

Efficient Dispute Resolution in the Maritime Construction Industry

DISPUTE BOARDS IN MARITIME CONSTRUCTION

by

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It is no surprise that contract disputes arise in the marine construction/conversion industry. While ships come in a diverse assortment of configurations, varying in sophistication, they all share the common denominator of being a "floating city." In addition to providing the transportation service for which the vessel was designed, the ship is a complex, self-sustaining unit, capable of producing all of the services necessary to comfortably accommodate its crew over long and isolated ocean passages. The ship generates its own electricity, produces its own water and has systems for handling requirements related to heating, cooling, lighting, hot water, food preparation, garbage and sewage. The ship, which incorporates a wide range of technologies necessary to the provision of all these services, while remaining in compliance with safety, environmental and other regulatory constraints, then finds itself in need of shipyard services for a wide variety of reasons. Ships and their owners may seek shipyard services for everything from a relatively simple annual "check-up" to a major conversion, renovation or new construction. Often, many of the technologies incorporated within the vessel require maintenance, repair, or even reconfiguration.¹

In ship building/conversion contracts, the potential for contract disputes arises from the necessarily different objectives of the owner and the shipyard.

Shipyards are business entities with an obligation to strive for some degree of profitability. The ship owner is either a governmental agency with a severely limited budget or a commercial entity also seeking to maximize profitability by minimizing expenses and downtime. Thus, in interpreting any given contractual requirement, the shipyard will seek to maximize profitability by implementing the lowest-cost solution, which still satisfies the specific contractual requirements, can be implemented within the project schedule and which will survive the contractual warranty period. Conversely, the owners' interest will be in seeking the highest quality fittings and

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The views expressed in this article are our own and do not reflect an official position either of the ICC, its Arbitration Commission or the Task Force on DBs.

¹ Richard Dinapoli, Jr. & Albert H. Bowers, III, Marine Log Ship Repair Conference

workmanship for the lowest price to assure the longest possible working-life for its construction or repair dollar.

Disputes, therefore, are going to arise. Too often, the contract management representatives for the owner and the shipyard arrive at diametrically opposed viewpoints concerning the issue in dispute and then pass the matter along to higher authorities for ultimate resolution. A possible result of the traditional resolution process, however, is that the prevailing party will discover that it has spent far more to win the resolution than the original issue was ever worth. The goals of both parties are more likely to be achieved if the contract managers and those negotiating the contracts understand the procedures, risks and costs associated with the various methods of resolving commercial disputes, such as: litigation, arbitration, mediation and, most recently, the use of Dispute Boards. Intelligently drafted dispute resolution provisions will allow the parties a flexible and modulated approach in dealing with difficulties which may arise in the performance of their contracts.

At the start of every contract, the parties are enthusiastic and anticipate that everything will go according to plan. The ship will be delivered on time to her highly pleased owners, with all work satisfactorily accomplished and all regulatory approvals obtained. The shipyard will add one more successful venture to its already stellar reputation. Unfortunately, things frequently do not turn out that way and something goes awry during the construction process. This paper will focus on how parties can best manage the unforeseeable and unthinkable, while salvaging their contractual relationship and reputation.

For those involved in the maritime construction process, disputes generally fall into one of the following categories:

1. Different elements of the document package present conflicting requirements with respect to a particular item of work.
2. The contract documents fail to accurately describe the full scope of work envisioned by the owner with respect to a particular item.
3. The contract documents fail to accurately describe a specific level of quality envisioned by the owner with respect to a particular item.
4. Work on a particular vessel system is described by a contract specification, but not illustrated on the contract drawing of that system.
5. In conversion situations, the contract documents do not accurately reflect the present condition of the vessel, yet the shipyard, in the preparation of the bid, relied upon such insufficient representations.

While such disputes may arise on many ship construction/conversion projects, it is naive to think one can eradicate disputes by clever contract drafting alone. Regardless of how well a contract is drafted, situations will occur which were not foreseen and contractual parties may differ as to the meaning of even the most limpid clause.

Traditionally, the courts of law have been the ultimate judges of who is right and wrong and who has to pay whom, how much. However, the courts have largely fallen out of favour as a valid mechanism for resolving disputes in international commercial transactions. Not only may a national court be perceived as prejudiced in favour of its own national or not familiar enough with the peculiarities of international disputes

but, even when this is not the case, the existence of different degrees of jurisdiction do not provide the rapid resolution of the conflict that business people need.

