

Dispute Boards & Airport Industry

A method for resolving disputes
during the execution of
airports infrastructure projects



MARÍA LAURA VELAZCO
CAPPELLINI & ASOCIADOS
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What are Dispute Boards?



Dispute Boards are bodies of one or three impartial and independent experienced professionals, normally set up at the outset of a contract, to deal with contractual disagreements as they arise.



What does the DB process primarily offer?

DISPUTE AVOIDANCE



The DB process offers something which no other dispute resolution technique offers. **It puts expert assistance in place before any disagreement has arisen**, and empowers the DB to assist the contract parties to avoid future disagreements escalating into formal disputes.



Alternative Dispute Resolution (ADR)

DB

- Dispute avoidance or dispute prevention
- Mitigation of disagreements

Negotiation
Mediation
Conciliation
Neutral Evaluation
Expert Determination

- Adversarial positions

Arbitration
Litigation
(only last resort)

- Entrenched adversarial position

Real-time intervention by a DB



- The members of a well-run DB are thoroughly acquainted with the parties, the contract and its performance.
- A well-run DB is **an enhancement and support to your project management team** and operates in real time to motivate the parties:
 - To **collaborate**
 - To **mitigate** the adverse impacts of unplanned events that occur during the progress of the project:
 - ✦ before the unplanned event occurs, and
 - ✦ before the parties react to the unplanned event without coordinating their efforts.
 - ✦ **before the parties have already assumed entrenched adversarial positions.**
 - To **resolve disputes amicably** by the time performance of the contract is complete.

The top main causes of disputes in construction projects



- Ambiguities in the contractual documents.
- Incomplete design information or employer requirements.
- Unrealistic contract completion date being defined at tender stage.
- Unrealistic risk transfer from employers to contractors.
- Failure to properly administer the contract.
- Owner imposed change.
- Failure to make interim awards on extensions of time and to give associated compensation.
- Conflicting party interests.

Early identification and resolution of claims in “real time” is critical to the success of the process

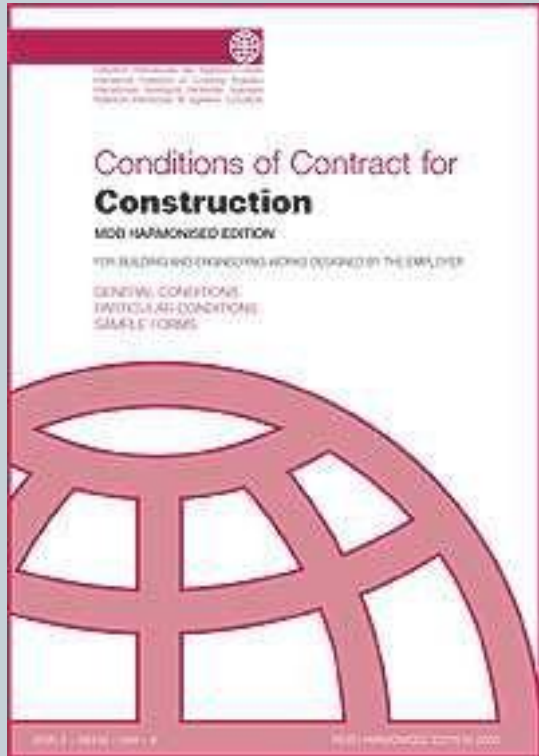


- The adoption of the DB process by the **World Bank** and by **FIDIC**.
- The adoption of the DB process, through FIDIC, by the **Multilateral Development Banks**.
- The decision of the **ICC** to offer the DB process worldwide on any long term or complex business contract relationships.





MDB HARMONISED EDITION



- The World Bank
- Islamic Bank for Development
- European Bank for Reconstruction and Development
- African Development Bank
- Asian Development Bank
- Black Sea Trade and Development Bank
- Caribbean Development Bank
- Council of Europe Development Bank
- Inter-American Development Bank
- Japan International Cooperation Agency (JICA)

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Dispute Boards on international scene

Application to types of projects



Public and private projects

- Airports
- Bridges
- Buildings
- Dams
- Energy
- Highways
- Ports
- Power plants
- Tunnels
- Underground
- Universities
- Medical facilities

What do they have in common?

