ROUND TABLE REPORT

Disputes boards discussed

Herbert Smith Freehills' construction partners hosted a round table dinner on the use of dispute advisory boards in construction and infrastructure projects, attended by *CDR*

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The construction disputes round table event was chaired by *CDR*'s outgoing editor-in-chief **Ben Rigby** under the Chatham House Rule. The hosts included, from **Herbert Smith Freehills**, **James Doe**, head of the London contentious construction and infrastructure group, together with non-contentious partner **Tim Healey**, and disputes partners **Emma Schaafsma** and **David Nitek.**

From the Bar, speakers included **Alexander Hickey QC** of **4 Pump Court**, while **James Foster**, head of international arbitration at third-party funder **Augusta Ventures**, was on hand. **David Barry**, chairman of **Blackrock Expert Services Group**, added his experience as one of the world's leading delay experts, giving his insights into programme, project and construction management, as well as having acted as a member on a number of dispute advisory boards.

There was also in-house legal representation present from an industrial infrastructure and engineering background.

Contractual provisions

Doe started by raising the simple question as to whether dispute adjudication board (DAB) provisions were, in fact, included in contracts.

Healey said that the concept of DABs was seen as a good idea, performing useful functions, and the fact that the global construction industry body, **FIDIC** had hardwired it into its contracts was important, and illustrated the value placed on DABs.

He noted that, anecdotally speaking, DABs are popular in the United States, in Africa, thanks to the **World Bank**, perhaps reasonably so in the United Kingdom and the European Union, and rather less so in Asia.

Healey acknowledged that clients did not always focus on dispute resolution at project inception, but the perceived costs of supporting DABs was still off-putting.

Hickey noted that while costs were only an issue in a small proportion of cases, the decision to use them was very much a question of trust, as to how lawyers will represent clients at a DAB.

Clients, noted Hickey, may not trust a DAB "to sit in a room and decide their issues". Agreeing to the composition of a panel was often the problem.

Foster observed that clients still like processes with "a hard edge", such as other industry standard methods of dispute resolution, including adjudication, the courts and arbitration, while Nitek pointed out that, however unfairly, clients felt that DABs were there to benefit contractors by providing an extension of time or award of cost. However, as Schaafsma succinctly put it, the principal attraction for DABs is the perception of impartiality.

James Doe

David Barry

Barry outlined his experience of DABs. Starting with the ad hoc version, the two next most common were the classic standing DAB, which held regular site visits and monitoring, while there was also a standing DAB which sat without monitoring the project in question, acting as a hybrid of the first and second types. This third, hybrid, type was more common now.

What was sought was not some kind of mediator-cum-adjudicator; parties wanted a decision.

The idea of a permanent monitoring by DAB was unattractive, while the binding nature of the award was its strength.

Doe suggested the process had to be both realistic and pragmatic in how far they could go in finally resolving disputes, something echoed by Healey, who said that boards were intended as a quick form of dispute resolution, and keeping the process moving was essential. Over time, said Barry, DABs would evolve to become far more cost-effective and would be better for it.

Enforcement engagement

Doe explained that in the UK, DAB awards were likely to be enforced in the same way as expert determinations. A DAB award is a contractual mechanism; the failure to adhere to an award is a breach of contract which could be enforced in the courts.

As Schaafsma indicated, in some jurisdictions, governments or state-owned enterprises will have difficulties in obtaining approval to make additional payments pursuant to a DAB award. As for enforcing an arbitral award requiring payment against an interim binding DAB award, again, in some jurisdictions the courts may struggle to recognise the concept.

There was panel agreement with Schaafsma's view that governments could be reluctant to entertain the concept of neutral opinions on disputes. From the client view, the classic mode of dispute resolution was very much adjudication working alongside arbitration, according to the contract, which included a board.

Membership and procedure

The panel was not prescriptive about which professions should make up a DAB. Suggestions ranged from senior engineers, expert consultants on delay, quantity surveyors, architects or senior non-lawyer arbitrators. This, explained Schaafsma, is not always an easy choice where there is to be a standing DAB appointed on a major project where it may be difficult to conceive at the outset what nature of disputes could arise. Legal experience certainly was valued.