Since the end of the last World War, international trade has increasingly come to rely on arbitration to resolve contractual disputes. Arbitration is a system of private justice, where the parties submit their disputes to the exclusive jurisdiction of an arbitral tribunal in lieu of a court. Because two of the three arbitrators are usually chosen by the parties, an arbitral tribunal is a neutral and, therefore, more acceptable forum. Like judges, arbitrators will decide a case on the basis of the contract and the law applicable to that contract and will issue their decision in the form of an arbitral award. Arbitral awards are final and are generally recognised as enforceable throughout the world.²

However, while arbitration may allow the parties to fight out their dispute in a neutral forum, it does nothing to remedy the extremely high costs associated with any form of litigation, including arbitration. Opponents will pay high fees and expenses to their legal advisors as well as the fees and expenses of the arbitrators. If the arbitration is conducted under the rules of an arbitral institution such as the ICC, the administrative expenses of the institution must also be paid. Moreover, arbitration does not address the hidden costs of a dispute, i.e. the disruption to the commercial relationship, the waste of management resources and the time required to obtain the arbitral award as well as the potential damage to commercial reputations.

Particularly in complex mid- to long-term contracts, there has been an increasing need for methods of resolving disputes which will not destroy the working relationship between the parties but will help them resolve their problems while they continue performing the contract. What parties, therefore, need is a mechanism for addressing disputes early on, that will give them a solution quickly, with as little cost and disruption to the contract as possible. To address this need in mid- to long-term commercial contracts, the International Chamber of Commerce (“ICC”) in 2004 published its “Dispute Board Rules”, which provide the framework for establishing and operating a Dispute Board.³

THE DEVELOPMENT OF DISPUTE BOARDS

A Dispute Board (DB) is a panel of -usually- three experienced, respected and impartial members, which are appointed at the outset of the contract and act throughout its performance, visiting the project on a regular basis and being regularly updated on its progress through written reports submitted by one or both of the parties.⁴

Dispute Boards evolved to meet the need in the general construction industry for prompt, informal, cost-effective and impartial dispute resolution. The Dispute Board

² The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which 125 countries are signatory (New York Convention), has significantly contributed to the growth of arbitration as a favored mode of settling international commercial disputes.

³ http://www.iccwbo.org/drs/english/dispute_boards/rules.asp contains the full text of the ICC Dispute Board Rules.

⁴ In smaller contracts it may be advisable to appoint a one-Member Dispute Board to keep costs at a reasonable level.

concept originated in the USA, where it has been used for over 30 years as a means of avoiding and resolving disputes in civil engineering works, particularly dams, water management projects and contracts for underground construction. The earliest reported use was on Boundary Dam in Washington in the 1960s, where the technical “Joint Consulting Board” was asked to continue its operation and make determinations regarding conflicts as they arose. The concept was reintroduced in the form of a Dispute Review Board in 1975 on the Eisenhower Tunnel project in Colorado and used internationally for the first time in 1981, on the El Cajon Dam project in Honduras. The idea has worked well and, as it is said: “The rest is history.” Since 1999, the International Federation of Consulting Engineers (FIDIC⁵) has incorporated the concept into its standard construction contract (Red Book) and the World Bank and most other development banks insist that projects of a certain size funded by them contain a dispute resolution mechanism involving a Dispute Board.

For the year 2004, the Dispute Resolution Board Foundation (DRBF) reported 1’237 projects with Dispute Boards, totalling a contract value of almost 90 billion U.S. Dollars.⁶ That year Dispute Boards had settled 1,414 disputes.⁷ According to anecdotal evidence, parties end up accepting or do not contest over 90% of the determinations made by the boards. This means that a very small number of those disputes end up before the courts or arbitral tribunals. Although the private nature of Dispute Boards and issues of confidentiality make it difficult to keep exact statistics, these figures are impressive.

We believe that Dispute Boards are bound to grow in popularity for use in complex mid- to long-term contracts, where the allocation of risk is sufficiently uncertain to warrant instituting a standing mechanism for resolving disputes on an ongoing basis. Until recently, Dispute Boards have been used exclusively in the international construction and engineering sector. Indeed, the rules governing such boards were imbedded in the standard construction contract proposed by FIDIC or the “Standard Bidding Documents for Procurement of Works” issued by the World Bank.⁸ With the ICC having published a free standing set of Dispute Board Rules in 2004, which is not geared to any particular economic sector, there is likely to be even more interest in this form of dispute resolution or dispute management.

The Maritime Construction Industry could certainly benefit from the use of the ICC Dispute Board Rules to streamline and significantly reduce the legal costs associated with resolving disputes. This, in turn, should have a positive effect on the overall projected cost of a vessel.⁹

The construction of any vessel is a complex affair, involving a myriad of contractual relationships lasting anywhere from several months to over two years. Generally,

⁵ Fédération Internationale des Ingénieurs Conseils

⁶ Most of these projects are in the USA, where the concept is well known and where the DRBF has been collecting data since 1982.

