

IDENTIFYING BARRIERS TO THE ESTABLISHMENT OF DISPUTE BOARDS IN UK CONSTRUCTION

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The process of dispute resolution is constantly evolving and the UK Construction industry continues to develop methods of alternative dispute resolution, particularly methods which may prevent disputes from occurring. One such method is the Dispute Board, which is a panel appointed at the beginning of a contract to advise the parties of situations where disputes are likely to arise and how to avoid them. Dispute Boards have been popular in the U.S.A for several years, which leads one to question why they have been little used in the U.K. A Delphi Survey was conducted amongst Construction Professionals, Lawyers, Arbitrators / Adjudicators and Clients in order to identify the barriers to Dispute Boards becoming an established method of alternative dispute resolution in the UK Construction Industry. The results show that barriers to the incorporation of Dispute Boards in the UK Construction Industry include poor attitudes towards new methods, the presence of adjudication, the lack of knowledge and understanding by clients and lack of practical experience by Dispute Boards. The implications of this are discussed.

Keywords: alternative dispute resolution, delphi survey, dispute boards.

INTRODUCTION

The process of dispute resolution is constantly evolving and the industry continues to develop methods which represent an alternative to litigation, arbitration and adjudication. These methods of Alternative Dispute Resolution (A.D.R) include mediation, conciliation and expert determination. Mediation has been a popular method of A.D.R. in the U.K. construction industry for many years. In 1998, Gould and Cohen stated that mediation was the most popular method of ADR, and in 2006 Brooker stated that there was an ever increasing body of mediation providers. Further, one of the principle findings in a survey by Brooker and Lavers (2001) was that mediation was considered by many construction professionals to be the only process associated with A.D.R. However, there are those within the construction industry who believe that mediation (and other methods of A.D.R.) can hinder the construction process if they are entered into during the contract period (Hibberd and Newman 1999). As Hobeck et al (2008, P1) state “ADR cannot be equated to, or is primarily, mediation. Mediation is one of a number of ADR instruments”. This, together with the fact that construction companies may now be willing to take proactive measures to prevent any disputes occurring on their projects, has led to the introduction of other methods of dispute resolution and avoidance.

One such method is the Dispute Board. This paper will describe the concept of Dispute Boards, and how they work. and will distinguish between Dispute

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Adjudication Boards (D.A.B's) and Dispute Review Boards (D.R.B.'s). Furthermore, it will investigate what barriers they need to overcome in order to be accepted as an alternative to more common methods of dispute resolution. Preliminary interviews indicated that the principle barrier to the adoption of Dispute Boards in U.K.

Construction is adjudication. The paper will attempt to ascertain whether this is the case or whether there are other relevant factors to consider. Or, indeed, whether there are any barriers to Dispute Boards having a role in U.K. construction.

The paper is structured as follows: background, research method, results, discussion and conclusion

BACKGROUND

A Dispute Board is a panel of, usually, three people who are appointed at the beginning of a contract to advise the parties of situations where disputes are likely to arise and how to avoid them. If a dispute arises, then the board can facilitate negotiation between the parties in the hope of obtaining settlement (Burkett 2000). The appointment is for the duration of the contract and is paid for by both the Employer and the Contractor. The Board may be required to make regular visits to the site and attend all meetings. Costs can be high so, historically, Dispute Boards have been employed only on very large contracts. Examples of projects where Dispute Boards have been employed are the Channel Tunnel and Hong Kong Airport. It is also proposed the Boards be incorporated into contracts for the 2012 Olympics. The generic term of "Dispute Board" has several variations. They have variously been termed Dispute Review Board (D.R.B.), Dispute Adjudication Board (D.A.B.), or merely Dispute Board. In 2001 The D.R.B. Foundation adopted the terminology of "Dispute Resolution Board" for all types of decisions or recommendations (Genton 2002). Genton (2002, p.603) goes on to state that "The D.R.B. is a consensual, amicable procedure with non-binding recommendations and the D.A.B is a kind of pre-arbitration step with binding decisions". For the purposes of this paper the generic term "Dispute Board" is used.

U.K. construction has tended to focus purely on the resolution of disputes. Therefore combined avoidance and resolution mechanisms such as Dispute Boards have not been widely adopted, although the latest edition of the ICE form of contract provides for their appointment. However, in the U.S.A, Dispute Boards have been employed on projects for many years, and studies undertaken by the Florida Highways Authority show that 97% of disputes referred to a board settled prior to litigation. Genton (2002) agrees by observing that because the parties are paying for the board anyway, they are more inclined to use it for advice on potential disputes.

