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Contractual adjudication and dispute boards are two methods of alternative dispute resolution (ADR) of construction disputes which have not yet been widely used in Australia, but have been growing in use internationally, particularly over the last decade or so. The two methods have a number of common characteristics. They both aim to provide a speedy and relatively inexpensive resolution of a dispute by means of an impartial determination of the parties' contractual rights by an independent expert (or experts), without foreclosing the possibility of final binding dispute resolution by means of arbitration or litigation. Dispute boards (DBs) have the additional important aim of avoiding disputes, by providing a forum in which contractual issues can be addressed before they progress to the stage of actual disputes which require formal resolution.

Contractual adjudication has much in common with statutory adjudication of payment disputes under the Security of Payment legislation now existing in most Australian States. However, as a creature of contract, the parties can agree on the scope of disputes to be resolved, and the procedural rules applicable. Although not intended to be a final and binding resolution of a dispute, there is evidence from the UK that in a large majority of cases the parties accept the Adjudicator's decision and do not proceed to arbitration or litigation.

DBs have been used on a substantial number of large projects for a range of public and private owners in the USA and internationally for over 30 years. They have not been used widely in Australia to date, however their use is growing. Published figures indicate that over 90% of projects with DBs did not have disputes which required resolution by arbitration or litigation.

Adjudication

Adjudication of disputes is a recent addition to the range of available alternative dispute resolution methods, at least in its current form.¹ In essence, it is a method of dispute resolution in which an independent Adjudicator resolves a dispute by providing a provisionally binding determination of the parties' contractual rights following an impartial assessment of the parties' submissions and other evidence. Key features of adjudication are that it is carried out within a strictly limited timeframe and is therefore relatively inexpensive, and it does not alter or finally determine the parties' contractual rights. The speed and economy of an adjudication makes it an attractive dispute resolution mechanism for contractors and subcontractors, for whom cash flow is vital, and the time involved in ultimate resolution of disputes potentially financially crippling or fatal.

Statutory adjudication is the adjudication of a dispute in accordance with the requirements of a statute. Adjudication of construction disputes of all types and at any time was introduced as a statutory right in the UK over 10 years ago in the *Housing Grants, Construction and Regeneration Act 1996 (HGCRA)*.² The subsequent fall in the number of construction litigation cases in parallel with the rise in the number of statutory adjudications in the UK suggests that, notwithstanding the provisional nature of an adjudication determination, this legislation has had a substantial impact on reducing the number of disputes that require final resolution by arbitration or the courts.³

Statutory adjudication of a more limited class of payment disputes under construction contracts has since been introduced into a number of Australian jurisdictions, New Zealand and Singapore under the rubric of Security of Payment legislation. This legislation has been widely used, particularly in NSW. The Australian legislation imposes significant constraints on freedom of contract that are not present in the UK legislation. For example, in the UK the parties can define their own adjudication scheme, providing it satisfies the eight compliance points in the HGCRA; the parties can also nominate their own Adjudicator. Fenwick Elliott discusses these and other differences between the UK and Australian legislation, and points out that (apparently for political reasons) the statutory schemes in Australia are generally biased in favour of the claimant.⁴

The main advantages of statutory adjudication are that it provides a speedy and relatively inexpensive method of at least provisionally resolving a payment dispute in a way that is biased to maintaining cash flow for contractors and subcontractors. As it does not affect the parties' legal rights, they are able to finally resolve their dispute and correct any wrong Adjudicator's determination by subsequent arbitration or litigation (providing the relevant party is still solvent). The principle has been succinctly stated as "pay now and argue later".

The disadvantages of statutory adjudication stem from the prescriptive and confined nature of the Security of Payment legislation. It only applies to the class of payment disputes provided for in the legislation, which (in Victoria at least) may exclude important cost issues such as variations or latent ground conditions. As it is focused on ensuring cash flow to contractors/subcontractors, it does not apply to many types of construction disputes such as extensions of time. There are very limited opportunities for extending the time for an adjudication, which may be inadequate for disputes over large and complex claims.