⁷ DRBF, Practices and Procedures Manual, Chapter I, Section 1, Appendix A (2005)

⁸ Article 20 - Conditions of Contract for Construction, 1999 edition

⁹ Anecdotal evidence from the international construction industry suggests that bidding prices are considerably lower in contracts where the owner foresees a Dispute Board, because contractors factor in a much smaller amount for legal fees than in contracts which only foresee arbitration.

depending on the type of vessel, this involves “families” of related services which may include:

- Naval design and architecture of overall concept and of the main and sub-systems.
- Subcontracting the development and construction of major subassemblies such as pre-outfitted hull modules, systems for propulsion generating electricity and their subsystems.
- Subcontracting of electrical and mechanical engineering services, etc.
- Designing and installing IT solutions to integrate the various systems of a vessel such as navigation, communication and automatic control systems.
- In war ships the design and installation of the various electronic and mechanical weapons systems, while on passenger liners a large portion of the effort would go into interior design and furnishings.

The technical complexity of the project will be mirrored in the legal complexities of the contracts and the great numbers of persons involved. Thus, the potential for disputes is similar to what one would expect in any terrestrial construction. The maritime construction industry should, therefore, be a prime beneficiary of the use of Dispute Boards. Moreover, in a situation in which the main contractor, i.e. the shipyard, enters into a host of sub-contractual relationships, a Dispute Board instituted on the level of the main contract could be called upon to resolve problems on the sub-contract level as well, thus ensuring coherence in the approach and resolution of conflicts within the entire contractual chain.¹⁰

WHY A DISPUTE BOARD AND WHY THE ICC RULES?

The traditional methods of Alternate Dispute Resolution (ADR) focus on trying to resolve a dispute after it has already arisen. In both Mediation and Conciliation, an independent Neutral is called in to try to help the parties resolve an existing dispute.¹¹ Parties will engage in these processes only once they come to the conclusion that they cannot deal with the dispute themselves, by which time the difference may have festered for a while with the parties becoming polarized in their views. By the time a Mediator or Conciliator has been brought on board, both sides have generally retained Counsel and costs are beginning to escalate. Frequently, such ADR is attempted only after litigation or arbitration has already commenced and the parties are seeking a less expensive way to deal with their differences. They will have already expended considerable amounts of time and money - not to speak of goodwill which will have all but evaporated.

¹⁰ One way of doing this in very large contracts would be to set up a pool of experts who can be drawn upon for any given type of dispute. Thus, the chairman may stay the same but, depending if the dispute is about the building of the hull or the installation of the other components, the members would be those knowledgeable in that area. Similar systems were used successfully in the construction of the Hong Kong Airport and the Eurotunnel.

¹¹ Sometimes, arbitration is included in ADR. However, arbitration resembles courts, insofar as an arbitral tribunal will render a decision after having heard the parties in much the same way as a court would. ADR as it is used in this context denotes a process in which the parties find an amicable solution with the help of a Neutral. For more information about ADR and about the ICC ADR Rules see: http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_guide.pdf.

The fundamental difference between traditional ADR methods and Dispute Boards is that the Dispute Board is set up by the parties at the very outset of their contractual relationship, when the Agreement is entered into. The idea behind a standing Dispute Board is that its members accompany the contract throughout its duration and can be called upon at any stage to deal with a problem between the parties as soon as it emerges. A Board is not only appointed at the outset of the contract but it visits the site at regular intervals and its members are continually updated on the progress of the implementation of the contract. This first-hand information about the contract puts the Board in a unique position to be able to very rapidly make determinations about any dispute that the parties bring before it. However, determinations of a Dispute Board are not the final word. Either party may refer any dispute to the courts or, if the parties have so agreed, to arbitration for a final decision on the matter. Dispute Boards not only resolve disputes brought before them, they also provide the parties with a regular forum for discussion of difficult or contentious matters, thus helping them to identify ways forward by keeping the channels of communication open in difficult moments.

To put the Dispute Board concept in its proper perspective, let us consider an example in which there is a contractual requirement to provide several new piping manifolds in a machinery space. The shipyard has planned for the routine fabrication of these manifolds, using standard pipe stock and valves assembled by its pipefitting personnel. When the production staff begins to fabricate and install these assemblies, however, it is discovered that the installation of a new, contractually required switchboard in the same area leaves insufficient clearance for the planned new manifolds and that the only solution is to procure custom-fabricated manifolds of a low-profile modular design from an outside manufacturer. For the sake of argument, let us assume that this procurement represents an additional \$500,000 in costs to the shipyard, in material, project delay and disruption. In this instance, the shipyard representative claims that there was a deficiency in the contract specifications, while the owner's representative claims that the contract required the installation of the manifolds and that the shipyard should have realized that custom fixtures were necessary due to the new switchboard location.

