Dispute avoidance in practice or how to stop a simple problem spiraling from a breeze to a whirlwind

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Prologue:

I am going to start this article with a true-life story.

Two Parties had entered into a construction contract with no provision for a Punch List Procedure. The Employer's lawyers attempted to make this good by writing a procedure[1] for the Contractor's review. The Contractor's lawyers added their own version side by side with the Employer's. The Employer did not entirely agree with the Contractor's lawyer's version and so produced another version set out side by side with the other two. Perhaps unsurprisingly the Contractor did not agree with the Employer's latest version and had its lawyer draft yet another. This went on for two years with the document getting longer and more complex but with the Parties getting no closer to a solution with a dispute was seemingly inevitable. At one of its regular site visits, the Parties asked the Dispute Board for its help. After taking some time to listen to the problem, the DAB did the following:

(1) It asked each party to decant into its own room and to write down what it thought the other Party wanted from the procedure.

(2) After an hour both Parties were brought back into the main room and their answers written up on a white board.

(3) Although each had used different words, they both expressed the same, or similar answers, it was simply that they were each using different language.

(4) Having established that the Parties essentially wanted the same outcome, the DAB then went on to suggest that the Punch List procedure needed to be a practical tool that the Engineers could use on site and that legal language was not relevant for all practical purposes.

(5) Instead, the DAB produced a simple flow diagram suggesting how such a procedure might work in practical terms.

(6) The DAB suggested that the engineers from the Employer's and Contractor's teams take the framework set out by the DAB and spend an hour discussing it. The lawyers were invited to do the same but declined, expressing a lot of scepticism that anything would result from the process and insisting this was a contractual matter to be resolved by leg drafting.

(7) After an hour and a half, much to the surprise of the lawyers, the two teams of Engineers emerged with a solution of their own based on the DAB's framework.

(8) That solution was summarised in an agreed procedure and successfully implemented in the project and an impending dispute was avoided.

So, what can we learn from this example? Firstly, that legal drafting does not always assist in solving practical problems. Secondly, that two Parties may have the same or similar aims but language may get in the way. Thirdly, that the best solutions are those the Parties develop for themselves because they are more likely to buy into them. The message I want to convey with this story is that a prolonged disagreement, spanning over two years, heading for a formal dispute was, in this case, resolved within the two days allocated to the DAB's site visit. How much more time consuming and costly would it have been to refer the matter to international arbitration, or even for a formal referral to the DAB?

Introduction

Disputes are costly. On average 50% of the legal costs borne by the construction industry are related to disputes and for roughly 10% of projects, 10% of the total costs were legal costs. If a dispute proceeds to international arbitration, under the ICC process a 10m dispute will cost about USD400,000 in administrative and arbitrator's fees alone[2] and that takes no account of the parties' legal and management costs and of course the hidden costs of lost reputations and goodwill. An ICC arbitration can typically cost as much as 18% of the value of the dispute[3]. Disputes take time and deflect energy and money away from the construction project, resources that could have been spent on the project itself or invested in the industry to provide better margins and performance for its participants.

In medicine, it is a well-known fact that prevention is better than cure. That is also true of construction and yet every year more is spent on cure rather than prevention and more is spent on legal solutions than is spent on the prevention of disputes in the first place. Then there are the cases where the total legal costs exceed the value of the claim, cases where the cure has cost many times more than prevention would ever have done.

How many times have we looked back on a difficult project and wondered if we could have done things better? It is said that hindsight is an exact science and also that hindsight provides a 20/20 visual perspective on things that have already happened. Clearly hindsight is not the solution and so it follows that proactive dispute avoidance needs to look forwards and to anticipate problems, which in turn will lead to a reduction in the need for hindsight.

For reasons we will discuss later, disagreements or differences in construction projects almost always occur. In fact, disagreement is not always a bad thing and may help to promote discussion and innovation, after all there is almost always more than one way of resolving a problem, and where difficulties arise there are usually two sides to a story. Disagreements and differences occur all the time and we should not shy away from them but if a disagreement has an impact on one or both of the participants, then we have the beginnings of what might

become a fully blown dispute. Dispute avoidance should recognise that differences occur all the time but monitoring them should enable those that have an impact on the parties' interests to be dealt with before a formal process of dispute resolution is required.

