

Dispute Boards: An Opportunity to Create and Enhance Trust in Construction Projects in Chile

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There is no doubt that Chile has changed profoundly during the past ten years. A greater fragmentation of information, higher levels of uncertainty and interdependence, and the dissolution of boundaries between public and private, are just some of the features of our current society.

Our construction industry has not been exempted from those changes, and as a consequence it has become increasingly adversarial and less productive. The situation above described is reflected in interesting research carried out by the Centre for Arbitration and Mediation of the Cámara de Comercio de Santiago (CAM Santiago) for the period 1993 - 2013, that shows how in 2013 42% of the construction contracts ended in arbitration.

In the same perspective, according to a study developed by the agency "Gemines" for the Chilean Chamber of Construction last year, 72% of "General Contractors" indicated that the majority of the conflicts occurred because of the lack of a system of timely resolution of disputes.

Many recipes and solutions have been raised; however, it appears that we are still missing a very critical element: the trust factor. Trust is essential for stable relationships, vital for the maintenance of cooperation, fundamental for any exchange and necessary for even the most routine of everyday interactions. In fact, only teams that work together using trust can adapt to changes and react skilfully and promptly to facts that were not originally foreseen. Unfortunately, construction projects are a very challenging field in the creation of trust, mainly because they are temporary organizations that also have a diversity of people that interact within them. These are the very reasons why Dispute Boards are needed.

There are many factors that can be identified as crucial for building trust in a construction project, but four of them seem to be the most critical: communication, reliable behaviour, competence and goal-congruence – all factors found in Dispute Boards.

1. Communication

It appears that communication is the main element to create trust in a team. As a matter of fact if communication is missing, nothing else will matter. Thus, to develop mutual trust and confidence, it is essential that each member of the team communicate in a clear and honest way.

Creating an informal and flexible environment appears to be very beneficial in getting honest opinions from the members of the project team. Due to the fact that dispute board members are part of the team from the project's outset, they can generate and facilitate links (communication) with each of the parties and with their professionals. In doing so, they would promote informal and flexible instances of conversation before disputes arise where often the parties have already developed an adversarial posture. Since dispute board members will visit the site on a regular basis and communicate with the team directly when problems arise, solutions can be adopted quickly thereby developing trust from the very beginning and a great opportunity for building trust among people at different levels and roles of the project. This informal sharing of information among the project team members would help to reduce uncertainties, allowing the project team to be more efficient in achieving the set goals.

2. Reliable Behaviour

Although important in all relationships, reliable behaviour may play a crucial role in collaborative relationships. If one person falls short in a repeated way or fails at delivering what he or she has promised, the other members of the team will likely lose trust in that person. The trust is in danger every time a team member behaves inconsistently. On the contrary, when a professional delivers what he or she has promised, he or she would become credible and reliable in the other members' eyes. The impact that a dispute board can produce in creating conditions for the parties to behave in a reliable way is of great value. In fact, the mere presence of a dispute board during construction may be critical in preventing the parties from having negative attitudes and unreasonable behaviours.

3. Competence

Any teamwork will require skills and knowledge from each member and at the same time have a general understanding about each member's responsibilities. Thus, if one member of the project team does not show competence, it will become very difficult for the other actors to trust him or her. Dispute Board members, recognized as experts by the parties at the onset of the project could make a huge difference in helping them to identify potential gaps and overlaps of skills and knowledge within the project team.

4. Goal Congruence

Among the relevant stakeholders of a project, specific goals should have already been set. These goals should be aligned among themselves, and with the goals of the project. If these goals are congruent, it will be easier for one party to trust that the other party will deliver its job. This will allow the parties to avoid misunderstandings, gaps and overlaps of responsibilities. Using Dispute Boards from the first meeting would help the parties to establish and declare the goals of the project, and the rules and procedures to be implemented according to the contract.

Beyond the specific factors discussed above, it is arguable that dispute boards are, in many regards, a mechanism that can strongly contribute to building, maintaining and restoring trust between the parties of a project and among the individuals who are part of each party's team. Dispute boards encourage cooperation and trust among the parties and help to create a different more positive mind-set so that the parties see themselves as part of the same team, using time and limited resources efficiently in achieving mutual goals. However, it is very important that the Chilean construction industry understands and applies dispute boards in keeping with the values and principles that were envisaged when their creators developed this idea in the late 1970's.

The spirit of the dispute board demands cordiality and respect from its members toward both parties and their teams, but it must not be less assertive or less proactive in achieving the mutual goals. Further, it is essential that dispute boards show impartiality and avoid any contact with one of the parties without the presence of the other.

Most of the time, but mainly during the dispute avoidance stage, the dispute board members will work on the site. They will be flexible but not less rigorous, behaving as part of the team and working and contributing toward the successful completion of the contract, and not acting as mere guests. In performing their role, dispute board members should be very cautious and primarily ask questions in order to let the parties reach their own conclusions and come up with the best solutions for the problems that may arise.

Once the parties have appointed the dispute board, the experts should have a complete copy of all contracts and documents at the beginning of the project. They should also be copied as the project develops and be copied on any variations, program revisions and any relevant information that may affect the progress of the work. One of the most important activities of the dispute board will be to visit the site with both parties. This will allow the board to witness directly the progress of the work while listening to both parties' apprehensions and concerns about possible future problems.

Another key factor to ensure the dispute board's contribution in creating and preserving trust within a construction project is that all of the professionals working within or related to the project understand the dispute board mechanism and process, both from a theoretical and a practical perspective. Construction lawyers for example, are very skilful when it comes to studying contractual documents to assist the parties in drafting their presentations and ensuring that the procedures will be implemented correctly; however, using these methods and perspectives within the dispute board setting (which is designed to build trust among the parties) will have results more along the lines of an arbitration or a litigation process.

In conclusion, for dispute boards to perform successfully they must create trust among the stakeholders of a project, and they must require from all professionals concerned that they work as members of the board and *with* the board – especially lawyers– to really

appreciate the original spirit of this process and act with an avoidance approach instead of focussing on adversarial practices. Dispute boards, if applied correctly, can definitely contribute to creating and maintaining trust within a project and among its parties, allowing effective dispute avoidance and timely resolution of those disputes that may arise during the construction project development. It is for these reasons that today it is so important to create more—and better—instances of excellence where Chilean professionals from different fields interested in working in construction projects, can learn and embrace the essence of dispute boards as a tool created by the construction industry and for the construction industry. The end result will help heal and even enhance relationships among stakeholders, and consequently will produce better business outcomes for everyone concerned.

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