If the parties cannot resolve this difference and have not foreseen a mechanism to assist them in finding a solution, they may find themselves before a court or an arbitral tribunal. In both cases, the parties will have to instruct legal counsel and educate them to the facts of the case; they may have to also call expert witnesses. This will not only involve the costs for legal counsel, expert witnesses and, as the case may be, the fees of the arbitrators, but will certainly also require a considerable number of non-production hours to be expended by the contract managers, their support staff and planning, production and inspection personnel. Apart from the high legal and other costs associated with this form of resolving a dispute, it may take anywhere between one and two-and-a-half years to obtain a final award concerning the dispute. If contract performance is suspended pending its resolution, this delay is certain to further increase the costs of the dispute disproportionately to the value of the claim. Thus, it is entirely likely that the combined damages claimed by the parties are a multiple of the original \$ 500,000 cost overrun, if the Owner claims for lost charter profits for the year or two of delays and the shipyard counterclaims for its own lost profits in not being able to handle new orders during the extra time the ship occupied space in its yard.

On the other hand, if the parties had foreseen a Dispute Board in their contract, this disagreement would be submitted to the Board, which, given its familiarity with the

project and the persons involved and the technical expertise of its Members, would deal with the issues immediately without the need for the parties to seek legal representation and without unnecessary delay to the overall progress of the project.

In the following paragraphs, we will endeavour to give a brief description of how the ICC Dispute Board Rules work.¹² As illustrative example we will take the construction of a cargo ship by the shipyard “WELDAFAST” for the owner “SPEEDYLINES”.

TYPES OF DISPUTE BOARDS

Mr. Speedopoulos, the owner of SPEEDYLINES, and Ms. Steele, the CEO of WELDAFAST, have agreed to submit all disputes to a Dispute Board under the ICC Rules and any dispute that cannot be resolved by the Board will be submitted to arbitration under the ICC Rules of Arbitration. However, they now have to decide what type of Board they wish to use, because the ICC proposes three different types of Dispute Boards.

Mr. Speedopoulos suggests adopting a **Dispute Review Board (DRB)**. Ms Steel of Weldafast would prefer a **Dispute Adjudication Board (DAB)**. What’s the difference? A DRB issues Recommendations and a DAB issues Decisions. A Recommendation is not binding when the Board first issues it. It only becomes binding on the parties if neither contests it in writing within 30 days of receiving it.¹³ Once a Recommendation is binding, it becomes a term of the contract. Both parties must comply with it and cannot contest it any longer. A Decision, on the other hand, is binding immediately when the parties receive it. They must comply with its terms at once. However, the Board’s Decision is only temporarily binding, as the parties may refer the dispute to arbitration. In their award, the arbitrators may modify or annul the Board’s decision. However, until a Decision has been so modified or vacated, the parties must comply with it.

Mr. Speedopoulos would like to retain the flexibility that comes with a DRB, which allows the parties to decide for themselves whether they wish to comply with the Board’s Recommendation or not. Ms. Steele, on the other hand, prefers the Board to have the power to act decisively when a dispute arises. She is particularly concerned that the Board be able to impose a solution, if and when an urgent decision is required.

They eventually agree to set up a **Combined Dispute Board (CDB)**. Unique to the ICC Dispute Board system, this type of Board combines the advantages of the DRB with those of the DAB. Under normal circumstances, the Board issues Recommendations but, when requested by a party, it can issue a Decision, if the urgency of the situation so warrants and if a Decision would help performance of the contract or prevent its disruption or preserve evidence. Finding this a good compromise, the parties insert the following ICC Combined Dispute Board and arbitration clause into their contract:¹⁴

¹² The ICC Dispute Board Rules will be referred to as “the Rules” or the “ICC Rules”

¹³ All references to Articles are, unless otherwise stated, to the **ICC Dispute Board Rules**, in force as of September 1, 2004

¹⁴ There is a standard Dispute Board clause combined with an arbitration clause for each type of ICC Dispute Board.

The Parties hereby agree to establish a Combined Dispute Board ('CDB') in accordance with the Dispute Board Rules of the International Chamber of Commerce (the 'Rules'), which are incorporated herein by reference. The CDB shall have three members appointed in this Contract or appointed pursuant to the Rules.