The reasons why disputes arise in construction projects

There are many definitions of a dispute. Dictionary definitions are general in nature and not necessarily; relevant to construction. One of the first construction contracts to define what a dispute is, was the FIDIC Gold Book in 2008:

> *"[Dispute] means any situation where (a) one Party makes a claim against another Party; (b) the other Party rejects the claim in whole or in part; and (c) the first Party does not acquiesce, provided however that a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAB or the arbitrator(s), as the case may be, deem it reasonable to do so."*

This tradition is continued in the latest version of the FIDIC 2017 Contracts:

> *"Dispute" means any situation where:*
>
> *(a) one Party makes a claim against the other Party (which may be a Claim, as identified in these Conditions, or a matter to be determined by the Engineer under these Conditions, or otherwise):*
> *(b) the other Party (or the Engineer under Sub Clause 3.7.2 [Engineer's Determination] rejects the claim in whole or in part; and*
> *(c) the first Party does not acquiesce (by giving a NOD) under Sub Clause 3.7.5 [Dissatisfaction with Engineer's determination] or otherwise,*
>
> *provided however that a failure by the other Party (or the Engineer) to oppose or respond to the claim, in whole or in part. May constitute a rejection, if, in the circumstances, the DAAB or the arbitrator(s) as the case may be, deem it reasonable to do so"*[4]

I have my own non contract-specific definition, which in my view applies to all construction disputes:

> *"Disagreements become disputes when they have an adverse commercial impact on one or both Parties"*

Disputes in construction can arise for many reasons. For instance, misunderstandings about obligations rise from erroneous contract interpretation, or perhaps the documentation has not been clearly drafted. Issues about progress and quality frequently arise and may originate from the different priorities each party to the contract will have. Disputes about the quality or lack of information may have an impact on other aspects of the project, for instance commonly quality and time Payment is probably the most common issue perhaps because almost all disputes boil down to money in the end.

A construction project involves a number, and sometimes many, participants, each with different priorities and aspirations arising from the project. For instance, the Employer will want the highest quality project for the lowest cost to be constructed within a limited time. The Contractor however will be focused on the financial success of the project for its own organisation which may mean that quality, time and cost do not have the same priority for it. It is therefore not surprising that differences arise between the Employer and Main Contractor, but the complexity of the construction process means that differences may also arise between the Main Contractor and its Subcontractors and Specialists and at the other end of the process between the Employer and its consultants.

Construction projects are not manufactured products and are subject to difficulties not encountered in manufacturing where a high degree of control can be exercised over the process. Construction projects involve many more unknowns, and it is this uncertainty that gives rise to disputes. For instance, even if two identical buildings were to be constructed on two sites in different locations, there would be differences in the physical characteristics of the site and possibly location specific differences that mean that almost all construction projects, even if similar to a previous one, are in effect prototypes. Even if the geotechnical characteristics are the same or similar, location specific differences will arise from weather and climate and the political and economic regimes under which the contract is being carried out.

Most manufactured products are fully designed before production begins and often prototypes are built and tested so that performance, buildability and durability can be established. It is seldom possible to design a construction project to the point at which all aspects of the project have been fully resolved prior to commencement of the contract. There is seldom the appetite to pay the design team to even begin to approach this state of completion and in fact it is questionable whether, given the nature of construction projects, it is even desirable. Therefore, at the commencement of almost any construction contract, some uncertainty will be inherent in the design and project information and each project is in fact a prototype.

Uncertainty may also arise from an ill-considered procurement process that does not properly address the priorities of the participants and the reasonable allocation of risk. Design and build has become a popular method of procurement and may be appropriate for many projects, but it has been used for many others without proper consideration of what is desired of the finished product. The same could be said of the various forms of management contracting and construction management that similarly set aside the greater certainty of traditional procurement, often without proper consideration of the tangible benefits or problems that might arise. Poor project management can be a major contributor to uncertainty and because it usually occurs post contract, later in the whole procurement process it is harder and more costly to rectify.

In any joint venture the ability to communicate is essential. Construction is almost always a joint venture between a team of participants. A lack of communication can be a fertile breeding ground for disputes. This might arise because of insecurity about how a party's interests might

be affected by openly discussing an issue, it may arise from cultural differences between the parties or because the team has become dysfunctional with team members are simply unable to get on and communicate with each other: a common trait with human beings. Sometimes this may have been prompted by the position of a participant within their organization that might make them hesitant to discuss an issue for fear of blame being attached to them personally. In some countries, government employees could be in fear of their jobs (or worse) if it was demonstrated they were in some way responsible for a loss incurred by their employer.

