways to suit the needs of the dispute and by the arbitral panel exercising more control.

## CONCLUSION

COVID-19 has had a considerable impact on construction projects around the world. It has stopped or delayed progress, impacted supply chains, required new health and safety measures on construction sites, prevented site attendance and resulted in substantial increased costs.

These impacts will inevitably result in claims for cost and delay in a changed environment where the contracting parties are subject to considerable economic pressures. Such claims are not illegitimate *per se*, nor do they necessarily imply a dispute. Construction contracts usually provide a detailed procedure for the submission and assessment of claims, often with strict time limits. Procedures such as those in the FIDIC contracts provide a first opportunity for avoiding disputes by enabling parties to agree on outcome that is acceptable to them.

Contracts that provide for standing DBs provide a further opportunity for parties to avoid disputes by using the DB's expertise, for example by the use of advisory opinions. The successful track record of DBs in dispute avoidance, particularly in Australia, demonstrates the efficacy of this process. Even in contracts that do not provide for a standing DB, the parties can subsequently agree on the appointment of an *ad hoc* DB that may be able to assist parties to avoid a dispute.

Not all disputes arising from the impact of COVID-19 can or will be avoided. In the prevailing economic environment and where there may be considerable demand for experienced third-party neutrals, there will be more need than ever for effective and efficient means of dispute resolution. Disputing parties will need to be pragmatic in assessing achievable negotiated outcomes where possible, or utilising a method of dispute resolution that will result in a final and enforceable outcome as expeditiously as possible.

Whilst no one size fits all, in this writer's view, a DB process as provided for in the FIDIC contracts will be suitable for many disputes arising out of the impact



of COVID-19—it provides for a third-party neutral that can assist the parties to avoid disputes, or make a decision on the merits of a dispute in a limited time. The parties can use a DB decision to negotiate a commercial settlement with the assistance of a mediator or embark on arbitration with the background of the DB's decision and reasons. If arbitration is unavoidable the parties have the opportunity of tailoring an efficient procedure appropriate to the needs of the dispute.

In dealing with disputes in the aftermath of COVID-19 this writer considers that parties should exhaust their 'jaw-jaw' methods of dispute resolution before resorting to 'war-war'. A party may find that winning the battle of an arbitration may ultimately result in losing the war for the project.

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15. In *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC) Edwards-Stewart J determined that under a modified Silver Book contract the parties were required to obtain a decision on their dispute before it could be finally determined in court. Similarly, the Supreme Court of Switzerland determined that submitting a dispute to a DAB is a mandatory precondition to arbitration in *A SA v B SA* [2014] Swiss Federal Supreme Court 4A\_124/2014.

**Editor's Note:** For *PT Perusahaan Gas Negara (PGN) (Persero) TBK v CRW Joint Venture Operation* cases referred to on p12, see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33; *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146; *PT Perusahaan Gas Negara (Persero) v CRW Joint Operation (Indonesia)* [2015] SGCA 30.

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