All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the CDB in accordance with the Rules. For any given dispute, the CDB shall issue a Recommendation unless the Parties agree that it shall render a Decision or it decides to do so upon the request of a Party and in accordance with the Rules.¹⁵

If any Party fails to comply with a Recommendation or a Decision when required to do so pursuant to the Rules, the other Party may refer the failure itself to arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

If any Party sends a written notice to the other Party and the CDB expressing its dissatisfaction with a Recommendation or a Decision as provided for in the Rules, or if the CDB does not issue the Recommendation or Decision within the time limit provided for in the Rules, or if the CDB is disbanded pursuant to the Rules, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. London shall be the seat of the arbitration and the arbitration shall be conducted in English.

WHAT IS THE VALUE OF A NON-BINDING RECOMMENDATION?

Ms Steele may have her doubts about a process that results in a non-binding Recommendation. However, experience in the US, where DRBs are the norm, has shown, that, even if a Recommendation is not initially binding, it may, nevertheless, be an efficient tool to resolve a dispute. There are several reasons for this. First, a Recommendation provides the parties with the assessment of the situation by the Board. This is a valuable reality check about the strength of their respective positions. A Recommendation may thus become a workable basis for the parties to settle their dispute by themselves. Moreover, if the parties cannot find a negotiated solution, either of them could refer the dispute to arbitration and submit the Recommendation as evidence. An arbitral tribunal is likely to give some weight to a Recommendation given by a panel of experienced, impartial experts, who were familiar with the project from beginning to end. One should, therefore, not underestimate the persuasive force of a non-binding Recommendation.

SETTING UP THE DISPUTE BOARD

Because Article 3 provides that the parties shall establish the Board at the time of entering the Contract, Ms Steel and Mr. Speedopoulos come to the final negotiation session with a list of persons they would like to see on the Dispute Board.

¹⁵ The Rules also foresee that the Parties can agree to have Decisions "reviewed" by the ICC before being issued to the parties, in accordance with Article 21. In this case, they should add to their DAB or CDB clause the following text: "*The DAB shall submit each Decision to ICC for review in accordance with Article 21 of the Rules.*" This would only apply to Decisions. The ICC would never review a Recommendation.

Mr. Speedopoulos would like to appoint the head of a very well-known naval engineering firm, while Ms. Steel proposes the chief naval architect of her shipyard as the second member. He would be ideal because he already knows the project so well. Mr. Speedopoulos points out that, under Article 8, all members of a Dispute Board “*must be and remain independent of the parties to the contract*”¹⁶ They finally agree to the engineer and an independent naval designer. According to Article 7.5, the Chairman of the Board is proposed to the parties by the first two members within 30 days of their appointment. The naval engineer and the designer propose several names to the parties; among who is a lawyer with considerable experience with Dispute Boards and other forms of dispute resolution. The parties agree that it would be useful to have a lawyer on the Board. Alex Legaleagle is thus appointed as Chairman of the Combined Dispute Board.¹⁷

Letting the parties chose the first two members and having those then suggest the third member of the Board to the parties is the “bottom up” method of selection set out in the ICC Rules. However, the parties could also agree to appoint the Chairman of the Board and leave the designation of the other two members to the Chairman. This “top down” method, which has been successfully used by one of the authors, has the advantage that the Chairman will select independent persons, with whom he or she will work well. This will ensure a harmonious and efficient Board right from the beginning. While the parties have much less influence upon the composition of the Dispute Board with the “top down” system, they may be happy to proceed in this manner if they both trust the Chairman of the Dispute Board to select competent and independent people.

One cannot emphasise enough the importance of establishing the Board at the very outset of the Contract.¹⁸ If it is set up during the honeymoon period, while the parties’ contractual relationship is still harmonious, the Board is likely to easily establish a good working relationship with the parties. However, if the parties wait with the Board’s appointment until the first dispute has arisen, it may not be able to function to its fullest potential. If an ongoing dispute has soured the parties’ rapport, the Board will have a hard time establishing a mutually harmonious working relationship with all involved. Early appointment and regular site visits enable the Dispute Board members to become conversant with the project and actually observe the problems on site as they develop. Technical difficulties and their contractual ramifications can readily be appreciated and, should the Board be required to make a determination on a dispute, its close knowledge of the project and of the issues (and personalities) should permit quick, well-informed, even-handed and consistent responses.

It is said that a judge (and arbitrator) clings to contemporaneous material like a drowning man clings to the wreckage. The Dispute Board’s enduring association with

¹⁶ The Members should attest their independence in a Statement of Independence.

¹⁷ This is obviously the best case scenario, where all parties agree when setting up the Board. Article 7 of the Rules also foresees the case when one of the parties does not cooperate in establishing the Dispute Board. If the parties are not able to agree on the first two Members, either Party can request their appointment by the ICC’s Dispute Board Centre, 30 days after signing of the contract or commencement of performance, whatever comes first. If there is a problem in appointing the third member, the Centre will appoint him upon the request of a party.

