

INDUSTRY UPDATE

10 December 2018

THE SINGAPORE INFRASTRUCTURE DISPUTE- MANAGEMENT PROTOCOL

BACKGROUND TO THE PROTOCOL

On 23 October 2018, the Ministry of Law launched the Singapore Infrastructure Dispute-Management Protocol (“SIDP”) to assist with dispute management and avoidance for mega infrastructure projects. The SIDP is intended for use in construction or infrastructure projects of at least SGD 500 million as projects of this scale would make the appointment of a Dispute Board cost-effective.

The SIDP is a Singapore initiative designed to facilitate infrastructure development in Asia and comes in the wake of the 2017 Asian Development Bank report which found that Asia will need more than SGD 2.3 trillion of infrastructure per year from Y2016 to Y2030.

The report also notes that disputes are sometimes unavoidable given the typically complex and multi-party nature of infrastructure projects, with the average infrastructure / mining / oil and gas project having cost overruns of 80% above the budget and delays of some 20 months.

OVERVIEW OF THE PROTOCOL

The SIDP focuses on early dispute avoidance, with the intention being for parties to appoint a Dispute Board to follow the project from start to finish, even before any dispute arises. In essence, appointing a Dispute Board is akin to having a consultant team with quasi-adjudicatory functions on standby to resolve disputes as and when they arise – the aim

being to help anticipate issues and prevent differences from escalating into full-blown disputes.

The SIDP is a standalone procedural protocol which can be incorporated in construction contracts by the inclusion of an appropriate clause.

In this regard, the SIDP suggests the following standard clause:

“Parties shall establish a Dispute Board in accordance with the Singapore Infrastructure Dispute-Management Protocol 2018 (“the SIDP”), which is incorporated by reference. The Dispute Board shall comprise of [one/two/three] member[s]. The Dispute Board shall assist parties in preventing, managing and resolving differences or disputes in accordance with the terms of the Protocol.”

Under the SIDP, Dispute Board members are appointed by the Singapore International Mediation Centre (“SIMC”) or the Singapore Mediation Centre (“SMC”) (depending on which institution is requested to act) upon request by the contracting parties either jointly or by any party acting alone.

The SIMC and SMC will maintain panels of experts and professionals for possible appointment to Dispute Boards, as well as provide other logistical and administrative support to enable the Dispute Board to fulfil its functions.

In addition to their functions as neutral consultants and advisors to the contracting parties, Dispute Boards are vested with a wide range of powers designed to flexibly assist in the resolution of disputes.

In particular, if disputes arise, the resolution process starts with a party referring the dispute to the Dispute Board. In its referral, the party can specify which method of dispute resolution it wishes to pursue, or it can leave it to the Dispute Board to decide. If the other party objects to the proposed method of dispute resolution, the Dispute Board decides which method to adopt.

The three main modes of resolving a referred dispute are mediation (with the Dispute Board members acting as the mediators), rendering an opinion or rendering a formal determination.

Mediation needs little further explanation, whereas the distinction between opinions and determinations is less clear and merits further examination.

While not expressly defined in the SIDP itself, it appears that opinions and determinations are in essence decisions by the Dispute Board as to how the referred dispute is to be resolved. The former is in the nature of a 'soft' recommendation, while the latter is closer in nature to that of a 'coercive' interim measure.

- Opinions are not final and conclusive as to the merits of the dispute. On the other hand, they are binding on the parties until the dispute is finally determined by a court or tribunal, unless a party duly serves a notice of objection to the opinion within 28 days of receiving the opinion.
- Conversely, determinations are always binding on the parties. They will also be final and conclusive as to the merits of the dispute, unless a party duly serves a notice of objection to the determination within 28 days of receiving the determination.

COMMENT

Dispute Boards have been around for a long time and are used in infrastructure disputes in the US and Europe.¹

One example of this would be the iconic Dispute Adjudication Boards ("DAB") provided for in the FIDIC 1999 rainbow suite of contracts, with the Red Book contemplating a 'full-term' / 'standing' DAB appointed from the start to end of the project and the Yellow and Silver Books contemplating an 'ad hoc' DAB appointed upon request to resolve disputes.²

¹ Second Minister for Finance and Education Indranee Rajah S.C., *Note on Singapore Infrastructure Dispute-Management Protocol* (7 November 2018)

² In the FIDIC 2017 rainbow suite of contracts, the position has converged such that Red, Yellow and Silver

However, potential users should note that the Dispute Boards under the SIDP will play a more active role than is traditionally the case for other Dispute Boards.

For instance, under Clause 4.0 of the SIDP, the Dispute Board is required to establish a schedule of meetings and Site Visits, with a minimum of three meetings and three Site Visits to take place over the span of every 12 months unless otherwise agreed.

Given the quasi-supervisory role which Dispute Boards under the SIDP seem to have been called upon to assume, it remains to be seen how well this will sit and interface with contract forms where there is already a contract administrator / other neutral third party playing a similar role.³

Parties seeking to utilise the SIDP for their projects should consider how this is intended to work in tandem with existing multi-tiered dispute resolution / arbitration clauses in their contracts, particularly where the intention is to incorporate standard form contracts by reference. Appropriate amendments should be made to ensure that conflicts do not arise between the different regimes, which in the worst case could render such clauses 'pathological'.

A copy of the SIDP can be downloaded at <http://www.mediation.com.sg/business-services/sidp>.

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Books now unanimously provide for 'full-term' Dispute Avoidance / Adjudication Boards.

³ For example, the Engineer in the FIDIC Red Book, the Architect in the SIA Form and the Superintending Officer in the PSSCOC.

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