

DISPUTE ADJUDICATION BOARD AS AN ADR METHOD IN THE CONSTRUCTION INDUSTRY OF SRI LANKA

Mahesh Abeynayake*

Department of Building Economics, University of Moratuwa, Sri Lanka

ABSTRACT

Unresolved disputes can lead to project delay, increased tension and can damage long term business relationship. As a result, Alternative Dispute Resolution (ADR) methods were evolved during the passage of time to resolve construction disputes. Dispute Avoidance Procedures, which include Dispute Review Boards (DRB) and Dispute Adjudication Boards (DAB) are used in the construction industry since those methods are encourage parties to resolve their disputes at site level. The DAB first started to use in Sri Lanka after the FIDIC (1999) red book was introduced to use and due to the insistence of the World Bank and Asian Development Bank as funding agencies for the mega development projects. Although many research papers of foreign countries stated that their success with the DAB, Sri Lankan construction industry mostly practiced adjudication in ad-hoc manner. This research was carried out to provide suggestions to overcome the barriers to implement the full term DAB method in Sri Lanka. Therefore, it is indeed necessary to find out the genuine reasons behind the reluctance of stakeholders in Sri Lankan construction industry towards ADR methods and why stakeholders even do not use adjudication which has been recognized as an effective and efficient ADR method, elsewhere in the world. Questionnaire survey was carried out among contractor and consultant organisations and semi structured interviews were carried to gather descriptive answers from them. The research revealed the barriers to implement the full term DAB in Sri Lanka and provides suggestions to overcome those barriers. The research would also be conducted based on the provisions in Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (FIDIC 1999) first edition and Standard Bidding Document Procurement of Works Major Contracts (ICTAD/SBD/02) second edition. A pivotal conclusion of this research is that the stakeholders in the construction industry prefer “adjudication” as an effective ADR method.

Keywords: ADR Methods; Disputes; Dispute Adjudication Board; FIDIC.

1. INTRODUCTION

Ashworth and Hogg (2002) decades the perceived shortcomings of construction dispute litigation, with its attendant costs, delays, and adversarial relationship have led to the growing preference for Alternative Dispute Resolution (ADR) methods. Examination of the literature, some of the methods could be better defined as Dispute Avoidance Procedure (DAP) instead of ADR methods.

DAP may appear in the form of several identities and distinct approaches, namely, Dispute Review Board (DRB), Dispute Adjudication Board (DAB) and Dispute Resolution Adviser (DRA). A Dispute Board (DB) comprises a board of one or three persons, independent of the contracting parties, engaged to perform an overview role of the execution of the project and the contract. Its primary function is to assist the parties to avoid disputes if possible or if not, to assist them to a speedy, cost effective and acceptable resolution of disputes, and avoid the need for litigation. The FIDIC suite of contracts provides for two distinct types of DAB. The first type is the "full-term DAB", which comprises one or three members who are appointed before the contractor starts executing the works, and who typically visit the site on a regular basis thereafter. The second type is an “ad-hoc DAB”. The mechanism of Dispute Boards achieved such prominence and success in a relatively short time because of the significant advantages they offer in comparison to more traditional forms of dispute resolution. Although the success rates of DBs are encouraging, the process is not a panacea. The benefits that can be derived from DBs are highly

*Corresponding Author: E-mail - abey92@hotmail.com

contingent on careful planning and implementation. The research findings revealed that a few of stakeholders knew the actual procedures in adjudication and the vast difference between adjudication and arbitration and ad-hoc DAB is the most common way in DAB practicing in Sri Lanka. In Sri Lanka full-term DAB is rarely practicing. Therefore the aim of this research was to provide suggestions to overcome barriers to implement full term DAB in Sri Lanka. Specific objectives have been set to identify the advantages, disadvantages, critical factors of DAB and identify the barriers to implement the Full-term DAB in Sri Lanka and suggestions to improve the full-term DAB practice in Sri Lanka.

The major criticism of ADR methods is waste of time. It would lead to further delay in the settlement of the dispute due to unequalled litigation process. Secondly ADR methods would reveal too much of one's case or strategy to the opposition; eg. for those seeking to obtain information on the other side tactics and weakness. Another criticism has been that no adequate time to assess the details of the dispute. Many researchers have stated that most of the ADR methods are non-binding and identify it as a weakness (Horman, 2003; Fullerton, 2005). Finally, some writers criticize the involvement of legal professionals in ADR practice. They argue that ADR methods may be hijacked by the legal professionals sometimes would lead to legalism and formalism of its procedures (Brooker, 1993).