¹⁸ To enforce this requirement some lending institutions may make the availability of funds contingent on the parties’ having set up a Dispute Board before the commencement of works.

the project provides the members with this valuable contemporaneous knowledge of the project and the persons involved in it. As every arbitrator and judge knows, it is difficult to visualise factual circumstances that are said to have existed several years earlier merely by listening to others or by reading documents. If the disputes involve allegations of delay or disruption, parties may expend considerable amounts in legal fees demonstrating causality, even when contemporaneous records such as correspondence or photographs are available. By witnessing the technical and physical conditions prevailing at the time the difficulties arise, the Board can largely avoid *ex post facto* determinations and parties are spared the expensive task of reconstructing events which occurred in a more or less distant past.

THE DISPUTE BOARD IN OPERATION

A week after accepting his appointment, the Chairman of the Dispute Board calls a first meeting between the Board and the Parties at Weldafast's shipyard. This meeting should set the ground rules for the Board's operation and allow the Members of the Board and the parties to meet each other.

One of the first items on the agenda is organizing the flow of information about the performance of the contract, from the parties to the Board. The Board receives a full set of all contractual documents. Informed about the Board's need to be regularly updated about the progress of the contract, Weldafast agrees to provide it with monthly progress reports for all aspects of the construction. It will also supply its critical path analysis and any updates thereto as well as other project plans which it may generate in the course of the building of the ship.

The Chairman then comes to the issue of regular site visits. For reasons of economy, both Mr. Speedopoulos and Ms Steel would prefer that site visits be organized only when a dispute arises between the parties and they feel that the written documentation should be enough to keep the Board members abreast of the project. The Chairman points out that Article 12.1 requires at least three visits to the site per year. In his experience, the routine visits to the project by the Board are the very heart of the Dispute Board process. It is during these visits that the Board gains the most valuable insight into how the project is coming along. It not only sees how the project is advancing (or not) but can speak to those involved and so obtain a very real picture of what is happening on the site. Moreover, regularly scheduled visits allow the parties to prepare in advance the issues which they might wish to discuss with the Board. Appreciating the need for regular site visits, the parties agree that the Board should come for four regular site visits a year, on the first Monday of every month in which there is to be a visit.¹⁹

The frequency of site visits will depend upon the nature of the work or activities in process. In technically complex projects which have to be completed to a tight timetable it will make sense to schedule meetings more frequently than on projects where time is not so much an essential factor. There may also be phases in a project which require less involvement. Thus, if Weldafast must first come up with the design of a portion of the vessel that needs to be approved by Speedylines, there is little use

¹⁹ Fixing the regular meetings at the very outset will also have the advantage of reserving the required time in the members' agendas. It is often very difficult to find a time which will fit into the agenda of three busy persons if the meetings are not planned ahead for quite some time.

in the Board breathing down the designers' backs. In that case, a first visit might be appropriate once the assembly actually begins.²⁰

During the first meeting, the Chairman also explains the formal procedures for referring a dispute to the Board. A party will submit a claim by a written "Statement of Case" (Article 17). The other party then files its "Response" within 30 days (Article 18), after which a formal Hearing is held in accordance with Article 19. Mr. Legaleagle also draws the parties' attention to the fact that, under Article 16, the Board may informally assist them with difficulties if they agree to such assistance. In his experience, this is, in fact, one of the most useful functions of the Board, because it allows the parties to put a difficulty before the Members without the formality of a referral or the risk of the Board issuing an adverse determination.

Mr. Speedopoulos and Ms Steele both came away from this first meeting with a better understanding of the process and favourably impressed with the technical knowledge of the Board members as well as with Mr. Legaleagle's efficient and courteous conduct of the meeting.

During the second site visit, Mr. Speedopoulos points out to the Board that work on the hull is not progressing according to the original construction plan. In his estimate, the works are at least a month behind schedule. Ms Steel explains that Weldafast has had difficulties procuring sufficient quantities of steel. Moreover, the dramatic increase in the price of steel within the last year is making it difficult to keep to the contractually agreed price. However, she believes that the delay will be caught up within the next month. The Board suggests to the parties that they monitor the situation closely and that the shipyard should issue new production plans showing how it will catch up the delay. The suggestion is accepted. Another issue comes up when it becomes apparent that the parties have differing interpretations of a contract specification. The contract requires that Weldafast provide a "*positive means of preventing moisture from entering electrical cable insulation in way of cable termination fittings.*" Speedylines contends that the only "positive" means of accomplishing this requirement is through the installation of heat-shrink tubing or "boots" around the termination fittings. Weldafast, however, sees only the need for several turns of good electrical tape. Both parties request that the Board informally help them solve this problem according to Article 16. After having heard both parties' position on the question, the Dispute Board is able to orally clear up the situation by pointing to the contractual requirement that all technical specifications conform to national and international safety standards, which, in their "expert" opinion, would favour "boots" or "heat-shrink tubing".