- Lengthy duration
- Complex site/
construction methods
- High risk

How does a DB work?



- Each member is provided with copies of the **contractual documents**.
- All **communications** are through the Chair. Panelists are neutral and independent; so private communications with either party are prohibited.
- **DB keeps abreast of job developments** by:
 - periodically reviewing relevant documentation and
 - regularly holding joint meetings during regular site visits with owner and contractor representatives

How does a DB work?



- Encourages resolution of disputes at job level:
 - Identifies and discusses issues before they become disputes
 - Holds **informal hearings** to provide **advisory Opinions**
 - Holds **full hearings**, if necessary, and provides written **recommendations and/or decisions**.
- Length of time for Decision/recommendation: approx. 90 days



Types of Dispute Boards

DRB/DAB/CDB



- **Dispute Review Board (DRB) - United States and Canada**

The DRB issues “recommendations” that are not binding on the parties with respect to any dispute referred to it. The recommendation becomes binding if there is no notice of dissatisfaction.

- **Dispute Adjudication Board (DAB) – UK Style/FIDIC Style**

•The DAB issues “Decisions” that are ab-initio binding. The decision becomes final if there is no notice of dissatisfaction.

- **Combined Dispute Board (CDB) – ICC Innovation**

The CDB normally issues recommendations with respect to any dispute referred to it, but it may issue Decisions as well. This option offers an intermediate approach between the DRB and the DAB.

Combined Dispute Board



If any Party requests a Decision and another Party objects thereto, **the CDB shall make a final decision as to whether it will issue a Recommendation or a Decision.** In so deciding, 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.

How enforceable are DAB decisions?



- In the event that a Party fails to comply with any decision of the DAB, whether merely binding or binding and final, the other party may refer the failure itself to arbitration **for summary or other expedited relief.**
- There are reported arbitration cases where “binding and final” and “merely binding but not final” Engineer’s decisions have been enforced by an arbitral tribunal (ICC Cases n^o 3790, 3902, 4050, 4051, 4054 and 10619).
- Once enforced by an arbitral award, they could then be enforced internationally.



¿Permanent or Ad hoc DB?

Advantages of permanent DBs

- Determination “on the spot” possible.
- Faster proceeding through familiarity with project.
- Informal assistance with disagreements.
- Appointment of all DB members through agreement of both parties realistic
- No significant barrier to commence DB proceedings

Disadvantages of ad-hoc DBs

- Delay through appointment process
- No familiarity of DB with project =longer duration of proceeding
- Informal assistance not realistic
- Appointment of all DB members through agreement of both parties not practical
- Certain hesitation of parties in practice to commence DB proceedings=often delay in commencement

¿Permanent or Ad hoc DB?

Disadvantages of permanent DBs

- Cost, remuneration for availability
- Selection of DB members with wrong qualifications because types of disputes not exactly predictable

Advantages of ad-hoc DBs

- Lower cost, no remuneration for availability.
- Selection of DB members with right qualification for respective dispute.

Dispute Boards Direct Costs



The costs that need to be considered for each member of the DB include:

- Retainer
- Daily rate/Hourly rate
- Expenses
- Travel time to meetings
- Inflation
- Applicable currency
- Taxes
- Administrative expenses
- Interest for late payments

Other issues to be taken into account:

- Mechanics of payment
- Liability for fees
- Challenging fees
- Remedies

Administrative Expenses of ICC



- **Appointment of DB members**
 - Non refundable fee of US \$ 2 500
- **Decisions upon challenges**
 - Fee ranges from US \$ 2 500 to US \$ 10 000
- **Revision of Decisions**
 - Fee ranges from US \$ 2 500 to US \$ 10 000

Centro Internacional de ADR de la CCI
www.iccdisputeboards.org
disputeboards@iccwbo.org

Dispute Boards Indirect Costs



- The parties' cost associated with establishing the board, including management time and financial costs.
- Organizing and dealing with the members for and during site visits, and providing members with documents and handling correspondence; and
- The costs of representation (whether legal or otherwise) and the costs of experts in the event of a referral, response and/or representation



Example of a DB cost (USA)



1. Fees: approx. US \$ 75,000/year

- Average US \$ 2000/day x each DB member – x 3 DB panel members = US \$ 6000/x 12 (one monthly visit).
- Retainer to secure availability and independence of the DB member + daily fees for informal assistance (i.e.: site visits, advisory non-written opinions offered at a regular meeting, internal DB meetings).