Ultimately, disputes are about people. It is often said of successful projects that it was down a particularly good team of individuals which may never work together again on a future project. Too often though, when difficulties arise human nature takes over the participants bury their heads in the sand, hoping the problem might go away, or perhaps to distance themselves from possible blame. This in turn often leads to a lack of communication, and worse, an adversarial blame culture which ultimately leads to a dysfunctional team. Dispute avoidance should recognise that even on the best run projects, problems always arise and that this is no one's fault, and it should also encourage team members to identify and raise problems as early as possible without fear of retribution.

A lack of communication often means that the parties will resort to legal methods too quickly and before other ways to resolve the problems have been fully explored. Resorting to legal methods normally involves confrontation, at which point the parties each become entrenched in their own positions, focusing primarily on their own interests, ignoring those of the other party (and usually being encouraged to do so by their lawyers) and not considering what might be best for the project and ultimately for everyone involved in it.

In the case of construction projects there are two types of dispute avoidance techniques that can be used on any project[5]. The first are management techniques that are focused on the process. The second are the non-escalation methods which are focused on identifying issues and containing them.

Dispute avoidance techniques: management methods

Management methods commence as soon as work on the project begins and should certainly be implemented pre contract, although these methods also crucially extend into the post contract stages as well. A key feature of management methods is to appreciate and consider unpredictable scenarios before they occur. This can be achieved by learning from previous projects, by accepting that problems will arise and by being realistic about what could go wrong. Some forms of contract even formalize this into a risk register which can be priced to help decision making in the event a problem arises.

A key tool which is part of the management method is risk control. Future problems can be reduced through better and more extensive site information, which comes about through better pre-contract site investigation. I have mentioned previously the benefits of having well produced contract information, although this is often not achieved in practice but ought to be high on the

list of priorities. If the contract information is defective or deficient the project is almost certainly going to run into problems sooner or later.

Different forms of procurement allocate risk in different ways. By choosing the method of procurement which is most satisfactory for the work to be undertaken and by considering the priorities of the Employer and the likely priorities of the Contractor, some problems can be avoided. The chosen method of procurement will often result in the selection of the contract. It is important that contract documents are clear and unambiguous and if possible, a form of contract that promotes dispute avoidance should ideally be used[6]. It is worth trying to make sure the Contractor has fully understood its obligations and it is not a bad idea for the Employer to make sure it understands its own as well, especially where the contract has been drafted or amended by its lawyers.

The type of contract might also be selected to promote collaboration or partnering. Some projects run under such contracts have been very successful[7] but many have not.[8] In my view to be successful such contracts need to provide incentives that promote collaboration and cooperation because although parties may start out with good intentions, there is commonly a reversion to self-interest when problems begin to arise.

During the bidding stage management methods can be used to help select the most appropriate contractor. Characteristics of a contractor best suited to the project might be that it has a previous track record of similar projects, or least projects of a similar size and complexity and that it has adequate financial standing. Ultimately it is the people carrying out the work that are important and it is prudent to make sure they have been properly trained. As an Employer it is tempting to try to cut costs and reduce the contract price, or to allow the Contractor to under bid for the job. In fact, many contractors are selected on price alone. To some extent that might be prudent, and it is a fine balance, but go too far and you risk entering a contract where the Contractor is not being properly paid. Whilst this might theoretically result in an apparent saving it is also likely to promote claims by the Contractor in an attempt to make up the shortfall required by it to make a profit and survive and that can result in a project costing much more than originally thought and at the same time attract legal and dispute resolution costs on top of the project costs. As John Ruskin wrote “It’s unwise to pay too much but it’s worse to pay too little…”. A contract let in this way is likely not to promote cooperation and is very likely to result in disputes, the cost of which far outweigh any savings the Employer might have thought it had made at the Contractor’s expense.

Management methods can and should be continued right through the post-contract stages by ensuring that whatever type of contract has been used, that as much of a collaborative environment as possible is established. In the post-contract stages both parties have a role to play, and both should do what the contract requires. This requires an understanding of the contract documents which should have been achieved at bidding stage for the Contractor and much earlier than that in the case of the Employer. I have already discussed the possible difficulties that may arise from the differing priorities of the parties which will become most

obvious during and after the works have been completed. Active monitoring of progress will help the Employer to understand how the project is progressing but also acts as a barometer of the Contractor's performance. This is not always welcomed by Contractors and programs are seldom contract documents but a good program which is regularly updated can help to promote a culture where problems are not saved up until later, or heads buried in the sand.