A typical programme for a site visit would be for the Dispute Board to be given a brief verbal update on progress in the presence of both parties' representatives. The parties and the Board will then proceed with the inspection of the vessel or its components. The parties would be given ample opportunity to provide the Board with further information on any issues that might be or may have a potential of becoming contentious. Should such an issue finally ripen into a dispute which requires a determination by the Board, the parties will not have to spend valuable time

²⁰ Indeed, the Board should be careful not to become involved in the design of the project or performance of the contract in an effort to help the parties. Its function is, and should always be, to determine contractual disputes when they arise between the parties. Thus, it would not be wise for the Board to suggest improvements to the project, i.e. a better shape for the hull, etc.

explaining the genesis of the problem and the Board will be able to deal with the matter expeditiously, since Article 20 requires it to issue a Determination within 90 days of receiving the Statement of Case.²¹

On March 21st, three weeks after this meeting, the Board receives a “Statement of Case” from Weldafast. The shipyard explains that the cost of the steel for the ship was 85% more than had been foreseen when Weldafast made its offer. Given the unforeseeable nature of such an increase, Weldafast argues that it should be entitled to a price revision and to higher interim payments, since it will not be able to continue financing the construction at the current level of Speedylines’ progress payments.

On April 21st, Speedylines replies, in accordance with Article 18, that it does not agree with a price revision. The contract was clearly for a fixed price and the circumstances do not warrant any change. Moreover, Weldafast was perfectly aware that the price of steel might fluctuate and could have made provisions by hedging its exposure. Moreover, there is still a considerable delay in the progress of the construction that is certainly going to trigger the liquidated damages clause foreseen in the contract. Given the poor financial health of the shipyard, Speedylines argues that it is entitled to call the 10% performance bond and states that it will do so if the construction schedule is not fully met by the end of the next month.

On April 30th, the Shipyard requests the Board to urgently make a “Decision” that Speedylines is not entitled to call the performance bond and that it should be required to increase its interim payments by 60%. Weldafast contends that, failing a rapid Decision on these issues, it is unlikely to be able to complete the project since its cash reserves are dwindling. Speedylines immediately objects to the Board issuing a “Decision”. It argues that the requirements of Article 6.3 are not met and that, in its view, a Recommendation would be sufficient to deal with the matters at hand.²²

On May 15th, the Board decides that, if Speedylines called the performance bond, this would be likely to jeopardise the performance of the contract. Moreover, it finds that Speedylines has not shown that the conditions set out in the contract for calling the bond are met. It, therefore, issues a “Decision” enjoining Speedylines from calling the Bond under the present circumstances. Concerning the interim financing, the Board decided that it will issue a “Recommendation” after having heard the parties at a formal hearing during the next regular site visit scheduled for June 1st.

In the preceding paragraphs we have attempted to illustrate how a Dispute Board commences its operations and how a dispute may unfold before it. For a Dispute Board to be effective, it is of paramount importance that its members have the professional expertise and qualifications to be able to readily understand and deal efficiently with the technical issues raised by the subject matter of the contract. However, the efficacy of a Board, not only requires the technical expertise of its

²¹ This time-limit can be extended only with the agreement of the parties.

²² Article 6.3.

In so deciding [whether to issue a Decision], the CDB shall consider, without being limited to, the following factors:

- whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party;
- whether a Decision would prevent disruption of the Contract; and
- whether a Decision is necessary to preserve evidence.

members or the supply with relevant information at regular intervals, just as importantly it also entails that the Dispute Board members take the trouble to read and digest the contents of these reports (and to keep them accessible and in good condition for later reference, should a dispute arise). The amount of time (and storage space) required should not be underestimated. Total familiarity with the project is essential for the members when visiting the job-site and a member who has not read the reports will soon be discovered and may harm the Board's credibility in the eyes of the parties. A member's obligation is not just to read reports; Dispute Board members must be available at short notice to read submissions concerning disputes, convene hearings and prepare determinations within the 90 days foreseen by the Rules. While hearings will usually be held during the regularly scheduled meetings, it is possible that the situation may require more speed. According to Article 12.4, DB members should make themselves available within 30 days of a request for an urgent hearing.

THE COSTS

The ICC Dispute Board Rules foresee that Board Members receive two types of remuneration. The first is a Monthly Retainer Fee and the second a Daily Fee. The monthly fee (Article 27) remunerates a member for being available to attend site visits and meetings, for becoming and remaining conversant with the contractual documents and the periodic progress reports as well as for his or her office overhead expenses.