2. Expenses (i.e. travel costs).

3. Additional fees for formal hearings at the same daily rate, but the number of days of the engagement increases. Some contracts add hourly fees for "study time" which occurs before or after the DRB meeting. This is an unpredictable cost element

With no formal hearings, the cost of a DRB panel is fixed to the project duration and is completely predictable.

The savings may be measured in millions of dollars.

List of “qualified” board members



There are several lists of ‘qualified’ dispute board members to which parties or their advisers may turn to for the purpose of finding suitable persons.

FIDIC (www.fidic.org) maintains a list of persons (President’s List of Approved Dispute Adjudicators) who have been scrutinised and examined over a gruelling three-day assessment period and found properly experienced and qualified for DB appointments.

The Dispute Resolution Board Foundation (www.drb.org) – a US-based non-profit organization that promotes the use of dispute boards – lists members’ CV’s which can be browsed by parties seeking to appoint DB members.

Similarly, the Institution of Civil Engineers (www.ice.org.uk) maintains a list of persons who also have been tested for suitability.

Regulatory Framework of a Dispute Board



- Main contract
- Tri-party agreement
- Applicable procedural rules
- Applicable law



ICC Dispute Board Tools



- There are three types of Dispute Boards which can be set up by inserting the respective standard **ICC Dispute Board Clause** into the contract.
- The **Rules** are designed to govern the Dispute Board proceedings (34 articles) (In force as from 1 September 2004)
- The **ICC model Dispute Board Member Agreement** contains:
 - DB member's undertaking
 - DB member's remuneration
 - The duration of the agreement
- The **ICC DB Centre** plays a subsidiary administrative role that may include:
 - Appointment of DB members
 - Decision upon challenges
 - Revision of Decisions
- ICC Model Turnkey Contract for Major Projects

Hong Kong Airport Dispute Board



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Hong Kong Airport Dispute Board



- **Project description:** International Airport
- **Approx. value:** US\$ 15/20 Billion
- **Location:** Hong Kong SAR China
- **Employer:** Airport Authority
- **Contract:** Tailor-made, similar to HK Government form with 22 main contracts subject to DAB.
- **Contractors:** International, some Joint Ventures with local partners, many specialists (e.g. Air Traffic Control Systems).



Hong Kong Airport Dispute Board



- **Number on DB:** A Board of 7 members of various disciplines was established with panel of 3 members to handle the various disputes.
- **How chosen:** Agreement between Authority and Contractor's Association, members selected prior to contract awards.
- **Frequency of visits:** Every 3 months
- **Total site visits:** About 16

Hong Kong Airport Dispute Board



- **DB determinations:** Decisions, not automatically final but binding in the interim.
- **Disputes referred to DB:** 6
- **Disputes that went to arbitration:** 1 and the DB decision was upheld.



Hong Kong Airport Dispute Board

Special factors:

- DB covered all main airport contracts.
- Quarterly reviews/visits with all main contractors.
- Each DB member selected for specialist knowledge and experience.
- Formal hearings with parties' positions well presented by engineers, not lawyers.
- “Draft” decisions for party comments before finalisation.

Miami International Airport Dispute Board



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Miami International Airport (MIA) Dispute Board



- **Project description:** International Airport Expansion
- **Approx. value:**
 - North Terminal Expansion Program, a \$ 2 billion program
 - South Terminal Development Project, a \$1 billion program
- **Location:** Miami, USA
- **Developer:** Miami Dade County



MIA Dispute Board North Terminal Expansion Program

MIA began utilizing its first dispute board in 2004.