Disputre avoidance techniques: Non-escalation methods

Escalation occurs when a disagreement, which could be resolved by party negotiation, evolves into an argument, possibly requiring the assistance of a third party neutral, and then into a fully blown dispute which cannot be resolved without the intervention of an outside party. Somewhere between the second and third stages of escalation a party will consider that its rights are being compromised, hence the frequent recourse to legalistic solutions. Non escalation attempts to prevent the issue reaching the third stage. The aim of applying non escalation methods is to avoid the dispute and at the first and second stages the outcome is often non-binding, whereas at the third stage the inevitable outcome is a binding decision by a third party. That third stage can be included as a final measure in the overall strategy for dispute avoidance, or it can be external to that process where there is recourse to litigation or arbitration.

Non-escalation methods rely on there being at least two parties to a contract and at least as far as the Employer and Main contactor are implemented in the post contract stages. Again, a realistic attitude and recognition by both parties about the scope for possible disputes is required to make non escalation methods effective.

Non-escalation methods start with informal negotiation by the parties themselves. Instead of informal negotiation, parties tend to become entrenched in their own positions early on by asserting themselves which leads to a lack of cooperation. This might all be the result of a defensive stance taken because the issue has been dealt with legalistically at too early a stage. Non-escalation relies on the parties not burying their heads in the sands in the hope the problems will go away because they never do.

Alternatively, frequently problems are all left to the end of the project when there is no longer any way to resolve them without arguments about money. The place to start to resolve issues is on site, for instance at regular site meetings. Problems can only be resolved at this level if there is an open and collaborative no blame culture. This is often difficult to achieve because problems so often result in additional costs for which someone ultimately has to pay. However, there is no substitute for trying to find out what the problem is and to encourage discussion about possible solutions at as early a stage as possible.

There is no doubt the best way to resolve disputes is at the site level and by the project personnel themselves. Concerns about impacting the financial interests of one party or another or interpersonal relationships may prevent those closest to the project from achieving this. It might be possible for the project manager to take a key role at this stage, but a lot depends

on that person's skills and whether they are considered to be partisan, simply because most project managers will be paid for by the employer. The next step is to escalate the problem for formal negotiation by managers or senior staff of each of the organizations. This may fail for some of the reasons it failed at site level, although those involved may not have the same close personal relationship with the project. However, at this stage the resolution is entirely in the hands of the parties and solutions which may be outside the terms of the contract, but which may nonetheless be regarded as fair can be explored and implemented. Of course, self-interest and the risk of a financial loss or loss of face may prevent any form of negotiation, a situation not helped by most current construction contracts which are not drafted to promote such discussions and that rely principally on contractual and legal rights and remedies.

Although negotiation sometimes works, what is often required is the involvement of an independent third party to help resolve the problem. A third party, if engaged throughout the project, is also able to stand back and identify issues that might lead to problems and therefore to be more sensitive to the warning signs that things may be heading for a dispute. In some countries government staff are not permitted to take it upon themselves to negotiate, especially in a situation where the government might have to provide the remedy and in this case use of an independent third party can enable the government to distance itself from any recommendation or decision made by that third party. A third party is less likely to have any material interest in the outcome of the project and is in a better position to guide the parties to as fair a decision as possible.

Non-escalation methods further sub-divide into two categories: reactive and proactive. Most traditional methods are reactive in that they are implemented only after a dispute has arisen and include such things as mediation, adjudication and the ad hoc dispute board[11]. Mediation is (at least in theory) a consensual process, although it relies on the parties negotiating from positions they have taken prior to the process. Some might argue that mediation is proactive and can be used to avoid disputes but that is rarely the case and mediation tends to be focused on the solution to a problem, not the avoidance of the problem in the first place.

A proactive method of dispute avoidance is one that monitors the project and provides for the parties a means to openly discuss issues and if necessary for them to seek advice on how the problem might best be resolved. Examples of how this has been achieved are the dispute avoidance panels set up for the 2012 Olympics projects constructed in the UK. Such panels have their origins in America which was the breeding ground for the Dispute Review Board, a type of Dispute Board which gives non-binding opinions and recommendations[12]. One characteristic of such panels is the lack of highly structured procedural rules which allow the panel to be very flexible, adapting procedures to suit the particular situation and promoting a level of informality. The other characteristic is the close contact with the project by monitoring documents, physical progress and carrying out regular site visits.

