

## Dispute Boards

Dispute Review Boards  
Dispute Resolution Boards  
Dispute Adjudication Boards

*The construction industry's preferred  
alternative to arbitration or litigation.*



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## What users say about the DB process

*“The World Bank supports the use of Dispute Boards in the execution of civil works contracts that it finances. Dispute Boards help prevent disagreements becoming formal disputes that so often lead to arbitration. This is the rationale behind the inclusion by The World Bank, and most of its multilateral development bank partners, of provisions regarding the establishment of Dispute Boards in the Harmonized General Conditions of Contracts of the Master Procurement documents for large civil works.”*

- Bernard Becq, Head of Procurement Policy  
The World Bank



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## What users say about the DB process

*“When we set off to construct a new port for Rio Tinto on the Southeast tip of Madagascar neither the employer, the engineer, nor the contractor had experienced a Dispute Board before. We did however appreciate that the whole concept of the Dispute Board is one that encourages the contract parties to work together to resolve issues as quickly and painlessly as possible. Because of this we never had to use the Board for a formal dispute, but it was comforting to know that we had access to some very highly qualified experts should one develop.”*

- Chris Beaumont, General Manager Construction,  
Port of Ehoala, Madagascar



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## Dispute Resolution Board Foundation

- Nonprofit corporation
- Formed in 1996 to promote the use of DRBs worldwide
- Over 700 members from more than 59 countries



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## Dispute Resolution Board Foundation

### Objectives of the organization

- Increase awareness of the Dispute Board process
- Educate the industry on the process
- Offer training workshops
- Publish *Practices and Procedures* Manual
- Publish newsletter and other publications
- Provide networking for members
- Coordinate with regional chapters and other industry organizations



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## History of DBs

- 1975 First domestic DRB in the USA (Eisenhower Tunnel)
- 1981 First international DRB (El Cajon Dam, Honduras)
- 1992 FIDIC issues DRB Supplement to the 4<sup>th</sup> Ed. Red Book
- 1995 The World Bank (IBRD) makes DRB mandatory for all IBRD- financed projects in excess of US\$ 50 million
- 1997 Asian Development Bank (ADB) & the European Bank for Reconstruction & Development (EBRD) adopt DBs
- 1999 FIDIC rainbow suite introduces Standing and Ad Hoc Adjudication Boards
- 2004 ICC introduces DB rules (DAB/DRB/CDB)
- 2006 Nine Multilateral Development Banks adopt DBs



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## Development of DBs

How do DBs fit with other Alternative Dispute Resolution (ADR) processes?

- Only ADR process that includes dispute avoidance
- Contractually obligated to use DB process before other methods, unless both parties agree otherwise



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## What is a DB?

A Dispute Board (DB) is a board of **impartial professionals** formed at the **beginning of the project** to follow construction progress, **encourage dispute avoidance**, and **assist in the resolution of disputes** for the duration of the project.



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## What is a DB?

- Organized before construction begins (typically 3 members with one member serving as Chair)
- Parties ensure that all members of the DB are
  - Impartial
  - Experienced in the work of the contract



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## What is a DB?

- Each member is provided with copies of the contract documents
- Each member becomes familiar with the
  - Project
  - Parties to the contract and other participants in the project
- All communications are through the Chair; no ex parte communications



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## What is a DB?

- Joint meeting during regular site visits
  - With owner and contractor representatives
- Encourages resolution of disputes at job level
  - Identify and discuss issues before they become disputes
  - Advisory Opinions
  - Hold full hearings, if necessary, and provide written recommendations



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## Role of the Project Owner/Employer

- Evaluate applicability of DB to the project
- Decide to use DB
- Include DB specifications and 3-party agreement in bidding documents
- Award construction contract



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## Role of the Funding Agency

- Customarily have monetary thresholds and mandatory provisions requiring the adoption of a DB
- Standard forms of contract included in bidding documents normally contain DB specifications and 3-party agreement
- Ad hoc agreement (at the time of contract or later)



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## Role of the Parties

- All Board members must be approved by both parties
- DB is formally convened
  - 3-party agreement is signed
  - First meeting is held
- DB meetings and site visits at regular intervals



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## Role of the DB

- Keep abreast of project activities and developments between DB meetings
- Encourage resolution of issues by parties before they become disputes
- When a dispute is referred to the DB:
  - Conduct hearing
  - Complete timely deliberations
  - Prepare written recommendations



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## DB Opinions, Recommendations, & Decisions

