

# DRBF R3 Breakfast Briefing

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### ***One-Person Dispute Boards*** ***- Challenges and Insights***

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Dispute Resolution Board Foundation. *Moving projects forward* since 1996.



# What is a One-Person Dispute Board?

- The role, purpose and procedures for a one-person DB (IP-DB) are generally the same as for a three-person DB (3P-DB).
- The use of IP-DBs has been steadily increasing worldwide over the last 10 years, particularly by government authorities delivering a pipeline of infrastructure projects (e.g. Caltrans, TfNSW).
- There are modified forms of IP-DB (with limited powers) which have been utilised in some states. For example, the role of a Dispute Resolution Advisor (DRA) has been used in Hong Kong for many years. A similar concept (IRA) has been adopted by TMR in Qld for some smaller projects.

# How does a IP-DB differ from a 3P-DB?

- ➔ In principle, there is no difference between a IP-DB and a 3P-DB. The DB's role and procedures are the same.
- ➔ In practice, a 3P-DB is likely to:
  - have greater and more diverse experience to bring to the project;
  - provide more effective and better outcomes for the project, in both its dispute avoidance and resolution roles;
  - generate a higher level of trust, cooperation and confidence between the parties and the DB;
  - share ideas, tasks, drafting and reviewing between DB members.

# IP or 3P-DB? A decision based on project type, size and complexity

- IP-DBs are generally only suitable for smaller, less complex projects.
- Total cost is usually the best indicator of project size. Projects in the range of \$50 million to \$250 million are often considered suitable for a IP-DB.
- Complexity of the project is the other factor to be considered. Smaller transportation projects, such as roads, railways or bridges, are often suitable for a IP-DB. With additional size and complexity, e.g. tunnels, electrical and mechanical works, etc, a 3P-DB is generally the best option.

# What projects are not suitable for a IP-DB?

- ➔ Project type, size and complexity need to be assessed.
- ➔ Unique (e.g. large dam, power station) and PPP projects need special consideration but usually require a 3P-DB.
- ➔ Projects not suitable for a IP-DB include:
  - projects valued in excess of (say) \$300 million (AUD);
  - major road / tunnel / bridge projects;
  - metro rail projects (including urban development);
  - airports, water and power generation projects;
  - major development projects, e.g. Olympic Games facilities.

# IP-DBs in FIDIC 2017 Contracts

- FIDIC 2017 Contracts provide the option of a IP-DAAB (“sole member / adjudicator”) or a 3P-DAAB (“joint Board members”).
- Almost all international forms of FIDIC contracts (e.g. World Bank, ADB, JICA) use 3P-DBs as the default option.
- Many developing countries (e.g. within Africa, Pacific Islands, South America) use the FIDIC IP-DB option for small value, less complex projects.

# Why do users choose a IP-DB?

- The dispute resolution regime (including the use of DBs) within a project is almost always determined by the Owner (or its legal representatives) during the project procurement phase, without input from the future Contractor.
- Generally, minimising the cost of the DB is the Owner's prime consideration.
- “Why use a 3P-DB when a IP-DB can do the same job?”
- DRBF's experience is that very few Owners recognise the need to consider project type, size, complexity and suitability of the IP-DB, when choosing a DB option.

# Challenges for IP-DB Members

- ➔ #1 – DB members' attributes and experience.
- ➔ #2 – Building trust, cooperation and confidence.
- ➔ #3 – DB governance and administration.
- ➔ #4 – Dispute avoidance and resolution.
- ➔ #5 – Lack of DB collegiality and synergy.



# #1 – DB members’ attributes and experience

- Any DB member (either IP or 3P) should satisfy the following basic criteria:
- be independent and impartial, i.e. no past or present conflicts of association or interest;
  - have training in and an understanding of the DB’s role and processes;
  - be experienced in the type of work and risks involved in the project;
  - have prior experience in dispute avoidance and dispute resolution activities on projects;
  - demonstrate strong management and ‘people’ skills.

# #1 – Attributes cont. – IP-DB Members

➔ IP-DB Members should also satisfy the following additional criteria:

- prior experience as a member of a 3P-DB;
- technical and legal experience with similar contracts / types of projects;
- prior dispute resolution experience, including the ability to write persuasive advisory opinions and fully reasoned decisions;
- strong governance and management skills, including chairing meetings, communicating with parties, preparing agendas, minutes, etc.

## #2 – Building trust, cooperation and confidence between the DB and the parties

- To be effective, all DBs need to establish a relationship of trust and cooperation with the parties.
- Building this relationship requires significant effort and commitment from the DB. DRBF's experience indicates that 3P-DBs are usually more successful in this regard.
- A IP-DB member, nominated by the Owner or selected by the Contractor from an Owner's shortlist (the usual situation) will inevitably be subject to a (real or imaginary) apprehension of bias from the Contractor. Such perceptions are subtle and hard to dispel. They are reinforced if the IP-DB is subsequently required to make advisory opinions or decisions in favour of the Owner.
- The parties' levels of trust, cooperation and confidence in the DB process are greater with a balanced, 3P-DB, nominated by both parties.

## #3 – DB governance and administration

- ➔ DRBF's experience is that DB governance and management processes within large, complex projects are always more effective with a 3P-DB.
- ➔ Managing the DB process, including chairing regular DB meetings, requires experienced governance and “boardroom” skills.
- ➔ The administrative aspects of the DB process, including arranging meetings, recording minutes, communicating with the parties, etc, are also time-consuming and onerous.
- ➔ It is very difficult for a 1P-DB to effectively chair and control a DB meeting, while at the same time:
  - encouraging “without prejudice” discussions between the parties;
  - asking forensic-style questions on contentious issues;
  - interpreting the parties’ body language; and
  - making detailed notes of the discussion and directing future actions.

## #4 – Dispute avoidance and resolution

- ➔ With a 3P-DB, dispute avoidance activities can often be shared between the DB members according to their expertise. For example:
  - chairing ‘without prejudice’ negotiations between the parties;
  - facilitating meetings on technical issues;
  - facilitating meetings on legal/contractual issues;
  - Acting as a ‘mediator’ on particular questions (e.g. quantum).
- ➔ With a 3P-DB, dispute resolution and decision writing can be a joint process, utilising the particular skills (legal, technical, arbitral) of each DB member.
- ➔ In both these fundamental areas of DB practice, DRBF’s experience is that 3P-DBs generally provide better outcomes for the parties and the project, in comparison to IP-DBs.

## #5 – Collegiality and Synergy

- ➔ Sharing the administrative tasks – monitoring of site reports, notes of DB meetings, observations on site visits, meeting agendas, minutes and the like.
- ➔ Exchanging ideas about possible dispute avoidance techniques, party behaviours at meetings, analysis of technical issues, content of advisory opinions and determinations.
- ➔ Collaboration in the drafting (or review of drafting) of advisory opinions and determinations.
- ➔ Sharing the load within DB meetings – asking questions, observing body language, managing difficult exchanges.

# What can / should DRBFR3 do to assist IP-DBs?

- Provide specific training for IP-DBs?  
(DRBF in USA and FIDIC in Europe already provide courses for DB Chairs)
- Informal mentoring of IP-DBs by experienced DRBFR3 members?
- Provide formal support of IP-DBs (with the consent of the parties) in areas of (lesser) expertise?
- Educate owners and legal representatives as to the reasons for utilising 3P-DBs in lieu of IP-DBs?
- Seek assistance from major DB users, to use 3P-DBs to expand the 'gene pool' of experienced IP-DB members?
- Any other ideas?

# QUESTIONS / COMMENTS



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