Internationally, the preference has been for the establishment of the Dispute Adjudication Board. As I mentioned above adjudication is traditionally[13] considered to be a non-consensual

and in fact a highly adversarial procedure which is not conducive to dispute avoidance and one of the difficulties if the DAB is ad hoc because the only function the board has is one of adjudicating disputes after they have arisen. However, a properly constituted standing board, established at the outset of the contract can provide a powerful tool that allows for dispute avoidance.

The standing dispute board

Whether the preference is for a DAB or DRB a full-time standing board normally has a duty to monitor the project in ways that enable the warning signs of possible disputes to be recognised. The board should promote discussion and collaboration and because there is no learning curve the board should be able to do this quickly and effectively by having the ability to make non-binding recommendations to allow the parties to resolve issues quickly and cheaply during the course of the project. The board should promote party involvement and unlike adjudication and litigation, the parties will have had the chance to influence the selection of the board members which enables the partes to buy into the process and respect the assistance the board might give.

The Dispute Board is a creature of contract and requires contractual provisions to enable it to function. The provisions will be contained in the contract terms relating to dispute resolution and the powers of the board are normally set out in separate procedural rules. In the case of FIDIC the Dispute Board is obliged to carry out regular site visits (FIDIC Procedural Rule 3) and the parties are obliged to provide the board with documents and reports on a regular basis (Procedural Rule 4). During the site visits the board is expected to hold meetings with the parties at which the concerns of the parties can be raised and also if the board is carrying out its duties proactively the board itself will raise any matters it considers might be of concern, although this needs to be done with some care.

The board is obliged to produce reports of its site visits (Procedural Rule 3.10) in which it should formally set out any matters of concern and any early warnings of possible future problems and disputes. FIDIC has adopted the DAB, and some see this as a disadvantage over the DRB which is seen to be more collaborative. However, under sub-Clause 21.3, with agreement, the parties are able to refer any matter to the board for informal assistance, which may culminate in an informal non-binding opinion prior to seeking a binding decision. In fact, many issues referred to for informal assistance never progress to a formal referral. Therefore, used properly a DAB has all the advantages of a DRB but in the event the problem cannot be resolved informally there are provisions for it to be escalated and referred for a binding decision (sub-Clause 21.4.3). However, even after a binding decision has been given, and one party has given a notice of dissatisfaction, there is a period where the parties may seek amicable settlement (sub-Clause 21.4.4) before the dispute is referred to international arbitration, giving another opportunity for the parties to keep control of the decision themselves and for them to take an active part in resolving their own issues.

One of the reasons why Dispute Boards are not used more widely is the perception they are

expensive. So, is dispute avoidance worth it? A typical board costs between 0.05 and 0.26% of the total construction costs[14] and about 99% of disputes are resolved within 90 days, the average cost being about 0.02% of the value of the dispute. 98% of disputes end with a Dispute Board decision or recommendation. Of the remaining 2%, half are normally upheld in future proceedings and of the remaining 1%, most are upset because of a procedural irregularity which was not related to the substance of the decision. Then there is the bonus of time. UK based adjudicators may look enviously on the 84-day period to resolve the dispute afforded to a Dispute Board[15] but that time is much, much shorter than it would have been had the dispute been arbitrated. The figures above are related to dispute resolution. One of the big unknowns is just how effective a Dispute Board is in preventing disputes in the first place. The evidence for that can be found from large projects that have had very few, or possibly no, disputes referred to the board and none that progressed to arbitration either. Now that really is dispute avoidance in action.

Dispute avoidance in action

Dispute avoidance itself is not tangible, although its effects are, it is rather an attitude of mind that the dispute board members must possess and also infuse the parties and the project management with. Perhaps, at this stage, it is worth considering the advantages of dispute avoidance, as follows:

(1) Dealing with problems in real time quickly and economically at a job site level, enabling the project to progress;

(2) Maintaining productive and positive commercial relationships between the parties to a contract;

(3) Enabling cashflow; and

(4) Preventing the escalation of disagreements, which divert effort and money, to the detriment of the project.