Contractual adjudication

Although statutory adjudication in Australia is confined to a certain class of payment disputes, the benefits of adjudication of other types of disputes arising out of or in connection with a construction contract can be achieved by contractual means. Contractual adjudication is a method of ADR in which the parties agree in the contract (or in a separate contract) for an independent Adjudicator to resolve a dispute by providing a provisionally binding determination of the parties' contractual rights, following an impartial assessment of the parties' submissions and other evidence. Care needs to be exercised in proper drafting of the adjudication provisions to avoid prohibited "contracting out" of any applicable Security of Payment legislation.

The above definition of contractual adjudication suggests that the process is essentially that of expert determination, carried out within a strictly limited time period. The efficacy and acceptance of this process is based on the stature and competence of the Adjudicator: the parties will be more likely to accept the Adjudicator's determination if they have been party to his/her selection on the basis of the skills and experience necessary for resolution of the particular issue or dispute.

The Contractual Adjudication Group in Adelaide has drafted a set of procedural rules for contractual adjudication which can be incorporated in a construction contract. These can be used in those jurisdictions which do not have Security of Payment legislation (currently South Australia, Tasmania and ACT), or can supplement statutory adjudication in the other jurisdictions.⁵ The key features of the Contractual Adjudication Group Scheme are:

- (a) there are no default provisions - the basis of the Adjudicator's decision must be the parties' actual rights, not compliance with procedural steps;
- (b) the parties choose their own Adjudicator in whom they have confidence;
- (c) the Adjudicator can limit the length of submissions s/he will consider;
- (d) the Adjudicator can call for a short limited hearing to enable the parties to vent their concerns and the lawyers to make relevant submissions; and
- (e) the Adjudicator has three weeks to make his/her determination.⁶

Other procedural rules for contractual adjudication can be found in UK standard form contracts. Since the enactment of the HGCRA these contracts have provided for contractual adjudication as the first or second stage of the dispute resolution process, e.g. the JCT Standard Form of Building Contract (2005) and the JCT Design and Build Contract (2005) provide firstly for mediation (by agreement) and then adjudication, the ICE Conditions of Contract (1999) provide for adjudication after any ADR the parties have agreed to, and NEC3 (2005) provides for adjudication as the first method of dispute resolution. Procedural rules for the conduct of an adjudication under these standard form contracts are specified either within the construction contracts themselves or as a separate document.

As the Adjudicator is not a party to the construction contract, her/his services must be regulated by a separate contract. This agreement defines the Adjudicator's scope of work, his/her responsibilities, the duration of services, compensation and reimbursement for services, and legal relations. It almost invariably requires that the Adjudicator will maintain confidentiality about the dispute proceedings and outcome. Each of JCT, ICE and NEC publish an Adjudicator's agreement, e.g. NEC3 Adjudicator's Contract, for which guidance notes and flowcharts are available.

Whilst such contractual adjudication is intended to operate as a speedy "rough and ready" form of ADR, in practice it can have many of the features of accelerated arbitration. Parties can provide written submissions and witness statements, and attend a hearing where witnesses are examined and cross-examined. The written decision of the independent, impartial Adjudicator may then be substantively the same as an Arbitrator's award.

The advantages of contractual adjudication are, first and foremost, the short timeframe and limited costs involved in obtaining an independent third-party neutral's evaluation of the parties' contractual rights. As a process defined by the relevant contract, the parties have control over the process, including selection of the Adjudicator. Such a provisionally binding resolution of a dispute, even if ultimately disputed, enables the parties to deal with the issues in a timely fashion when the evidence and memories are fresh. The ultimate resolution of any disputed adjudication can usually be deferred to the end of the project, thereby enabling the parties to focus on completion, rather than being distracted by preparation for dispute resolution.

Disadvantages of contractual adjudication mainly stem from the limited time and scope of the process. The short time period allowed for may be insufficient for complex legal and factual disputes which require careful consideration of large numbers of documents and other evidence. Contractual adjudication is likely to be an effective ADR method where:

- the parties have confidence in the Adjudicator's experience, expertise and skill;
- the parties are prepared to accept the Adjudicator's "rough and ready" determination as an independent and impartial assessment of the parties' contractual rights;
- the disputed issues of fact and law are confined in scope.