2. DISPUTE ADJUDICATION BOARD (DAB)

Adjudication is a method that the disputes are referred to a neutral third party for a decision which is binding on the parties only until the dispute is finally resolved by arbitration or litigation. This was a principle developed in the English legal system and finally held in the case of *Machon Civil Engineering Ltd. vs. Morrison Construction Limited*. In this case the Court held that 'Adjudication process intended to be a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators pending the final determination of disputes by arbitration or litigation'. This method of dispute resolution was introduced in England by Housing Grants, Construction and Regeneration Act in 1996 and the concept behind adjudication was aided by recommendations of Sir Michael Latham's fundamental review of the construction industry published in the report '*Constructing the Team*' in 1994 (Planterose, 2003; Sims, 2003). The Housing Grants, Construction and Regeneration Act (HGCRA) enacted in 1996 and it includes an adjudication procedure (Coutts and Dann, 2009). HGCRA granted adjudication with a legal enforceability. The Act came into force on 1st May 1998 and applies to all construction contracts entered into after that date in UK. However the Act currently applies only to written contracts and Act says that every construction contract should enable the parties to it to refer their disputes to adjudication under a procedure that complies with the Act.

At the commencement of the contract, parties agree to the appointment of an adjudicator known as the Dispute Adjudication Board (DAB) or a sole adjudicator. Latham (1994) has recommended referring the disputes which cannot be resolved first by the parties themselves in good faith to the adjudicator for a decision. He recommends that the board should be independent, and panel of names should be in the contract to deal with all major disputes. Since the board being an independent it would definitely improve the effectiveness of the decision making process.

Dispute Boards (DB), sometimes referred to as Dispute Review Boards (DRB) or Dispute Adjudication Boards (DAB) were evolved from the role of the engineer as decision maker in the first instance under various standard forms of construction contracts. The International Federation of Civil Engineers (FIDIC), a prolific publisher of standard form contracts for international projects, introduced the DAB in response to the condemnation of the dual role performed by the engineer as both the client's agent and independent decision maker. In FIDIC -1999 published there major sets of condition of contract (the red, yellow and silver books) all of which contained DAB provisions. FIDIC Conditions of Contracts (1999) has introduced the Dispute Adjudication Board (DAB) system as a pre arbitration requirement. However, Adjudication is not more popular in Sri Lanka, because of non-availability of governing international convention and non-availability of statute locally.

A decision that has a quasi-binding effect, where the decision is binding unless the dissatisfied party follows the appropriate procedural rules, will allow the parties to maintain a less adversarial and more amicable relationship on the construction site while giving the parties an opportunity to contest a DAB decision that they feel is particularly egregious, erroneous, or improper for a DAB to decide. The DAB

has broad power to establish procedural rules, decide upon its own jurisdiction, and decide the scope of any dispute. The DAB has the power to take its own steps to ascertain facts required to make a decision, including employing the use of its own specialist.

3. FIDIC CONDITIONS OF CONTRACT AND DAB

In FIDIC suite of contracts provides for two distinct types of DAB.

- Full term DAB
- Ad-hoc DAB

Full term DAB comprises one or three members who are appointed before the contractor starts executing the works, and who typically visit the site on a regular basis thereafter. The main reason for a full term DAB is to deal with disputes on or related to the construction site. A standing panel may also be able, if desired by the parties, to act as an informal sounding board when issues first arise and before they are formally referred to dispute resolution. The second type of DAB is the ad-hoc board, which comprises one or three members who are only appointed if and when a particular dispute arises, and whose appointment typically expires when the DAB has issued its decision on that dispute. It loses the distinct advantage of having an on-call DAB to assist in making decisions.

The conditions provide for reference of any dispute arising between the parties to the Dispute Adjudication Board (DAB) comprising one or three persons for its decision to be given within 84 days or such other time as is proposed by the DAB and approved by the parties. The decision of the DAB is binding unless and until intervened by other methods of dispute resolution provided by the conditions of the contract. If either party is dissatisfied with the decision or the DAB does not deliver its decision within the specified time limit it may give notice of dissatisfaction to the other party within 28 days after the decision or after the specified time limit, and the dispute will be referred to the next stage which is called arbitration. According to the FIDIC conditions if either party does not refer the dispute to the arbitration within the specified time period, the Adjudicators' decision becomes final and binding upon the Employer and the Contractor.

