



NEWSLETTER



*Engineering Professions
Association of Namibia*

Volume 1, Issue 2

May 2011

International Trends

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We are pleased to present the second issue of the EPA NAL Newsletter. The NAL Committee of the EPA is committed to keep members of the Namibian construction industry informed of developments both locally and abroad. The purpose of this Newsletter, then, is to brief interested persons on matters relating to alternative dispute resolution and to expose particularly representatives of employer organisations that are members of the NATDAB to the developments and international and regional trends in construction contract management, as well as to noteworthy judgements of courts in the region.

We can announce that approval was granted by the board of the *Dispute Resolution Board Foundation* (DRBF) for our use of articles published by the Foundation on international trends and experiences in alternative dispute resolution. These articles will become a regular feature in the *EPA NAL Newsletter*, and will surely further enrich it. Our thanks and appreciation for this generous contribution goes to the *Dispute Resolution Board Foundation*.



Editor

International Guest Speaker: Dispute Resolution

Special points of interest:

- *Upcoming training course: Delay, Disruption and Extension of Time 23 & 24 May 2011 in Windhoek. 2 CPD points.*



Please contact the EPA
for bookings
epa@africaonline.com.na

We are excited to have a very experienced speaker give a presentation in Windhoek later this year. Gordon Jaynes, based in England, has recently had appointments in Pakistan, China, Singapore, Bangladesh, and Vietnam. An international attorney, Mr Jaynes provides legal counsel and arbitration services for transnational construction projects, including many financed by the World Bank and other world development organizations. His work is a vital link in the complicated, multinational process of building dams, highways, mass transit systems, airports, and other infrastructure in developing countries.

Mr Jaynes will be speaking amongst other about the benefits of dispute boards and adjudication, as well as the hazards of 'ad-hoc' dispute boards.

Once the date and venue for the presentation by Mr Jaynes have been finalised, details will be published in a future issue of this Newsletter.





URGENT REMINDER
 Continued Learning Re-
 quirements for regis-
 tered adjudicators: Due
 date for achieving
 minimum credits:
1 August 2011

Visit the EPA
 website at
[www.engineers -
 namibia.org](http://www.engineers-namibia.org)

Progress on the Adjudicator Performance Review

In order to ensure that adequate standards are maintained by adjudicators registered on the National Adjudicator List, provision is made for adjudicator performance review. This has been widely discussed on both the forums, i.e. the DABFORUM and the NATDAB forum, and the process of establishing a workable system appears to be nearing its conclusion. Mr Maritz, who is driving this process, has indicated that the review process was checked to ascertain that it is in line with industry trends. This was done and a draft document on Performance Review was prepared and submitted to both forums for comment. All comments will be consolidated during May for submission to the NAL Committee for finalisation, approval and implementation.

MEET THE NAL COMMITTEE

The EPA established a committee for the oversight of the National Adjudicators List, to sensitise the Namibian construction industry of the benefits of Dispute Adjudication Boards, and to ensure that registered adjudicators are adequately trained and experienced. The NAL Committee was to include members representing employer organisations and members representing the EPA Council. The EPA additionally appointed the NAL Manager for the operational aspects of the NAL, as well as the nominations process. The Secretary of the EPA would function as the NAL Registrar.

NAL Committee members:

Chairperson: Mr Ako Al-Jaf representing the EPA Council (EPA President)

Member: Mr Nico Louw representing the EPA Council

Member: Mr Horst Schommarz representing the Roads Authority

Member: Mr Ronald Brunauer representing the City of Windhoek

Alternate Member: Mr Lieb Maritz representing the City of Windhoek

NAL Manager: Mr Andreas Helmich

NAL Registrar: Ms Tanja Bednarek

FROM THE PUBLISHING SUB-COMMITTEE

This Newsletter is published by the *NAL Committee* of the *Engineering Professions Association*. Any enquiries regarding any article or information contained herein, or contributions for inclusion in the next issue can be directed to the NAL Registrar, *Engineering Professions Association*, telephone 223009, fax 223009 or e-mail as follows: epa@africaonline.com.na.