Dispute Boards

A DB for a construction project is a panel of one or three persons, independent of the contracting parties, who are available to consider the facts of any issue or dispute in its early stages, and provide an independent, impartial opinion on the parties' contractual rights and obligations. The recommended form is a "full-term" DB in which the board members are appointed at the start of the project, and who become and remain familiar with the project during its entire execution by means of regular site visits and by reading site communications.

Resolution of disputes at the job level is promoted by interaction between the DB members with owner and contractor representatives during regular site visits. The engagement by board members with site issues helps the parties head off problems before they escalate into actual disputes which require formal consideration by the DB. This role of the DB in dispute avoidance is clearly evident in the statistics of projects which have used DBs.

When a dispute flowing from the contract or the work cannot be resolved by the parties, the DB can conduct a hearing at which each party explains its position and answers questions. The DB's recommendation for resolution of the dispute is based on its view of the relevant contract documents, correspondence, other documentation, and the particular circumstances of the dispute. The Board's report on a dispute includes an explanation of its evaluation of the facts, contract provisions and the reasoning which led to its conclusion.

Perhaps the most important feature of DBs is the selection and identity of the board members. The contractor normally selects one member, subject to the approval of the employer, and likewise the employer

selects one member subject to the approval of the contractor. The two board members then typically select the third member (usually the chairman) subject to approval by the contracting parties. The efficacy of a DB as a dispute prevention and resolution panel stems from the stature of the board members. To be fully effective they need to be very experienced in the type of construction, as well as having a deep understanding of contractual issues, and need to be respected as experts by both contracting parties.

A one person DB with its substantially lower costs than a three-person DB may be deemed adequate for lower value projects, and may be referred to by a different name, e.g. Dispute Resolution Adviser (Hong Kong), Dispute Review Adviser (Caltrans) or Disputes Review Expert (World Bank). In very large projects it may be appropriate to have a DB of five, from whom an appropriately qualified three-person board can be constituted for specific disputes. A five-man board was used for the Channel Tunnel.

The Dispute Resolution Board Foundation (**DRBF**) publishes a Practices and Procedures Manual (available on its website⁷), containing a comprehensive description of the concept and its benefits, a user guide describing the recommended DB procedures and the Code of Ethics for Board members, a member guide presenting best practice guidelines for the use of DB members, and a section outlining the use of DBs internationally.

The protagonists of DBs (particularly the DRBF) extol the virtues of a “full-term” board, that is one that is set up at the beginning of a project, and which maintains an active involvement in the progress of the project by reading regular progress reports and making periodic site visits. Such a board is very well placed to make an expeditious determination of any dispute, as its “learning curve” will be minimal, and may be able to determine disputes as part of regular scheduled site visits. The only real downside to such a DB is the not insignificant cost; board members will need to be paid a retainer to compensate them for reading site communications, maintaining appropriate files and being available at short notice to participate in determinations of disputes, as well as daily remuneration and expenses for travel to site, site meetings and dispute hearings.

However, if a DB is effective in avoiding disputes in a major project, its cost (typically averaging 0.15% and no more than 0.26% of total project cost⁸) is likely to be good value for money “insurance”. This can be demonstrated as follows. It has been suggested that in almost 10% of construction projects, between 8% and 10% of the total project cost is legal cost, and 50% of all legal cost is expended in connection with disputes.⁹ Using the methodology commonly used in pricing contract risks at the tender stage, the cost of the risk of disputes in a construction contract could therefore be calculated as $0.08 \times 0.1 \times 0.5 = 0.004$ (0.4%). Thus, the cost of a DB at typically 0.15% is less than cost of the risk of disputes. Looked at another way, the expenditure of 0.15% of the project cost on a DB is worthwhile if it substantially reduces the possibility of a dispute which may involve legal expenditure of the order of 4-5% of the project cost.

A less effective but less expensive alternative to the full-term DB is an “ad hoc” DB; a board that is only constituted when a dispute arises, and is then required to read all the relevant background information, conduct site inspections and a hearing and prepare a determination. The FIDIC Conditions of Contract for Plant and Design-Build and Conditions of Contract for EPC/Turnkey Projects provide for such an ad hoc DB, whereas the FIDIC Conditions of Contract for Construction provide for

a full-term DB. Clearly, an ad hoc DB that is only constituted to resolve a dispute cannot play the role in dispute avoidance that a full-term DB can.