The requirement of the qualities and the quantities of persons, who are participate in the DAB has defined here. FIDIC Red book stated (under clause 20.2) that provisions for appointment of Dispute Adjudication Board. Accordingly there should be three qualified persons requires to be appoint and out of those three, one person should be serve as a chairman and the termination of a member would be able to enforce by a mutual agreement of both parties. Under the clause 20.4 to the FIDIC conditions of contract (as an Obtaining dispute adjudication board's decision), if there has been arose a dispute in the contract, as according to the aforesaid condition that the matter has to be inform to the DAB in writing to their further examinations and decisions with copies to the other party and to the Engineer. Within 84 days after giving such kind of reference to the DAB or within acceptable time duration by the both parties, the DAB's final decision has been express.

In addition to that if either party has disagreed with the decision given by the DAB, then they have to state their disagreement to the other party within 28 days after the DAB's decision. Furthermore after giving the notice of dissatisfaction, then they can attempt to the amicable settlement of the dispute. If it is not successful then the arbitration process shall begin after the 50 – 60 day of the notice of dissatisfaction is given.

4. ICTAD CONDITIONS OF CONTRACT AND DAB

According to the ICTAD conditions the adjudicator shall be a single person appointed by agreement between the parties. If parties are unable to reach the agreement within 14 days of such request of agreement, the adjudicator shall be appointed by the ICTAD. Either party may refer of the dispute to the adjudicator by giving 07 days notice to the other party. Then the adjudicator shall give his determination about the dispute within 28 days or such other period agreed by the parties to the dispute.

The clause 19.2 of the SBD No. 02 of ICTAD stated provisions for appointment of Dispute Adjudication Board (DAB). Accordingly it has given its' 1st priority for adjudication process as a method of dispute resolution for any kind of dispute arose in construction projects. Also parties should appoint an DAB within 28 days from the date of commencement of the project. The requirement of the qualities and the quantities of persons, who are participating in the DAB has defined here. (Under clause 19.2 as Appointment of Dispute Adjudication Board as same as per the FIDIC Redbook under clause 20.2 as Appointment of Dispute Adjudication Board). Accordingly there should be three qualified persons requires to be appoint and out of those three, one person should be serve as a chairman and the termination of a member would be able to enforce by a mutual agreement of both parties.

Under the clause 14.1 of the SBD 03 of ICTAD there is a provision for Dispute Resolution. That it says for any kind of dispute they should go to an adjudication process rather than going for any other ways of dispute resolution. In the case of adjudication each party should have to give 07 days' notice to the other party by initiating the reference of dispute. When appointing the Adjudicator, ICTAD shall be the adjudicator unless the bidder expresses his or her disagreement in bidding document. Within 14 days from the letter of acceptance, contractor and the employer should able to appoint an adjudicator by their mutual consents. If not then the ICTAD shall appoint the adjudicator by the request of contractor or employer after expire of 28 days. As the same way the professional fee of the adjudication process should have to bear equally by the both parties.

Within the period of 28 days the adjudicator should give his or her determination. And each party can give any information or documents with reference to the process. And all the reference information and the documents kept in confidential by the adjudicator or the parties. After examine all relevant information and the other evident documents with respect to the dispute, ultimately the adjudicator has to give his final decision for the considered matter. And the decision given from the process of adjudication, and it is final and binding, unless if neither party express their objection before 28 days from the Adjudicator's determination.

5. LEGAL ASPECTS OF THE CONSTRUCTION ADJUDICATION

As per the arguments of Gould (2003) the legal characteristics of the Adjudication can be summarised in to five groups.

- The Adjudicator is a neutral individual who is not involved in the day-to-day running of the contract. He or she is neither an arbitrator, nor a state appointed Judge
- The Adjudicator's decision is temporary binding on the parties, and therefore, unlike mediation, the process does not require the co-operation of both parties
- The adjudicators' decisions are usually expressed as being binding until the end of the contract when either party may seek a review of the decision, most commonly by arbitration
- The adjudication is not arbitration and is therefore it is not subject to the Arbitration Act

In the case of *Discain Project Services Ltd vs. Opecprime Ltd (2000)*, BLR 402 courts observed as *the adjudicator is working under pressure of time and circumstance which makes it extremely difficult to comply with the rules of natural justice in the manner of a Court or an Arbitrator*".