This is encapsulated in the following definition of dispute avoidance:

> *"In its dispute avoidance role, the DB assists the parties in managing or resolving contentious issues and contractual disagreements before they develop into a formal dispute"*[16]

This hands on, inquisitorial approach must be underpinned by collaboration, knowledge and experience and only then will the Parties have sufficient respect for the DAB to enable a position of trust to exist between them. In fact, the way a DAB builds trust between it and the Parties is probably the most important thing it must do from the start. This is helped by the way a DAB member is appointed by each of the Parties and the two selected then nominate the chair. It is important for the Parties to understand that once appointed, the member they

appointed is not representing their position and must act independently and impartially. It goes without saying that the members must understand this as well!

The provision of information by the Parties and regular monitoring of the project by the DAB through site visits and meetings are at the heart of the dispute avoidance process. To make the process work requires particular skills of the DAB members which are not required in other forms of dispute resolution. The tripartite agreement entered into by the DAB members and Parties obliges the DAB members to have experience in the type of project and the form of contract and language in which it is to be performed; so those are skills which can or should be taken for granted and can be verified by researching and interviewing DAB candidates. The DAB must also collectively have the skills to communicate in a confidential but informal environment. It must do so with honesty integrity and neutrality and be seen to do so with procedural fairness by being impartial, fair and without bias. Importantly the DAB must also be capable of acting proactively by being inquisitorial. It is not enough to sit back during meetings and listen to the Parties present the state of the project and any difficulties they may be encountering. Instead, the DAB should let the Parties do this and then ask probing questions, which the Parties may be reluctant to discuss, but by creating a collaborative environment can make it easier for them to do so.

About the dispute avoidance process, the FIDIC 2017 contracts say this:

> *"If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.*
>
> *Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise.*
>
> *Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. 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, whether orally or in writing."*[17]

The ICC Rules provide similar, but different provisions:

> *"If at any time, in particular during meetings or site visits, the DB considers that there may be a potential Disagreement between the parties, the DB may raise this with the Parties with a view to encouraging them to avoid the Disagreement on their own without any further*

involvement of the DB. In so doing, the DB may assist the Parties in defining the potential Disagreement. The DB may suggest a specific process that the Parties could follow to avoid the Disagreement, while making it clear to the Parties that it stands ready to provide informal assistance or to issue a Conclusion in the event that the Parties are unable to avoid the Disagreement on their own."[18]

and

"1
On its own initiative or upon the request of any Party and in either case with the agreement of all of the Parties, the DB may informally assist the Parties in resolving any Disagreements that have arisen during the performance of the Contract. Such informal assistance may occur during any meeting or site visit. A Party proposing informal assistance from the DB shall endeavour to inform the DB and the other Party thereof well in advance of the meeting or site visit during which such informal assistance would occur.

2
The informal assistance of the DB may take the form of a conversation among the DB and the Parties; one or more separate meetings between the DB and any Party with the prior agreement of all of the Parties; informal views given by the DB to the Parties; a written note from the DB to the Parties; or any other form of assistance that may help the Parties resolve the Disagreement.

3
If called upon to issue a Conclusion in connection with a Disagreement on which it has provided informal assistance, the DB shall not be bound by any views, whether expressed orally or in writing, that it may have given in the course of its informal assistance, nor shall it take into account any information that has not been available to all Parties."[19]

Both processes require the agreement of the Parties that allow the DAB to take part in informal assistance. Both processes allow for the DAB to meet with the Parties separately. DAB practitioners tend to be divided on this last point because whilst private meetings may assist with the Partes opening up to the DAB, that has to be measured against possible future problems with enforcement where a Party may allege the DAB was made aware of matters that were not aired prior to a formal Referral. In this respect, whilst DAB members might effectively employ mediation techniques to promote dispute avoidance, the process itself is not mediation. That latter process normally adopts private sessions between the mediator and the parties, whereas in my own personal view discussions between the DAB and the Parties should always take place with all Parties present, unless exceptional circumstances dictate otherwise.

Neither FIDIC nor the ICC prescribe a method of informal assistance, except that it might take place during a site visit or meeting. However, it must remain the case that parties should not wait until the DAB next visits the project during one of its regular meetings in order to implement

informal assistance. It should be agreed and requested at as early a stage as is possible. The parties and the DAB must then agree a procedure. As the rules suggest, that may take the form of a discussion with either an oral or written conclusion. Alternatively, the agreement may be for brief written submission from each party. For relatively straightforward disagreements, I have successfully implemented a written procedure which allows fourteen days for a party to make brief written submission, fourteen days for a response and fourteen days for the DAB to give its non-binding recommendation. Whichever method is adopted I believe it is important to ultimately record any agreement in writing. One way of doing this is to include a section in the regular site meeting reports produced by the DAB in which recommendations are recorded. Indeed, in the interests of proactivity, the DAB can include such a section in all of its site meeting reports to remind the parties of matters of concern that have been discussed with proactive recommendations of how the parties might proceed with their own discussions, even prior to any request for informal assistance.