Dispute Resolution Boards

The recommended US model is for a Dispute Resolution Board or Dispute Review Board (DRB), in which the Board’s recommendation for resolution of a dispute is non-binding. The parties have a choice as to whether or not they will adopt the Board’s recommendation; unless both parties agree to accept and implement the DRB’s decision, it will not have any contractual force, e.g. the draft clause for implementing a DRB proposed by the Dispute Resolution Board of Australasia Inc (**DRBA**) provides for a period of two weeks for the parties to accept or reject the Board’s recommendation.¹⁰

Procedural rules for a DRB are available from the DRBF,¹¹ and from the American Arbitration Association.¹² The DRBF also publishes a Three-Party Agreement for execution between the contracting parties and each member of the DB separately, defining the DB’s scope of work, the parties’ responsibilities, payment and legal relations.

Dispute Adjudication Boards

The international model is typically for a Dispute Adjudication Board (DAB). The main difference between the US practice of DRBs and the international use of DABs is the parties’ obligations in respect of the Board’s decision. A DAB’s determination of a dispute is binding on the parties, unless and until it is overturned by the final dispute resolution method provided for in the contract, e.g. arbitration or litigation.

Contractual provisions implementing a DAB usually provide a limited period of time after the Board hands down its determination on a dispute for either party to give notice of dissatisfaction, thereby setting in train the contractual procedures for the final resolution of the dispute. Until such time as the dispute has been finally determined in accordance with the procedure specified in the contract, the parties are bound by the DAB’s decision. For example, the FIDIC Conditions of Contract for Construction provides that disputes shall be adjudicated by a full-term DAB, which is to be jointly appointed by the parties by a date stated in the contract. Either party may refer a dispute to the DAB, which has 84 days to make its investigations, conduct a hearing (if required) and provide its reasoned decision. If either party is dissatisfied with the decision, it may give notice of dissatisfaction within 28 days. If no notice of dissatisfaction is served, the DAB’s decision becomes final and binding. Where a notice of dissatisfaction has been served, the parties are required to attempt to settle the dispute amicably, before the commencement of arbitration at least 56 days after the notice of dissatisfaction.

Procedural rules for a DAB are published by the ICE,¹³ FIDIC¹⁴ and the ICC.¹⁵ The World Bank mandates the use of DABs for all projects over \$10 million which it funds, and its contract contains procedural rules for a DAB which are based on and very similar to the rules in the FIDIC Conditions of Contract for Construction.¹⁶ Each of these organisations also publishes an appropriate three-party agreement for execution between the parties and each member of the DAB separately.

There are many similarities between the use of a DAB and contractual adjudication.¹⁷ In particular, DAB and contractual adjudication provide for a provisionally binding determination to be made by a third-party neutral(s), chosen by the parties, who conducts the necessary investigations and hearing within a strictly limited and enforced period of time.

Dispute Boards' track record

The DRBF website provides a comprehensive database on projects around the world which have used DRBs, identifying the contractor and employer, contract value, and the numbers of disputes heard, settled or referred to other dispute resolution procedures.¹⁸ The database lists 1532 projects started from 1975 to 2006, with a total contract value of US\$98b. Of the 1860 disputes heard, 92.4% had been settled, and only 2.8% had been referred to binding dispute resolution procedures.

The use of Dispute Boards in Australia has been limited to date. In a status report presented by the DRBA in September 2008, the following statistics were presented:

- eight contracts in progress or completed since 2006 used DRBs;
- the value of those contracts was \$3.7b;
- only one dispute was referred to a DRB;
- there were no disputes unresolved by the DRB process.

The following currently operating, recently completed or planned Australian contracts have DRBs:

- Ross River Dam (Queensland) semi-alliance contract;
- Port Botany expansion works design and construct contract;
- City West cable tunnel (Sydney) construct only contract;
- Gateway bridge upgrade project (Queensland) design, construct and maintain contract;
- Sydney Water desalination facility design, build, operate and maintain contract;
- Pacific Motorway transit project (Brisbane) early contractor involvement contract.