Ling (2006) has been suggested that, while the manner by which the principles of natural justice apply to arbitration and court proceedings have been well established, it may be unrealistic to expect adjudicators acting under severe time constraints in the context of the legislation to comply with these principles to the same extent.

Humphrey Lloyd QC J in his judgment in the English case of *Balfour Beatty Construction Ltd. vs Lambeth London Borough Council (2002) EWHC 597*, concurred that, *"principles of natural justice applied to adjudication may not require a party to be aware of the case that it has to meet in the fullest sense since adjudication may be inquisitorial or investigative rather than adversarial"*

In Sri Lanka the DAB comes in to effect in most of contract only after completion of the project. That is the ad-hoc DAB procedure is mostly practiced and also sometimes a dispute board is selected on a stand by basis and parties are not inviting adjudicator to site visit and meetings.

6. RESEARCH METHODOLOGY

For this research preliminary survey, detailed questionnaire survey and semi structured interviews were carried out to collect data from the construction industry. Questionnaires were distributed among 30 professionals in the consultant and contracting organisations and semi structured interviews were carried out among 5 professionals in the dispute resolution field. The questionnaire requested the respondents indicate their degree of agreement, on a five point Likert scale ranging from very low degree of agreement to very high degree of agreement. Mean weighted rating was used to analysis of data collected from questionnaire survey and content analysis was used to analysis the data collected from semi structured interviews.

7. DATA ANALYSIS

Dispute Adjudication board achieved prominent success in the construction industry due to its significant advantages over other most traditional dispute resolution methods. The professionals in the construction industry identified following advantages which can be gain from the full- term DAB over arbitration. Advantages were ranked based on the mean weighed rating worked out by the questionnaire survey as shown in Table 1.

Table 1: Advantages of DAB

Statement	Rank
Reduce and shorten the dispute resolution process	1
Enhances of credibility of the decision	2
Provide a Dispute Avoidance mechanism	3
DAB is addressed the disagreements or dispute, without the need for the historical reconstruction of events as in arbitration	4
Better communication among parties	5

7.1. CRITICAL FACTORS OF DISPUTE ADJUDICATION BOARD

There are many advantages of DAB process. But the benefits that can be gained from the DAB depend on the careful implementation of the DAB process. Seven factors were identified which are affecting to a successful DAB by the researcher through literature review and preliminary survey. Critical success factors were ranked based on the mean weighed rating worked out by the questionnaire survey as shown in Table 2.

Table 2: Critical Factors of DAB

Statement	Rank
Expertise for DAB should be selected based on the nature of the project	1
The Dispute Board need to receive relevant documentation during the course of works and site visits should be maintained throughout	2
DAB members should be carefully selected to provide a balance of experience and technical expertise.	3
The selection of panel members respected by the parties for their neutrality, integrity and expertise is important for a successful DAB	4
The success of the DAB process depend largely on the owner and the contractor`s mutual trust and confidence in the board itself	5

The success of DAB process depends on contracting parties satisfaction with every member. Therefore both parties must carefully investigate nominees to ensure that each nominee is experienced and technically qualified. If either party is uncomfortable with a member of a DAB the DAB process become ineffective. The ability to analyze the technical matters is very essential characteristic of a DAB member. Otherwise there is a high risk of failing the disagreement addressed properly. Each member should also have a certain amount of knowledge of contract administration and the ability to interpret contractual provisions. Absence of these loses the parties confidence on the member, and the DAB process and it leads to DAB procedure ineffective. The type of disputes varies according to the nature of the project. And the technical expertise required for the project based on the nature of the project. Therefore expertise for the DAB should be selected based on the nature of the project. The nature of the project defines the areas which DAB members should be expertise. This is a process largely based on the attitudes of the parties, the mutual trust and confidence of the board is a major success factor. Also regular site visits, meetings and reports from the parties are important to make fair decisions. In addition to that DAB members need to keep updated relevant project correspondence, monthly and other periodic reports, modifications to contract documentation, and potential disputes. Site visits should be maintained in a frequency that DAB members can sufficiently informed about the working progress and the probable conflicts.