The Daily Fee will cover the time spent by a Dispute Board member on particular activities such as meetings, site visits and hearings, travel, the study of documents submitted by the parties in the course of a referral or informal assistance. It also covers the time required to prepare determinations and procedural orders as well as the time spent in organising and preparing for meetings, site visits and hearings (Article 28). Travel and hotel expenses are invoiced separately and reimbursed at cost (Article 29).

Each Dispute Board Member must sign a DB Member Agreement (Article 10) dealing with those issues. The rates for the daily and monthly fees are fixed and recorded in that Agreement. The Rules also foresee that all members of a Board should receive the same rates of remuneration. The parties must equally share the costs of the Board (Article 26).

HOW EXPENSIVE ARE DISPUTE BOARDS?

The Dispute Resolution Board Foundation (DRBF) estimates that the average Dispute Board costs about 0.15% of the project cost.²³ When compared to the likely costs of arbitration, which are anywhere between 2% and 4% of the cost of the project, this is very little, particularly if one remembers that practically no disputes which have been determined by a Dispute Board are referred to arbitration. Clearly, the larger the project the easier it is to justify the expense of a Dispute Board, but one-man Boards can be considered for smaller projects at a very modest cost.

Furthermore, the costs of a Dispute Board are offset by the lower bid prices that are known to result when contractors prepare tenders on contracts which call for a Dispute Board rather than only arbitration. Contractors familiar with the concept

²³ <http://www.drb.org/FAQ.htm>

know about the reduced probability that disputes will end up in arbitration and will factor in the saving in their bids.

According to Article 26.1, the parties share the costs of a Dispute Board equally. Also, all members of the Board are to be remunerated at the same rate, which does not mean that they will be paid exactly the same amount. The Chairman is likely to be paid more since his or her workload in organizing the activities of the Board and writing its determinations may be heavier than the other Members'.

In the ICC Dispute Board Rules provision is also made about the costs associated with the possible involvement of the ICC in (1) the appointment of DB Members (USD 2'500) or (2) challenges of Members for lack of independence (minimum of USD 2'500 and maximum of 10'000) as well as (3) the administrative expense for reviewing Decisions when the parties have so agreed (minimum of USD 2'500 and maximum of 10'000).

WHY DISPUTE BOARDS WORK

On a large railway project in London, the DAB was never required to make a decision on a dispute. The Contractor freely admitted that this was because the Board was seen "patrolling" the site during the quarterly visits. Both parties tried very hard to prevent the Board being used, neither wanting to be proven wrong. This is the experience of many Boards. The very fact that a Board will accompany a project from its beginning to its end gives it an active role in the completion of the contract and thus the Dispute Board becomes part of the contract team.

Faced with a standing Board with members who are intimately familiar with the project and the persons involved with it, parties are less likely to engage in the type of brinkmanship one sometimes finds on sites where the final reckoning in the form of an arbitration is a long way off. A Board's 'long shadow' may prevent many disputes from actually occurring, because parties prefer to work out problems among themselves rather than to be seen as being unreasonable for frequently referring to the Board. However when a difference is actually brought to the attention of the Board, its knowledge of the circumstances and the persons involved will allow the response which is most adapted to the circumstances and best suited in preserving the parties' working relationship.

Because the process unfolds during the performance of the contract, the tone of exchanges between the parties is likely to be more factual than adversarial and thus considerably less acrimonious and contentious than one might find in an arbitration or court litigation. Here also the presence of a Dispute Board will have a salutary effect as neither of the parties will want to come across as uncooperative. Tempered by their perception of the Dispute Board's view of their behaviour, the parties are less likely to engage in the kind of posturing behaviour which is so characteristic of litigation and which makes further co-operation between parties difficult if not impossible. The presence of a Dispute Board will also motivate parties to keep precise contemporaneous records and documents which can be invaluable if a dispute does go to arbitration.

The statistics prove that Dispute Boards' work is significantly reducing the uncertainty and costs associated with disputes arising out of contracts. Why this is the

case, we have tried to demonstrate above. That they should be just as efficient in the realm of maritime construction as they have been in construction generally is the general proposition of this article. There are no discernible features of maritime construction that would render a Dispute Board unpractical, nor are the disputes associated with maritime construction so particular that a Dispute Board of experienced members would not be able to cope with them.

It is becoming more and more difficult to find cheaper ways of producing a vessel while maintaining ever increasing quality requirements. This may be the moment to look towards reducing the overall costs of maritime construction projects by saving on those involved in resolving disputes between the parties.