*“The dispute board met regularly, and issues were discussed before claims were asserted. The dispute board never held any formal dispute resolution hearings. **The completion project finished with no claims, and no litigation.** The County was awarded a “Gold Award” for management excellence for the completion project from the Construction Owners Association of America”*

(Deborah Mastin –Representative of the public Owner)

MIA Dispute Board South Terminal Expansion Project



The South Terminal Development Project at MIA, a \$1 billion, project, was underway at the same time using the same construction manager, **but with no dispute board.**

“The South Terminal project ended with the contractor suing the construction manager for \$87 million in delay claims, with \$63 million in claims asserted against the County by the construction manager. The County spent months of negotiations to resolve the outstanding claims on South Terminal”

(Deborah Mastin)

Ft. Lauderdale-Hollywood Airport (FLL) Dispute Board



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Ft. Lauderdale-Hollywood Airport (FLL) Dispute Board



*“When I started working with the staff at FLL, I encouraged them to try a pilot project with a pro-active dispute board. They chose an \$8 million taxiway repair project that was in the critical path of the new \$800 million South Runway expansion project. The taxiway repair project met regularly, but held no formal dispute hearings. The taxiway repair project finished on time and under budget. **The staff at FLL then included pro-active dispute boards in every project greater than \$10 million, including the South Runway project components that had not yet been awarded, and the \$900 million Terminal Expansion program projects.** The South Runway is scheduled to open on time next month, and to date there have been no formal dispute hearings held by any of the FLL dispute boards, and no litigation that I am aware of”.*

(Deborah Mastin, August 2014)

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Benefits which flow from dispute avoidance board



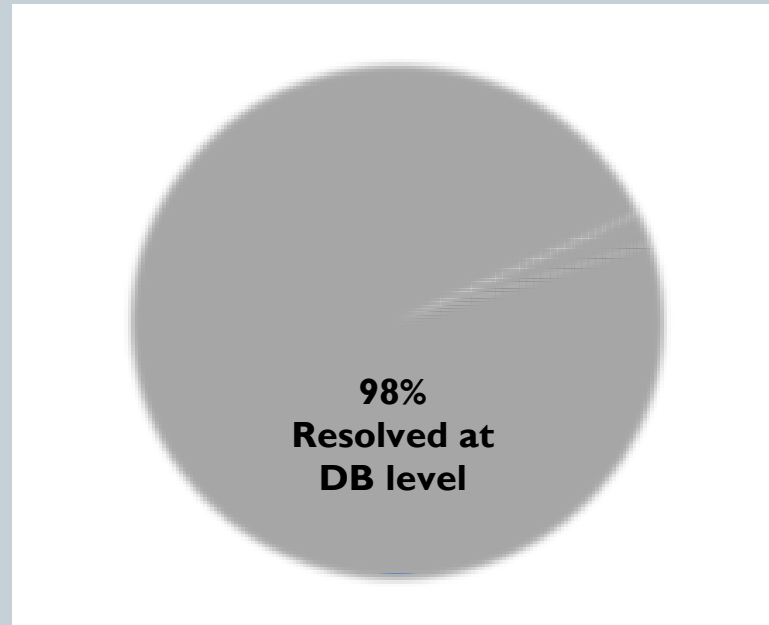
- Facilitates open communication, trust and cooperation.
- Focuses on early identification and evaluation of disputes.
- Provides an impartial forum.
- Reduces job delay due to disputes.
- Focuses on successful completion of the contract.
- Preserves corporate commercial relationships for future work together.

Statistics of the DRBF



DB track Record

Resolution rate do date: over 98%
of matters going to the DB
do not go on to later
arbitration or litigation



Thank you for your attention!



MARIA LAURA VELAZCO
ARGENTINEAN REPRESENTATIVE OF THE DRBF

The Dispute Resolution Board Foundation (DRBF) is a charitable organisation established in 1996 in Seattle, USA. Its function is to promote the development of DBs throughout the world. The DRBF has various regions and country representatives, produces a quarterly magazine, the FORUM, and holds training workshops and at least two conferences each year. For further details, contact the DRBF on www.drbf.org

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