Given the high level of disputes which arise in the U.K. Construction Industry, and the fact that Dispute Boards have been popular in the U.S.A for several years, one might question why they have been little used in the U.K. Indeed, a review of the literature regarding methods of dispute resolution has indicated that knowledge of Dispute Boards is becoming more widespread, but that the majority of writers merely list this as another form of A.D.R. without addressing the issue of its application in U.K. Construction or how it differs from other "alternative" methods in terms of dispute avoidance.

Gerber (2001) appears to be one of the few authors who discuss Dispute Boards as a dispute avoidance procedure. Gerber's paper focuses on Dispute Adjudication Boards, Dispute Review Boards and Dispute Resolution Advisers in some detail as a

response to growing awareness within the industry that proactive measures such as D.B.'s are preferable to reactive measures. Others who support dispute avoidance are Faulkner et al who describe it as:

A systematic set of mechanisms to timely and efficiently eliminate disputes as early as possible and so preclude or peel away as many disputes as cost effectively as possible, through an innovative reconfiguration of the most useful aspects of classical arbitration methods. (Faulkner et al., 2002, pp.14)

Dispute Boards are seen as a method which work successfully internationally but which are largely dismissed in the context of the U.K. Construction Industry. Therefore it would seem appropriate to carry out a survey amongst those who are most active within the industry as to what they believe are the most likely reasons why Dispute Boards are not as popular in the U.K. as they are in other countries.

RESEARCH METHOD

A Delphi survey was undertaken amongst professionals who are expert in the field of Dispute Boards and other forms of dispute resolution. Day and Bobeva (2005 pp.1) define Delphi as “a structured group communication method for soliciting expert opinion about complex problems or novel ideas, through the use of a series of questionnaires and controlled feedback”. The Delphi survey technique was developed by Dalkey and Helmer (1993) as a tool for forecasting future events.

The author considers Delphi to be a suitable technique to use in achieving this objective because as Ericsson and Henricsson (2005) state “it is especially effective in difficult areas which can benefit from subjective judgements on a collective basis but for which there may be no definitive answer”. The author is seeking the opinions of experts who have in depth knowledge of Dispute Boards and what might constitute a barrier to their use in UK Construction, which is obviously very subjective. The Delphi survey is considered to be a suitable method in order to obtain a consensus of opinion.

Respondents

The survey required respondents to be very familiar with Dispute Boards and their application within the industry. Therefore it was decided to approach adjudicators, arbitrators and construction lawyers who had knowledge of Dispute Boards, how they operate and the reasons why they may not be adopted by the industry. The Chartered Institute of Arbitrators were approached as well as the Society for Construction Lawyers. A general email was circulated to all members asking them to contact the author if they were interested in assisting with the survey. Additionally a general internet search was conducted using details from the RICS. A total of 21 people responded declaring their interest including several well – published authors on A.D.R. and Dispute Boards, as well as lawyers and consultants specialising in Dispute Resolution. A number of people also responded saying that they didn't have the experience of dispute boards to be able to give their opinion.

Round 1

In line with the recommendation by Delbeq et al (1975), the first questionnaire asked individuals to respond to a broad question. As the aim of the Delphi survey was to investigate the barriers to the incorporation of Dispute Boards within UK construction contracts, it was decided that the most appropriate question to ask respondents was to state what they believed those barriers were. This was felt to be a broad enough

question to give respondents opportunity to state their views on the matter, but not too broad to allow them to be sidetracked by other issues.

Round 2

The responses from round one were grouped under the following headings:

- Client Attitude
- Suitability for all projects
- Adjudication
- Competition from other forms of A.D.R.
- Dispute Board members
- Enforcement of Decision / Recommendation
- Use in the U.K. Construction Industry.

Respondents were asked to state their opinion on each statement by “clicking” on the appropriate response, as shown in the table below.

Table 1: An example of a section within the round 2 Delphi questionnaire

Client Attitude	Strongly Disagree	Disagree	Neither Agree or disagree	Agree	Strongly Agree
The Client is not happy to pay for a DRB at the beginning of a contract when he has no dispute.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Clients perceptions as to cost	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

This could be converted into a 5 point scale in line with Ericsson and Henricsson (2005).

Round 3

In Round 3, respondents from Round 2 were sent a revised questionnaire constructed from Round 2 items. Those items which had at least 60% consensus were not required to be rated. Feedback was individualised to each respondent and gave the response of the individual panel member; the mean and mode responses; the range in which 60% of responses fell and any comments and clarifications for relevant items as detailed in the example below.

Respondents were then offered the opportunity to re-evaluate all of those items that had not yet reached consensus. In this instance, respondents were asked to give a rating from 1 – 9 where 1 = strongly disagreed and 9 = strongly agreed with the statements. This Likert scale was used in order to measure the degree of agreement or disagreement (Fellows and Liu 2003) which will give the respondents the opportunity to fine tune their response in the light of additional information. There were 13 respondents to Round 1, which equated to a 62% response.

