



A is for apple, adjudication, arbitration and now avoidance

PAUL BATTRICK – DIALES EXPERT AND DAVID BROWN, PARTNER, CLYDE & CO IN PARIS SETTLE DOWN FOR A CONVERSATION ABOUT THE POTENTIAL PROS AND CONS OF STANDING DISPUTE BOARDS.

After discussing if Newcastle United were going to be the best football team in England and if Leicester Tigers would re-gain their position as Europe's premier rugby team, Paul and David recalled their last meeting at the recent Dispute Resolution Board Foundation (DRBF) "Grab the Bull by the Horns!" conference in Madrid. This is how the conversation went.

DB. Well Paul, what did you think of the Madrid conference? You were always pretty sceptical about the benefit of

standing dispute adjudication boards as a means of dispute avoidance.

PB. Oh David! You completely misunderstood the points I was making regarding standing boards. I am convinced of their worth, but many of my clients and contacts are not. Their stock comments are always: "Why do we need to waste money when there is not a dispute? Profits are low in the contracting industry and this is just another diluting factor, if indeed we make profits."

In any event an ad-hoc board can be selected such that their talents match the

nub of the matter.

DB. I don't think these people get it. It's all about avoidance nowadays.

PB. No. certainly not. There is a lack of understanding concerning the whole process of a standing board. Let's face it, if FIDIC ever gets around to issuing the new Rainbow Suite, and if, as we understand it, the new disputes and arbitration clause will not be amended, then standing boards will become a very, very frequent

occupational hazard and a cost that is unavoidable.

DB. The cost issue is one that is really quite easily swung around. Yes, there is a cost to both parties and yes, it is incurred before a dispute exists or is crystallised; but the standing board is all about dispute avoidance not dispute adjudication, with the potential to go on to arbitration.

PB. David, I agree. The key is to get people thinking about dispute avoidance. Not letting the issue get to the stage of potential trench warfare, when you need a third-party to make a decision for the parties because they cannot reach a decision for themselves or by themselves. I understand that FIDIC are on this path too; the word 'avoidance' may even appear in the dispute clause title.

DB. Thinking on from that, if, on the regular visits of the board, the parties come to an agreement regarding a matter, perhaps with the help of an opinion from the board or just after discussions with the board the parties' make their own agreement. They retain control over their own destiny.

PB. Totally agree. Asking the board for an opinion when there is the slightest whiff of an issue is an excellent way to avoid escalation; as are the discussions and presentations made to the board on a visit.

DB. We must always stress, when talking about this subject, that meetings with a board should never take place without both parties in attendance. Even though some think otherwise, that alleviates any problems of trust.

PB. Control is always a plus point for mediation and it is the same with a standing board. You know, I think that the parties' knowledge that the dispute board will visit every three months, or whatever is agreed, and that the dispute board will receive certain documents regularly is actually promoting both sides to maintain better records.

DB. You and your "records, records, records...". But it's true, I've heard it said

many times that the parties' actually meet before boards arrive to agree matters that are on the agenda for discussion.

PB. Now that really is dispute avoidance.

DB. Yes, but matters are still discussed at site.

PB. In Madrid, there seemed to be two camps when discussing the most suitable background for the members of a standing board. Lawyers was one and engineers was the other. Where do you sit, being a lawyer? We see so many arbitral tribunals now that consist of only lawyers, do you think this is the way forward for standing boards?

DB. Well, when it comes to finding a sole dispute board (DB) member I myself prefer to talk in terms of 'construction professionals'. For example, lawyers with plenty of projects experience and an interest in technical issues, or engineers with a good understanding of contractual issues and the impact of the applicable law.

PB. That seems sensible to me. And if we have a panel of three, then I think the best make up is a mix. If you take into account that the visits will take place during the course of the project, it is beneficial to have members who have been brought up in that environment; engineers, quantity surveyors, and the like. But at the helm or the chair, I would like to see a 'hands on' style lawyer – just like you! There will always be matters of interpretation and lawyers are generally superb in this field.

DB. I'll drink to that – if you are buying!

PB. Mmmm, I can't help thinking about the costs [not of your drink]. Three people receiving and reviewing documents, visiting site for say 2 to 3 days, more if you include travelling time, relative to a project lasting perhaps 4 or 5 years. That is a lot of money.

DB. Yes, but there are two issues here. Firstly, what does a bidding contractor put in its tender? I think the tender documents should have a sum included such that every bidder includes the same amount.

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PB. And the actual expenditure could be set-off against this amount?

DB. Yes. As an aside, I note some funding agencies such as the Japan International Cooperation Agency (JICA) are seriously backing the use of standing dispute boards.

PB. Back to your second point please!

DB. I know the DRBF are carrying out surveys to establish the costs and benefits of standing boards, so much of the data out there at present is anecdotal or from a very small sample. I suppose if disputes are avoided there will be no data at all in some respects. However, you and I both know how expensive an arbitration can be, so standing boards seem to be a very good project investment.

PB. Yes, for sure. I've sat in a hearing with a tribunal of three, with barristers, lawyers, experts, and parties' representatives, and counted up a cost per hour, per day, per week. The total figure was enormous and the decision out of the parties' hands. Costs are often higher than ten per cent of the amount in dispute and can correspond to a significant proportion of the cost of the project.

DB. That is a good point. The average cost of a standing board is said to be less than one percent of the contract price and, if a matter is resolved without referral to arbitration, around 70% of matters go no further; so, the use of a board is an even better investment. With the right people constituting the board, I always think that their decision is a bit like having your horoscope read, in that you are second-guessing the tribunal's award, but having spent a few million to get it. What a waste of time and effort.

PB. And so disruptive for business too! Well, maybe I will revisit those I know who are sceptical about standing boards.

DB. Having put the world to rights on that topic what shall we talk about now? Brexit...

The mood changed and both David and Paul took a large gulp of their drinks. ■