

# Understanding the new Singapore Infrastructure Dispute-Management Protocol

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## What happened?

On 23 October 2018, the Ministry of Law launched a new Singapore Infrastructure Dispute-Management Protocol to help parties involved in mega infrastructure projects manage disputes and minimize the risks of time and cost overruns. Minister for Finance Mr Heng Swee Keat announced the launch of the new protocol at Enterprise Singapore's Asia-Singapore Infrastructure Roundtable as part of efforts to establish Singapore as the infrastructure hub of Asia.

Based on an Asian Development Bank report, Asia will need more than US\$1.7 trillion (S\$2.3 trillion) of infrastructure per year from 2016 to 2030. As infrastructure projects are typically complex and involve multiple parties, differences and disputes are sometimes unavoidable and can result in delays and higher costs, if not managed well. It was found that infrastructure, mining and oil and gas projects have on average cost 80% more than budgeted and run 20 months late.

The new Singapore Infrastructure Dispute-Management Protocol will help parties proactively manage differences to prevent them from escalating into disputes, and minimize the risks of time and cost overruns. Under the new protocol, parties will from the start of the project appoint a Dispute Board comprising up to three neutral professionals who are experts in relevant fields such as engineering, quantity surveying and law. The Dispute Board will follow the project from start to finish and proactively help to manage issues that may arise, through a range of customized dispute avoidance and resolution processes.

## What is it?

The Protocol is a set of contract terms and conditions which provide for the appointment of a Dispute Board in an infrastructure type project. It is intended to be incorporated into the EPC contract for the project. The Protocol recommends that a Dispute Board arrangement be considered where the project value exceeds S\$500 million and allows for a Dispute Board comprising one, two or three members.

## What is a Dispute Board?

Dispute Board usually refers to a person or a panel of individuals who under the terms of the contract either:

- provide non-binding recommendations to the parties on issues arising in the course of a project; and/or
- consider the issues and then make decisions which the parties are obliged to comply with.

The main function of the Dispute Board is to assist the parties to avoid disputes and where disputes cannot be avoided, to assist the parties to resolve the dispute in a speedy, cost effective and acceptable way so as to avoid arbitration or litigation.

The members of the Dispute Board will have to be experienced in the type of project under construction and have a thorough understanding of the contractual issues. They also need to be independent of the contracting parties.

The use of Dispute Boards first started in the US in the 1960s but only came to prominence in 1970s in the Eisenhower Tunnel project in Colorado. After that it went international with the El Cajon Dam and Hydropower Project in Honduras. Overtime, it has gained popularity and we see today that it is provided in most international infrastructure forms of contract. Dispute Boards have been a feature of the well-known FIDIC suite of contracts for two decades. The World Bank has mandated the use of Dispute Boards since the mid-1990s. The International Chamber of Commerce (ICC) has since 2004 published the necessary documents for use of Dispute Boards.

In this region, the use of Dispute Boards in international infrastructure projects is quite common place. In Singapore, the Court has considered the enforcement of the decisions of Dispute Boards under a FIDIC form contract in the celebrated *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* line of cases.

However, on the domestic Singapore construction scene, notwithstanding a substantial amount of infrastructure developments in last three decades, the use of Dispute Boards has not been common place. The advent of statutory adjudication in 2004 (with the enactment of the commonly known SOP Act) may have contributed to the slower development of the use of Dispute Boards in Singapore because the statutory regime is an attractive alternative in terms of costs, speed and enforceability. However, a big criticism of the statutory adjudication regime is the question of whether this method of dispute resolution is suitable for more technical and substantive disputes (statutory adjudication has been referred to as a rough-and-ready method intended to facilitate cash flow). This perhaps may explain the recommendation that the Protocol be adopted for project values in excess of S\$500 million where one expects to find more complex technical disputes. As more infrastructure projects in Singapore adopt the Protocol (as one expects to see since the Protocol is an initiative of the Singapore government), Dispute Boards should establish a foothold in Singapore.

## What are the significant provisions of the Protocol?

The Protocol builds on international best practices and introduces a few novel features to address the challenges faced in complex infrastructure projects.

First, it takes a proactive dispute prevention approach. The Dispute Board is appointed from the start of the project, rather than only after disputes have arisen. It helps anticipate issues and prevent differences from snowballing and escalating into full-blown disputes which become difficult and expensive to resolve. Historically, Dispute Boards have either been appointed from the start of a project or as and when disputes arise. The Protocol adopts the former approach which is generally acknowledged as the better approach to the use of Dispute Boards.

The Protocol requires the Dispute Board to hold meetings and site visits. The default position is that a minimum of three meetings and site visits are required every 12 months although parties are free to agree to a different prescription. The meetings allow issues arising in the course of the project to be discussed and hopefully resolved efficiently in terms of costs and time.

Second, should disputes arise; the dispute resolution process starts with one of the parties issuing a referral of dispute to the Dispute Board and the other party. In issuing the referral, the party can specify which method of dispute resolution it wishes or leave it to the Dispute Board to decide. The other party may object to the method specified. If there is an objection, the Dispute Board decides which dispute resolution method to adopt.

The Protocol provides a wide range of methods which can help address the disputes at hand. These include mediation, opinion and determination. This is different from the more prescriptive approach adopted by other forms – Europe/FIDIC provide for binding determinations and US provide for non-binding opinions – and similar to the ICC structure.

In mediation, the Dispute Board assists the parties to narrow their differences with the objective of reaching a settlement agreement. If the parties do not agree, the Dispute Board has no power to force a decision on the parties.

As for opinions, the Dispute Board is tasked to provide an opinion on the issue in dispute. The opinion is not binding on the parties (if any party objects to the opinion) but it carries significant weight since it is the view of a neutral panel comprising person(s) who are knowledgeable about the project, the contract and the issues. If there is no objection to the opinion, it becomes binding until or unless overturned later in litigation or arbitration (whichever is applicable to the project).

When a Dispute Board is asked to render a determination, it is required to consider the issue in dispute and render its determination, which will be final and binding on both parties unless any party indicates that it wishes to object to the determination. In the event of an objection, the party objecting shall have the right to refer the dispute to litigation or arbitration (whichever is applicable to the project) for final resolution but shall be required to comply with the Determination in the interim.

Third, the Protocol also provides for full professional and administrative support through the Singapore International Mediation Centre (SIMC) and the Singapore Mediation Centre (SMC) which can help with identifying and appointing Dispute Board members as well as with meeting, escrow and other administrative services.

## Will Dispute Boards cost a lot of money?

Certainly, the engagement of experienced and knowledgeable professional(s) to form the Dispute Board will not be cheap especially when the engagement commences from the start of the project. However, Dispute Boards are widely accepted as effective to cut down costly disputes. On this basis alone, the expenditure to engage a Dispute Board should be easily justified. Even so, the recommendation in the Protocol that Dispute Boards be used in projects where the project costs exceeds S\$500 million acknowledges the costs considerations by advising that it be used only in big infrastructure projects.

## What do I need to do if I want to use the Protocol?

All that is required is to insert a clause in the EPC contract to incorporate the Protocol. The recommended clause is as follows:

*[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 SIDP.]*

## Where can I find the Protocol?

A copy of the Protocol can be downloaded at [here](#).

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