- Advisory Opinions: typically are given orally for potential disputes before the parties have formed firm positions, but wish to have the impartial input from the DB following limited presentations by the parties.
- Recommendations and/or decisions with supporting rationale are provided in writing after a full hearing of the dispute by the DB



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## Costs of DBs

- Direct cost ranges from 0.06-0.30% of final construction contract amount, shared equally between the parties
  - €2000 to €3000 per day per member
  - Monthly retainer
  - Travel time to meetings and expenses
  - Progress review between DB meetings
  - Board deliberations and report preparation following a full hearing



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## Costs of DBs

- Indirect costs
  - Parties expenditures in preparing for and participating in DB meetings and hearings
  - Distributing progress updates and other documentation to the DB members



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## Recommended Elements for a Successful DB

- All DB members are:
  - Impartial
  - Subject to approval of both parties
- All members sign the 3-party agreement obligating them to serve both parties impartially



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## Recommended Elements for a Successful DB

- The fees and expenses of the DB members are shared equally by the parties
- The DB is organized before the work begins, BEFORE there are any disputes



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## Recommended Elements for a Successful DB

- The DB keeps abreast of job developments through:
  - Relevant documentation
  - Regular site visits and meetings
- Either party can refer a dispute to the DB for a full hearing
- An informal but comprehensive hearing is convened promptly



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## Recommended Elements for a Successful DB

- The written recommendations or decisions of the DB are well reasoned and implemented by the parties
- All parties support the system and are fully engaged
- The DB members are absolved from any personal or professional liability arising from their DB activities



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## Perceived Problems with DBs

Misperception:

DBs do not add value

Reality:

- DB cost advantages include more competitive bids, better communication on the job, resolution of issues at job site level and fewer end-of-project claims, all resulting in lower total contract completion cost and time



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## Perceived Problems with DBs

Misperception:

DBs impose their own concepts of fairness and equity

Reality:

- DBs have no authority to change the contract provisions and must comply with applicable laws



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## Perceived Problems with DBs

### Misperception:

Presence of DB will promote claims

### Reality:

- Many parties maintain that the avoidance of disputes is the greatest benefit of DBs
- Neither party wants to suffer loss of credibility by submitting non-meritorious claims



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## Perceived Problems with DBs

### Misperception:

Lack of qualification or presence of bias

### Reality:

- Parties must be willing to reject any questionable nominee and accept only those whom both parties consider to be impartial and experienced in the work of the contract



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## Perceived Problems with DBs

### Misperception:

The presence of a DB will promote acrimony

### Reality:

- Exactly the opposite - properly conducted, the DB process reduces acrimony



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## Perceived Problems with DBs

### Misperception:

DBs are unreliable because they lack formalities of legal proceedings

### Reality:

- Informal nature of hearings encourages open and honest communication
- Less than 2% of all disputes referred to DBs have gone to subsequent proceedings (arbitration or litigation)

(cont.)



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## Perceived Problems with DBs

### Misperception:

DBs are unreliable because they lack formalities of legal proceedings

### Reality:

- Contemporaneous interaction by the DB and readily available witnesses minimize factual disagreements
- Board members experienced in the type of work ask probing questions



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## Application to Types of Construction

### Public and Private Projects

- Airports
- Bridges
- Buildings
- Dams
- Energy projects
- Highways
- Ports
- Power plants
- Underground
- Universities



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## Cost Savings and Other Benefits

Dispute avoidance and resolution benefits

- Improved working relations and management focus on the real issue – timely completion within budget
- Cost savings for the project and the parties
  - Reduces transactional costs (legal & consultant fees)
  - Reduces bids by ensuring less costly dispute resolution



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## Dispute Avoidance and Resolution Benefits

The presence of a DB:

- Promotes mutual resolution
- Facilitates positive relationships
- Facilitates open communication
- Facilitates trust and cooperation
- Minimizes posturing



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## Dispute Avoidance and Resolution Benefits

- Focuses on early identification and evaluation of disputes, followed by prompt resolution
- Parties are predisposed to use informal procedures



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## Dispute Avoidance and Resolution Benefits

- Extremely high resolution rates
- Provides an impartial forum
- Provides informal and rational basis for resolution (political cover)
- Parties are required to use the DB procedures for resolution prior to any other judicial proceedings, unless agreed otherwise



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## Dispute Avoidance and Resolution Benefits

- Reduces job delay due to disputes
- Better informed decisions by experienced Board with contemporaneous project knowledge
- Increases the number of bidders by ensuring more timely resolution of disputes



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## DRBF Statistical Database 1975 - 2010

Number of completed projects:

**Over 2,200**

Total construction value:

**Over \$200 Billion**



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# Questions?



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