The compiled responses from Round 1 were sent to the original 21 panellists in Round 2. This again resulted in 13 responses although 2 Round 1 panellists declined to respond, but 2 who had not responded for Round 1 did submit for Round 2. These were then sent the analysed results from Round 2. Round 3 resulted in 9 responses – a 69% response.

Table 2: An example of a section within the round 3 Delphi questionnaire

Barrier	Your Response to the previous round	The panels mean response	The panels modal response	The range wherein lies 60% of responses	Comments/clarifications	Your response after consideration of the feedback information. Where 1 = Strongly disagree and 9 = Strongly agree Consensus achieved
The Client is not happy to pay for a DB at the beginning of a contract when he has no dispute.	9	6.69	7	7	-	
Clients perceive DB's to be too expensive	9	6.23	7	7-9	Although ultimately this may not prove to be the case this is what clients believe	

RESULTS

Round 1

Round 1 comprised of an open question which asked respondents to “Identify the principal barriers to Dispute Review Boards becoming a major method of dispute resolution in the UK Construction Industry”. Delphi Round 1 attained a 62% response, 13 responses in total which were compiled under various headings for round 2.

The question was an open question and answers included, “Lack of familiarity: the British tend not to like new things and are suspicious of them”; “there are not many of us qualified to act as DRB members, so finding people who can commit the time may be a problem”; “there may be problems getting DRB decisions enforced. However, I suspect this will be overcome in the same, positive way as it was with adjudication” and “at the start of a project those involved do not think about disputes. They assume that this project will be ok, so they do not address their mind to how disputes might be resolved. They leave it to the contracts, which default to adjudication, arbitration or litigation”.

Some responses were taken word for word into round 2 but where there were many responses of similar themes, the wording was adjusted to reflect the meaning of that response. The purpose of this was to reduce the amount of items going forward into round 2 as recommended by Delbecq et al (1975).

Round 2

Round 2 required respondents to rate the various statements from strongly disagree to strongly agree

There were 13 responses for round 2. The analysis of round 2 comprised of allocating a numerical value to each of the responses, where:

- Strongly disagree = 1
- Disagree = 3

- Neither agree nor disagree = 5
- Agree = 7
- Strongly agree = 9

There has been little written on what constitutes consensus. Williams and Webb (1994) have levels ranging from zero to 100%. White (1991) as cited by Williams and Webb considers it appropriate to let the data resolve the issue of consensus if the panel remains constant. With this in mind, it was considered that consensus was reached when 60% of the respondents agree. In this instance 60% was equivalent to 8 respondents. The 60% range of responses, if not given to one category, was taken as the nearest categories around the mean which received 8 responses.

Consensus was achieved in Round 2 for the following statements.

- The Client is not happy to pay for a Dispute Board at the beginning of a contract when he has no dispute – at least 60% of respondents agreed with the statement
- There is resistance by clients of an unproven method - at least 60% of respondents agreed with the statement
- There is a lack of knowledge and understanding of the process by clients - at least 60% of respondents strongly agreed with the statement
- There is an emphasis on their application to larger projects, especially Engineering works - at least 60% of respondents agreed with the statement
- Binding DB's / DAB's become an expensive precursor to final determination in the long term. At least 60% of respondents disagree with the statement.
- There is a problem of enforcement of the decision / recommendation - at least 60% of respondents agreed with the statement
- The industry sticks to processes it knows and is unfamiliar with DB's - at least 60% of respondents agreed with the statement
- There is conflict between US style and European style DB's. Consensus was deemed to be a 5 because 10 respondents selected "neither agree nor disagree" as their response. It is arguable that perhaps this statement should have gone into round 3, because it is not a definite result. However, with 77% of respondents opting for this category it is deemed to be consensus by any of the measures used historically.
- Lawyers will not promote the concept as it may take business away from them. Consensus was deemed to be a 7 meaning the panel agree with the statement.
- Lack of practical experience of DB's – 100% of respondents were in agreement.
- Lack of familiarity – clients/practitioners are suspicious of "foreign" methods – consensus was achieved at a 7 meaning the panel agree with the statement.
- It is always difficult to sell preventative medicine – consensus was achieved at a 7 meaning the panel agree with the statement.

These statements were excluded from Round 3. Although the respondents were informed as to which items they were, they did not have an opportunity to grade them.

Round 3

Round 3 required respondents to grade each statement from 1-9.

Client Attitude

In each of the statements regarding clients attitudes i.e.