7.2. BARRIERS TO IMPLEMENT OF FULL - TERM DISPUTE ADJUDICATION BOARD IN SRI LANKA

Moreover in Sri Lankan context, although the DAB appointed at site level parties are not being invited the DAB members for the site visits. Maintaining site visits throughout the project and receiving relevant documentation is a critical factor of a DAB. Therefore, this situation directly affect to the success of the DAB. In Sri Lankan culture professionals tend to go for next solution even though they feel the decision given by the DAB is correct. Therefore absence of legal framework to enforce the decision is directly affected to the successful implementation of the DAB. Further very few construction industry professionals are acting as adjudicators in Sri Lanka. Due to this reason contracting parties may unable to select an adjudicator based on the nature of the project. But this is a major success factor of the DAB. Further it diminish the opportunity of selecting parties by balancing experience and technical expertise, selecting parties for their neutrality, integrity, and the parties confidence of the DAB. Therefore this barrier leads to diminish most of the critical success factors of DAB. If DAB decision cannot be enforced the cost of maintaining a DAB throughout the project is a waste. Most of the contracting parties believe that the cost of maintaining a DAB throughout the project is a waste. This perception of high cost is a major barrier to implement the Full- term DAB in Sri Lanka. Since most of the contracting parties use the Sri Lankan conditions of the contract for their projects familiarity with the full term DAB is very less. Although the FIDIC conditions of contract contains provisions for full term DAB, most of the contracting parties not use the FIDIC document for their contracts. This is a major barrier to implement Full-term DAB in Sri Lanka.

7.3. SUGGESTIONS TO IMPROVE FULL - TERM DISPUTE ADJUDICATION BOARD IN SRI LANKA

Suggestions were presented for the purpose of minimizing the barriers to implement the DAB practice in Sri Lanka and generate the critical success factors of DAB directly as follows.,

- Conducting awareness programmes
- Develop a mechanism to directly enforce the decisions of DAB
- Incorporate a full-term DAB provision to the domestic (ICTAD) standard conditions of contracts

Further the contracting parties to a construction project should educate themselves about how to properly use the DAB process. Moreover since this is a mechanism which is based on the mutual trust and confidence of the parties unlike the adversarial system, the attitudes of the parties directly affect to the success of the DAB. Therefore attitudes of the parties should be changed. The industry professionals should be encouraged to enter in to this field and work as adjudicators to develop this field. Since the technical competence and experience of the adjudicator is a main success factor of the DAB adjudicators should be borne by the construction industry itself. Therefore by giving necessary knowledge of the DAB

process and its benefit to the industry and the professional should be welcome to this field. Since FIDIC clauses also not provide a direct way to enforce the DAB decision, developing a mechanism to enforce the decision is very important. Majority of the contracting parties are reluctant to use this mechanism since the decision of the DAB not enforceable. By developing a mechanism to directly enforce the DAB decision this barrier can be minimized. If DAB can get an institutional support the contracting parties' mutual trust on the DAB can be improved and the attention of the contracting parties can direct to the DAB process. Further the construction industry professionals who are involved in producing contract documents can take a step to incorporate the full term DAB to domestic contracts.

8. CONCLUSIONS

The DAB allows more experience and greater relevant expertise to be applied to construction disputes. The strength of the adjudication process is that it provides a rapid and cost effective mechanism for deciding a dispute, which can be undertaken during a project without major distraction from the overall project objectives. A major advantage of the DAB is that it can operate on site and resolve issues before leaving the site. The results showed that Sri Lankan construction industry can gain numerous advantages from the full-term Dispute Adjudication Board including shorten the dispute resolution process, dispute avoidance, better communication among parties. However, several barriers impeding to gain those advantages from full-term Dispute Adjudication Board. To gain the advantages from the full-term DAB in Sri Lanka critical factors should be generated and Barriers should be minimized. Drawing from the results of this study, it is recommended to implement institution for conduct DAB process in Sri Lanka and conduct awareness programmes for industry practitioners who are willing to become construction industry professionals in the future to improve the full-term DAB procedure in Sri Lanka. Adjudication was identified as the most effective mechanism for resolution of construction disputes while Arbitration is the most popular method for dispute resolution in Sri Lanka.

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