Where case law summaries are included in this publication, the comprehensive judgement can be requested from the Editor via e-mail:

Brunauer.Ronald@gmail.com



Any contributions to
 this Newsletter are
 welcome!

Do We Really Need Dispute Boards?

The following article was supplied courtesy of the *Dispute Resolution Board Foundation*.

By Levent Irmak

I wish to begin by mentioning briefly about the DRBF Annual Meeting & Conference organized by Region 1 which took place on October 1-3, 2010 in Charleston. The conference was well attended by over one hundred delegates from around the United States. There were about fifteen delegates from outside the US, which gave the conference a bit of an international flavor.

On the last day of the Charleston Conference, I was a speaker in the panel titled "The Owners' Perspective on DBs" and my presentation was about the Dispute Boards' benefits to project owners. My intention was to give delegates a somewhat different perspective on the benefits of Dispute Boards: the "psychological aspect."

During the conference I realized that Region 1 was truly working hard on promoting the use of Dispute Boards within the country, in a systematic and quite organized manner. Perhaps, by sharing my thoughts on this very subject, I can help and contribute to the efforts of my fellow colleagues who voluntarily dedicate their time and energy in promoting Dispute Boards around the world.

Disputes are inevitable, and that is a fact. Another fact is that all disputes get resolved sooner or later, in one way or another, i.e. resolution by amicable settlement, by Dispute Boards, by

arbitration or by courts, etc. Then, one may ask: why do we always talk about Dispute Boards while there are other methods to resolve disputes? Perhaps, the answer to this question is the key element in convincing potential users of Dispute Boards.

If we have to categorize dispute resolution mechanisms, without a doubt, the best resolution mechanism is the settlement between the parties on an amicable basis. However, the reality is that amicable settlement cannot always be reached. Then, we resort to other methods to resolve our disputes. The most commonly used dispute resolution mechanisms used in construction projects world-wide are arbitration and litigation. Perhaps the UK and US may be excluded from this generalization, simply because the use of Dispute Boards in these countries are rather much more common than any other country in the world. Mediation is also another commonly used method, but I consider mediation an intermediate method which aims at amicable resolution. Therefore, I wish to limit the extent of my discussion by focusing only on Dispute Boards and its benefits over arbitration and litigation.

We often talk about advantages of Dispute Boards over arbitration and litigation. The points many people focus on are: (1) timely resolution, and (2) less costly resolution. We also often talk about the dispute avoidance and prevention function of the Dispute Boards. Indeed, Dis-

pute Boards provide the parties with the benefit of highly effective dispute resolution. Disputes are resolved comparatively in much less time with the involvement of DBs and the overall cost of resolution process is much lower than that of arbitration and litigation. The dispute avoidance function of DBs is something that deserves more attention than ever.

There are other benefits of DBs, which we often omit to pay enough attention. I call them "added benefits" and will attempt to elaborate on them in the following.

Based on my work experience over the years, I have come to realize that the destiny of a construction project depends on the people who are involved.

Let's think of a typical construction project. The notice to proceed is given, and the contractor begins the work. The first few months are usually the best time period for the contractor and the employer. I call it the "Honeymoon Period." People are excited about a new project, the stress level is not yet high and pressure has not yet set in among people. As the project progresses further, problems start to surface and the atmosphere starts to change. The Honeymoon continues only until the contractor files his first claim and the owner rejects it.

Then what happens? A commonly known notion about the owners and the contractors starts to show itself. What is this notion?

Owners think the contractors always want to cheat them, whereas contractors think the owners always take advantage of them by asking for more work for less or no money.

I think it is this notion – among other things – that affects people's behaviors during the currency of a project, which in turn leads the way to disputes. This driving motive does of course occur in differing levels in each individual depending on each individual's own experience, character, perception and interests.



Levent Irmak is a Civil Engineer and Consultant and is the Dispute Resolution Board Foundation Country Representative for Turkey. He can be reached by email at lev-enti@tiac.net.