- Clients perceive DB's to be too expensive
- Parties are not willing to consider the possibility of conflict or disputes at the beginning of a project
- At the beginning of a project the parties do not believe that there will be a dispute, and therefore feel that a DB is unnecessary

The means had risen, which is somewhat surprising as the only changes made by respondents were to tend further towards disagreement in the third round than they had in the second. Although consensus was not reached there is a tendency towards agreement with each of these statements.

Suitability for all Projects

The response to the statements "DB's are only suitable for large projects because of cost" and "small, low value projects of short duration would not benefit from DB's" have tended more towards disagreement or being inconclusive between rounds 2 and 3 in the light of the clarification that Dispute Boards could comprise only one member for smaller projects. It must therefore be concluded that those respondents who did not reply to Round 3 originally gave these statements higher scores than most in Round 2. The first statement has not reached consensus and is inconclusive and although there is not consensus for the second statement, there is a tendency towards disagreement.

The statements, "DB's are expensive for small projects" and "DB's are expensive for medium sized projects" were originally combined, but it was felt that they should be considered separately in round 3. Again, there is no consensus but the results would tend towards disagreement with the second statement and no consensus view on the first.

Adjudication

It is arguably surprising that the first of the statements in this section, "Adjudication is available at any time" did not reach consensus in either round as many people both in the literature review and in Round 1 of this survey cited it as the biggest barrier to DB's becoming established in UK Construction. However these results do tend towards strong agreement. Similarly the statements, "The presence of statutory adjudication as the default rapid project based system" and "Adjudication has taken the focus away from dispute avoidance" have a tendency towards agreement.

The remaining statements "binding DB's (DAB's) duplicate adjudication in the short term"; "statutory adjudication provides an enforceable decision which DB's do not" and "there is resistance by adjudication practitioners" are less conclusive, with respondents differing between strong agreement and strong disagreement.

Competition from Other Forms of ADR

The respondents have reached consensus regarding mini-trial with at least 60% disagreeing that this would be a barrier. Although consensus was not reached regarding all other forms of ADR being a barrier, the respondents tended towards disagreement. The exception was mediation / conciliation and arguably expert determination. Mediation had a tendency towards agreement that it would be a barrier; however expert determination was more inconclusive.

Dispute Board Members

Although without consensus, the statements "Lack of Knowledge of participants" and "Lack of training for Dispute Board members" tend towards agreement. In both cases the means rose from the Round 2 assessment. The remaining statements "Lack of

suitably skilled and respected Dispute Board members”; “lack of trained and qualified personnel to undertake functions”; “Dispute Board members are unable to commit to the timescales” and “There are not many qualified members so it is a problem finding people to become Dispute Board members “ are inconclusive.

Enforcement of Decision / Recommendation

Consensus has been reached on the statement “Non- binding nature of Dispute Boards is open to abuse from parties wishing to defer payment” with more than 60% agreeing.

The statements “Dispute Boards have not yet been used on any major UK project” and “Lack of public sector approbation” are inconclusive. However respondents for the statement “It is seen as a two party process which struggles with multi party and other complex issues” were divided between agree and not agree.

Other Issues

The first statement “The inability to establish that disputes have been avoided.” is somewhat inconclusive. The statements “Parties are suspicious of the amount of freedom given to the board in terms of procedural issues” and “Change is always difficult” have reached consensus. In this section there has been little or no change in responses between Rounds 2 and 3.

CONCLUSION

The survey results prove that there are still many barriers to be overcome by Dispute Boards if they are to play a more significant role in UK Construction. The major barriers appear to be connected with lack of knowledge and understanding of clients together with unwillingness to pay for something that may or may not be required, particularly on anything other than large projects. Coupled with this is the belief that there is a lack of application so far in UK Construction and the industry takes time to accustom itself to new procedures. This in turn means that DB’s themselves lack experience and there is a shortage of suitable and experienced practitioners who are able to become DB members. The well-documented success of DB’s in other countries, particularly the USA, proves that they can be a useful form of dispute avoidance and resolution. Additionally, the proposed use of DB’s on the 2012 Olympic projects may also help to improve practitioner’s knowledge and promote their use elsewhere in the UK.

There do not appear to be any perceived barriers caused by the presence of other methods of ADR, with the possible exception of mediation. With regards to adjudication, the panel did not reach consensus as to the extent to which they agree that the presence of adjudication “at any time” is a barrier, however there was a tendency towards strong agreement. The panel was more inconclusive as to whether the fact that Dispute Boards do not produce a binding decision was, in fact, a barrier to its use in the U.K, particularly when this has not been shown to be a problem internationally.

The findings of the survey can be useful to the industry in several ways. Firstly by promoting knowledge of DB’s, their function and their success rate internationally. Secondly, by knowing what the potential barriers are, emphasis can be placed on overcoming these and take positive action to avoid disputes escalating into adjudication, arbitration or litigation.

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