

# **Dispute boards: procedures and practice**

*Gwyn Owen and Brian Totterdill*

  
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# Preface

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Claims and disputes have always been a problem in the construction industry. Construction, by its nature, brings unexpected problems which may result in delays to the project and additional cost to either the Contractor or the Employer. In recent years an ever-increasing number of projects have appointed dispute boards as an independent tribunal to help with the avoidance or speedy resolution of claims or disputes.

This book is not a learned legal analysis of claims and dispute resolution procedures but is a practical guide for the people who are actively involved with construction projects. It is written by practising engineers, who also serve as members of dispute boards, and is intended for all those people who work in construction and so may become involved with the work of dispute boards. Their involvement may be as the Employer who, with his or her financial advisers and consultants, prepares the contract documents; as a consultant or contractor who carries out the design or construction of the project; as a lawyer or other professional who prepares and responds to claims; or as a dispute resolver who helps to achieve the final resolution of a dispute.

The authors are most grateful to FIDIC for permission to include extracts from its Conditions of Contract; to the ICC for permission to include its Dispute Board Rules, to the ICE for permission to include its DRB Procedure; and to the DRBF for its pioneering work in this field. Further information and contact details for these organisations can be found in the Appendices at the end of the book.

Gwyn Owen  
Brian Totterdill

June 2007

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# 1. Introduction

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In most legal jurisdictions it is the case that public policy provides authority that parties should be encouraged so far as possible to settle their disputes without reference to litigation or arbitration. The system of dispute resolution through the use of dispute boards should be seen as one of the range of procedures which serve as an alternative to litigation or arbitration but which provide that the process is not final and binding. It is hoped that agreement may be achieved by disputing parties through the process of participation which is to be undertaken by cooperation and consent.

The dispute board (DB) system is probably not suitable for all disputes or situations or even certain parties, however at the time of writing (2007) it is generally accepted that some form of job site assisted dispute resolution procedure provides parties with positive, cost-effective and time-sensitive solutions to disputed issues and encourages dispute resolution by consensual means which in turn provide win-win solutions to contracting parties.

Records of the construction industry up to around the mid-1950s contain little information on the frequency and seriousness of disputes and litigation. However, it appears that commonly used dispute resolution procedures, such as informal negotiation, or a ruling by the Architect or Engineer were generally sufficient to resolve most disputes at the job level. It is the case that construction contracts undertaken since the 1950s became more complex and other non-technical demands such as environmental regulations, social requirements and public interest group pressures came into being after the 1980s. Arbitration became more popular, as it was at that time less expensive and faster than litigation. But, since the millenium, a movement away from litigation and arbitration is marked by the development of alternative dispute resolution methods and in particular the DB concept.

As the success of the DB process became more widespread the Dispute Resolution Board Foundation (DRBF) was established in the US to promote use of the process, and serve as a collective in order to disseminate the understanding of the system and improve the dispute resolution process. The DRBF has initiated programmes for providing DB information and training on a global basis and information on the Foundation may be found at [www.drb.org](http://www.drb.org). It is to be noted that the DRBF publishes a *Best Practices Guidelines* which serves as a reference for practitioners and users of the system.

Since the inauguration of the DRBF, such funding institutions as the World Bank and the Multilateral Development Banks as well as many

government and project execution agencies advocate the use of DBs and such institutions as the Fédération Internationale des Ingénieurs-Conseils (FIDIC), the International Chamber of Commerce (ICC) and the Institution of Civil Engineers (ICE) now provide contract forms which provide either mandatory or consensual procedures for the use and operation of DBs.

Project data available from the DRBF and from the use of adjudication in various jurisdictions indicate that the use of such pre-arbitral or pre-litigation procedures is well accepted by the industry and provides a significant margin of success in reducing the number of disputes which are required to be settled by an adversarial procedure.

### **Procedures for dispute resolution**

Construction contracts have, for many years, included provision for the appointment of an independent person, or persons, to assist in the resolution of claims and disputes. Most contracts have included provision for a project administrator, often an engineer or architect appointed by the Employer, to make an initial decision on any problems or claims. If either party was not satisfied with the initial decision then it could refer the matter to arbitration or litigation.

This two-stage procedure worked well for many years but since around 1990 there has, for several reasons, been an increasing general dissatisfaction with this simple procedure, including:

- The project administrator is paid by the Employer and so it is sometimes difficult, or impossible, for him to be truly independent and impartial.
- The dispute may have arisen following some action, or inaction, by the project administrator, so he is giving judgment on his own actions.
- The increasing size, complexity and financial consequences of major projects make it more important to have an impartial decision.
- Arbitration and litigation are more appropriate for dispute resolution after completion of the construction, whereas good project management may require a fast procedure during construction.
- Procedures for arbitration or litigation are expensive and may take several years to reach a decision.

However, there are some features of the traditional Engineer or Architect which should be retained in any alternative procedure, including the following:

- He is an experienced construction professional and so will understand the cause and the technical aspects of the problem and he is accustomed to assessing evidence from documents or site inspections.
- Because he is already involved in the project he is aware of the background and development of any dispute and is immediately available to make a decision when required.

To overcome the perceived problems in the traditional procedures, the people who write contracts introduced alternative procedures, some of which are reviewed in Chapter 2. In deciding which procedure to incorporate into a contract, and whether to use the procedure when a problem

has arisen, the particular features of the dispute board must be considered, including:

- Dispute boards provide a forum in which a variety of complex problems and disputes may be discussed and resolved with the assistance of an experienced and independent panel before such issues escalate and require a more formal and binding dispute resolution process.
- Dispute boards reach decisions or recommendations not only by considering the facts of disputed issues as put to them by the parties but also by taking into consideration their own knowledge, experience and expertise.
- Dispute boards should be able to establish procedures suitable for each case, taking into consideration that they have a duty to be independent, impartial and act within the confines of natural justice and reach a conclusion without undue delay and expense.
- Dispute boards should not be constrained by legal procedures but should be fair, professional and innovative in their approach.
- Dispute boards when acting on a full-term basis, have procedures that ensure they are continuously fully informed of progress and problems and are in a position to assist the parties to reduce conflict and prevent potential problems or claims becoming disputes.
- Dispute boards should not infringe the authority of any of the project participants.

The dispute board, as reviewed in this book, is a flexible procedure. The rules can be chosen to suit the project, the requirements of the Parties to the Contract and to benefit from the advantages of each of the alternative procedures. For example, the full-term DB is appointed at the start of the project and makes regular visits to the site. It is available to discuss potential disputes and so can play an important role in improving communications and assisting with efficient project management.

Each party's willingness to accept a DB's opinion or decision is enhanced by confidence and trust in each board member's impartiality as well as by the opportunity to have discussions with the board before a problem develops into a dispute. The parties' confidence in the DB process plays an important role in the acceptance of the board's determinations, but is also influenced by the fact that any such determination is admissible in any subsequent arbitration or litigation.

Experience indicates that satisfaction levels with DBs are high and the process is cost-effective compared to final and binding systems of dispute resolution such as arbitration and litigation.

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