“Disputes are inevitable, and that is a fact.”



What happens in a project where the contract calls for arbitration or a court for the resolution of disputes? When disputes arise, the parties usually do not prefer to go to arbitration or the courts in the mid-stage of the project, but rather wait until the end of the project, knowing that engaging in such an adversarial position will further exacerbate the situation. The corollary of this is that the contractor starts filing claims for minor issues, and in return, the employer rejects them all. The relations get strained between the contractor and the employer. The tension escalates and the situation gets even worse over the course of the project.

This is not a healthy situation for a project, and this situation leaves no opportunity to the parties for any amicable resolution. After all, would you not think that such situation would lead the parties to the same notion about each other? It is a situation back to square one.

The above situation would be totally different if a Dispute Board was in place. Disputes would be resolved shortly after they have arisen, leaving no reason for the parties to take adversarial position and untoward behavior against each other. This helps in maintaining a good relationship between the parties, thus contributing to a successful progress of the project. There is no need to mention that the overall cost of arbitration or litigation would be far beyond the cost of a DB.

For your convenience, I summarize my thoughts on benefits and advantages of Dispute Boards:

1. DBs provide *effective dispute resolution*, meaning timely and less costly resolution of disputes.

In the case of Standing Dispute Boards (as opposed to Ad-Hoc), DBs help in *avoidance* and *prevention* of disputes. Dispute avoidance means money saving, time saving and positive focus on the project. This benefit can only be gained from a Dispute Board. Neither arbitration nor litigation can provide such benefit.

3. Resolving disputes at the jobsite level is better than resolving at higher management levels. DBs are involved in the jobsite level. Based on my experience, when a DB makes their site visits, the party reps usually consist of site management staff without the involvement of executive level management. When a referral is made to the DB, whether it is made by the contractor or by the employer, the position papers or other relevant documents are usually prepared by the site staff, without the involvement of corporate lawyers and outside counsels, except for issues involving pure legal matters or for highly complex issues. Unlike Dispute Boards, when a dispute goes to arbitration or litigation, it becomes a more important issue and draws the attention of executive level management, where lawyers get involved, outside consultants and counsels are hired. Simply the whole issue gets rather more intricate and more costly. For this reason, DB's involvement plays a great role not only in keeping the costs down, but also in preserving the relationship between the parties. Any attempt to resolve disputes beyond the job-site level will cost the parties more money, more time and stress.

4. From the owners' point of view, DBs help in respect of evaluating their engineers, designers or representatives, who are involved in preparation of contract documents. Imagine a dispute arising out of a design problem where the design was done on behalf of the employer by a designer/engineer, or a dispute arising out of an ambiguity in a contract clause setting out obligations of the parties. Normally, in such situations where designer/engineer or architect/engineer or ER whose professional work is questioned, the reasons given in a Dispute Board recommendation or decision can be a useful evidence for the employer to evaluate his designer/engineer/representative for their professional work. The employer may either pursue his losses against them or decide whether he would work with them again or not.

5. Unfavorable decisions or recommendations of DBs should be taken as "lessons learned." Those unfavorable recommendations or decisions should be used as a guideline by the owners, which can be quite helpful in drafting a new contract. Each lesson learned helps eliminate potential errors or problems in future contracts, and prevents the same errors and problems from reoccurring. This is also valid for the contractors. Therefore, Dispute Boards can be considered as neutral consultants, who provide guidance to the parties when the parties need clarification on disagreements. In respect of "lessons learned," this benefit can also be obtained when the disputes are resolved by arbitration or a court, but the cost and time required to get a resolution by arbitration or a court shall be considerably more than that of DBs. Further-

**"DBs help in
avoidance and
prevention of
disputes."**

ADJUDICATOR NOMINATION

Employer Registration

**For lower nomination fees,
organisations can register
with the EPA NAL.**

Contact Registrar at e-mail:

epa@africaonline.com.na



“In situations where contracts do not provide for timely and fair dispute resolution mechanisms, then it is highly likely that potential bidders will consider adding additional risk factors into their proposals.”