What is needed, noted Barry, is some experience of DAB and familiarity with an adversarial setting. Flexibility is also a virtue, possibly allowing for a larger standing panel and then selecting members of the panel according to the nature of the dispute in question.

That led the panel to a discussion on the proper procedure for a DAB. Doe led the debate by taking parties through the FIDIC contract, which, he pointed out, gave quite a lot of power to the board but with strict time restraints.

One point, endorsed by Barry, but discussed and agreed by Hickey, Schaafsma and Doe, was the need for, and the importance of, clear and proper terms of reference. Barry noted that enforcement issues were bound to arise if there was an absence of procedure, and could undo the good work done by DAB members – procedural fairness was

Alexander Hickey QC

significant, but so too was flexibility, and a good DAB would set out its parameters.

Lawyers and advocacy

Nitek had experienced a matter where the parties could not be represented by lawyers in DAB hearings and outlined how that had affected matters, including how inconvenient it was for sophisticated parties in large disputes.

Barry pointed out that questions of law can arise in DABs, while there was real scepticism as to whether this was practical or desirable. A non-lawyer, Barry made the point that as a DAB member, if a question of law arose, he himself would want to be able to hear from and question a lawyer.

Parties before, and members of, a DAB are always fully aware that the proceedings could be used as evidence in arbitration.

That meant, Schaafsma said: "You are setting out your stall in the DAB and you need to make the right arguments," which lawyers were equipped to do – something that in-house lawyers also firmly agreed with.

She noted that the process benefits from the fact that evidence is given by staff on site with fresh recollections and documentation readily at hand, which lawyers can take advantage of more easily than in an arbitration commenced months after demobilisation.

Equally, Hickey acknowledged that the intention was that in the beginning, appearances before any DAB were supposed to be "lawyer-light". He pointed out, supported by the panel as a whole – that "people didn't like it" and that the involvement of lawyers was now taken as a given.

Funding's role

Foster spoke on litigation funding, carefully comparing and contrasting the use of DAB with adjudication.

Funders like Augusta, he said, like adjudication because it is quick, the dispute in question does not involve a binary win/lose situation, but rather a question of nuance related to the quantum of any loss, so the client would often get some sort of return, and most crucially, it is enforceable.

DABs, noted Foster, had the advantages of speed of process and the reasonable expectation of some form of return. However, enforcement raises its own question marks. He proposed a balanced solution; a funder might fund a DAB as a first step in a proposed arbitration, but then, to manage the process properly for all sides, needs a break clause afterwards, if the DAB decision was unfavourable to the claimant.

Foster made the point that it was clear, from experience, that a favourable DAB decision might lead to settlement, and that funders prefer an early resolution, making the process attractive to them. While Augusta had not funded a DAB so far, he believed it would do so at some point.

Emma Schaafsma

Costs and the future

Doe raised some broader points on costs where it was common practice that litigation and arbitration were added to overall project development costs. This made project directors very cost conscious when it came to dispute resolution. In that context, the use of DABs might be seen as an unnecessary additional step towards arbitration, while Schaafsma suggested that increasingly, clients had clear strategies on costs which they expected firms to follow through with arbitration, of which the effective use of DAB is a part.

One panellist noted that "funding balances the books" and was "no longer a sign of impecuniosity", and while enforcement in certain jurisdictions was questionable, the market for funding was internationally vibrant and growing, a point detailed by Nitek.

There were industries where DAB could make a real impact – the nuclear energy industry, for example – in which the absence of a parallel system of adjudication made their use beneficial, while the use of the concept as an alternative to proposals like directed arbitration and mediation, for example, in Belt & Road cases, was also discussed.

While some industries, for example the energy and the oil and gas sectors, would be less likely to adopt the same, international infrastructure, power generation and heavy industrial plant projects had scope for DABs – as did construction projects. To Barry went the final word, saying "there's a fantastic future for DABs", on which note proceedings closed.