A possible barrier to informal assistance is the way contract drafters remove the provisions for it from standard contracts, like FIDIC, or omit them from bespoke contracts. Recently, I was asked by a contractor who had attended a FIDIC training course, why his matter of concern could not be the subject of informal assistance. I had to explain that the employer had deleted the parts of the contract that allowed for this but went on (in the presence of the employer) to explain that by agreement the process could be reinstated, for the benefit of both parties and the project. I am pleased to say that both parties agreed to the process which then effectively disposed of what might have evolved into a costly and time-consuming dispute.

For any sceptics, I know as matter of fact, that informal assistance works. At the beginning of this chapter, I gave one example, but this is just one of very many I have been involved with. The process requires a lot of hard work by the DAB and not all DAB members have the training or experience (or confidence) to carry it out. Whilst training may address that, just as the best mediators are a special breed, so are the best DAB members who are able to implement informal assistance because training alone cannot take the place of the mindset required by the DAB to do this. The message then, for the parties, is that if dispute avoidance is important to you (and it should be!), then choose your DAB members very carefully. At the same time, it is important that the parties are receptive to what the DAB suggests in terms of dispute avoidance but if the DAB has the trust of the parties this should be possible to achieve.

Of course, not all parties will be receptive and, not every matter of concern or issue can be avoided, and some formal referrals are inevitable. That does not mean the DAB has failed, but it is important that the DAB at least tries to educate the parties about the benefits of avoiding formal disputes and in the processes available to them to do so. If the DAB does not do that, then in my opinion it is arguable that it has failed.

The subtitle of this chapter is “How to Stop a Simple Problem Spiraling From a Breeze to a Whirlwind” which is a quote by Nael Bunni[20] from a paper given at a conference at Kings College, London in 2003. The fact is we have a choice, and we can actively implement dispute

avoidance if we want to. It is not possible to say just how many simple problems have resulted in major disputes that could have been avoided, but the thriving international arbitration industry is perhaps an indication of the numerous opportunities that have been lost. By making the choice to implement dispute avoidance procedures it really should be possible to reduce the number of whirlwinds and allow projects to be carried out in a pleasant summer breeze.

Murray Armes

1. *This the equivalent of a snagging procedure which deals with a list of defects to be corrected towards the end of the contract and prior to hand over.*
2. *ICC Costs Calculator: https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/costs-calculator/*
3. *https://www.international-arbitration-attorney.com/cost-of-international-arbitration/*
4. *Sub Clause 1.1.29, FIDIC Red Book General Conditions 2017*
5. *Brewer Dispute Avoidance, (2007) 437 Contract Journal 22*
6. *For example, FIDIC Contracts, NEC 4, ICC Dispute Board Rules and Procedures, ConcensusDocs contracts*
7. *An example being London Heathrow Terminal 5*
8. *Construction Playbook , 2020, Constructing the Gold Standard, 2021 co-authored by Professor David Mosey*
9. *Although the saying has been attributed to Ruskin but not found in any of his written works*
10. *The three stages of escalation and differences of opinion were suggested by I M Eilenberg in Dispute Resolution in Construction Management, 2003*
11. *They also include expert determination, arbitration and litigation, although we are concerned here with a process that precedes the last two.*
12. *Although under some circumstances the recommendations can become binding, particularly where DRBs are used internationally.*
13. *Particularly if a comparison is made with forms of statutory adjudication.*
14. *Data from the DRBF database*
15. *In the UY an adjudication typically takes between 28-42 days*
16. *The Dispute Board Manual, A Guide to Best Practices and Procedures, DRBF 2019*
17. *Sub-Clause 21.3, FIDIC Red Book 2017*
18. *Article 16, ICC Dispute Board Rules 2015*
19. *Article 17, ICC Dispute Board Rules 2015*
20. *Nael G. Bunni (2003) 'Contract or Cooperation? Insights from the Middle East. 'A paper given to a conference organised by the Centre of Construction Law at King's College London, 11th September 2003.*