INTRODUCTION TO INTERNATIONAL ADJUDICATION - CONFERENCE
29, 30 June 2011 in London



“The proper approach of the contract is not to avoid disputes, but adequately and efficiently to manage such disputes as must inevitably and properly arise.” So said John Uff QC at the first Centre of Construction Law Conference in 1988. During the intervening period, the quest to establish adequate and efficient means of both avoiding and resolving disputes arising in construction contracts has seen the emergence of two separate success stories - the effective use of Dispute Review Boards, which aim to avoid, but not formally resolve disputes, and Adjudication, which provides a dispute resolution process which is fair, quick and economical. The two concepts have also been successfully combined in the form of Dispute Adjudication Boards and their use on international projects is growing.

more, dispute resolution by DBs is more timely than others and this directly or indirectly helps the parties to focus on constructing the works and preserves the relationship.

6. DBs eliminate people-related controversies which may lead to major disputes if not handled and re-solved in time. The provenance of disputes is the differences in opinions. Opinions are reflections of perceptions, notions, knowledge, character, interest and intention, all of which are part of human psychology. Individuals involved in the management of a project may be different from one to another. DB decisions or recommendations give the higher management an indication as to whether the project team is running the project properly. This works both ways, both for the contractor and the employer.

7. In the case of Dispute Boards, the parties set the rules of resolution mechanism themselves, e.g. procedural rules, etc. In arbitration and litigation, the rules are set by others (DB – In Control, Arbitration & Litigation – Out of Control).

8. DBs provide auto-control in claim submissions. Particularly if the dispute resolution provisions of a contract stipulate certain time limits to the parties to resolve their disputes (as in the case of FIDIC contract books), then this function of DBs becomes even more effective in preventing disputes arising out of potentially bogus claims. This means to the owner time and money savings while giving the owner’s staff an opportunity to focus on other things. This is also valid when owners arbitrarily reject legitimate claims from the contractors. An independent, impartial, knowledgeable and experienced DB will not allow such bogus claims or arbitrary rejections of legitimate claims and discourage such behavior. Knowing that disputes arising out of such bogus claims or arbitrary rejections shall not be tolerated by the DB, the parties will eventually act accordingly.

9. In situations where contracts do not provide for timely and fair dispute resolution mechanisms, then it is highly likely that potential bidders will consider adding additional risk factors into their proposals. This means higher bids, thus owners will have to pay more for the work. Bidders may think that the owner would delay the resolution of disputes and that they would not be able to recover their costs. Incorporating DB provisions in the contracts can eliminate this notion, thus resulting in lower bids.

10. Decision-makers in state or public organizations are usually under strict scrutiny as they are subject to relevant rules and regulations pertaining to their own administrative laws. Because of this, they may be reluctant to make decisions on settlement of disputes and to approve payments where the intention is to avoid or resolve a dispute. A well-reasoned decision or recommendation of a DB consisting of independent, impartial and experienced professionals provides for credible evidence to support the decisions of such public decision-makers. An owner with lesser authority to make decisions on financial matters – because of fear of being audited – may perhaps prefer to have a Dispute Board whose decisions are binding (e.g. Dispute Adjudication Board) whereas another owner with higher authority may prefer to have a DRB (Dispute Review Board) whose decisions are not binding.

Probably the above list can be expanded further. My intention was to put forth this list as a guideline to help my colleagues who have already started or will start promoting the use of Dispute Boards. In promoting DBs, what might be a good idea is to prepare a “comparison chart,” having dispute resolution methods lined up on top and the benefits in the far-left column. For each corresponding benefit, a check-mark is put in the relevant box. I am sure the DB column will have the highest number of check-marks. When making a presentation to a potential user, a “one-sheet comparison chart” will make more impact than that of several pages of writing. As they say: “One picture is worth a million words.” If any of our colleagues happen to prepare such a chart, please do share it with us.

Before closing, the answer to the title question is:

“Yes, we really do need Dispute Boards.”

I wish you all the best and good luck with your efforts.

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