What makes adjudication and DBs effective methods of ADR?

Both contractual adjudication and DBs have a demonstrated track record of efficacy as a method of ADR in which the probability of subsequent arbitration or litigation is low. It is suggested that the following are among the significant reasons for this:

- the selection of the Adjudicator or DB;
- the time at which the process is engaged;

- the ADR procedures used; and
- the time and cost of the process.

The parties themselves select the Adjudicator or DB, based on their confidence in the experience, expertise and skill of the person(s), and their ability to provide an independent, impartial assessment of the parties' contractual rights. The Adjudicator or DB can address a dispute as soon as it has been referred for determination, avoiding long delays during which working relationships between personnel executing the project can deteriorate and compound the issues.

The procedures adopted by the Adjudicator or DB can be tailored by the parties to their particular requirements, subject to the overarching considerations of determining a dispute in a limited and defined period of time. Of necessity, this will limit the amount of preparation and material to be considered. A hearing is normally an integral part of the procedure, and provides a forum for the parties to air their grievances in front of a respected independent and impartial person or tribunal. The cathartic value of this "day in court" should not be underestimated.

Perhaps the most significant aspect of these procedures is the limited time period required to obtain resolution of a dispute. The limited time and correspondingly limited cost of resolving disputes has obvious commercial advantages for parties for whom the lengthy time and high costs of arbitration or litigation are an unwelcome distraction from their business. Although a party may not agree with the outcome of a particular adjudication or DB determination, they may be prepared to accept the "swings and roundabouts", as the next determination may be more favourable. Furthermore, although it may be "rough and ready", a determination is the considered view of an independent expert/tribunal which has considered the relevant facts; an aggrieved party may consider that there would be a significant probability that a much longer and more costly dispute resolution process would not lead to a different result.

1. The famous English scientist Robert Hooke (1635-1703) "*carried out occasional views on properties in the city, providing professional adjudications in disputes between property owners or builders, usually for a fee of 10s*": Stephen Inwood, *The man who knew too much* (2002) 386
2. S108(1)
3. Robert Fenwick Elliott, 'Building and Construction Industry Adjudication - the UK Experience' <<http://www.feg.com.au/papers/AdjudicationUKexperience.htm>>
4. Ibid
5. <<http://www.bigbutton.com.au/~afa/>>
6. Robert Fenwick Elliott, '10 days in Utopia' (2000 May) V27 No 1 the Arbitrator and mediator 57, 65
7. <<http://www.drb.org/manual.htm>>
8. Ibid, §1.4.2
9. Peter Chapman, 'Dispute Boards for Major Infrastructure Projects' (Paper presented at Seminar on The Use of Dispute Boards in Australia, Queensland, 30 November 2006).
10. <http://drba.com.au/images/DRBA_Precedents/draft%20contract%20clause%20final.doc>
11. <<http://www.drb.org/manual.htm>>
12. AAA Dispute Resolution Board Guide <<http://www.adr.org/sp.asp?id=22028&printable=true>>; AAA Dispute resolution Board Operating Procedures (Schedule A) <<http://www.adr.org/sp.asp?id=22029&printable=true>>; AAA Dispute Resolution Board Hearing Rules and Procedures (Schedule B) <<http://www.adr.org/sp.asp?id=22030&printable=true>>
13. Institution of Civil Engineers can, ICE Dispute Resolution Board Procedure (2005)
14. FIDIC Conditions of Contract for Construction (2000) ["full-term" DAB]; FIDIC Conditions of Contract for Plant and Design-Build (2000) and FIDIC Conditions of Contract for EPC/Turnkey Projects (2000) ["ad hoc" DAB]
15. <http://www.iccwbo.org/uploadedFiles/Court/DRS/dispute_boards/db_rules_2004.pdf>
16. World Bank, *Procurement of Works & Users Guide* (2007) <<http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Works-4-07-ev1.pdf>>; Multilateral Development Bank Harmonised Edition of the FIDIC Conditions of Contract for Construction (2006)
17. Fenwick Elliott, '10 days in Utopia' (2000 May) V27 No 1 The Arbitrator and Mediator 57, 58
18. <http://www.drb.org/manual/Database_2005.xls>