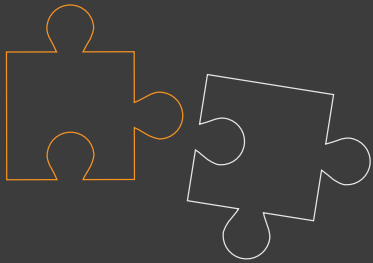


ENHANCED EFFICIENCY INCREASES VALUE OF DISPUTE BOARDS

ADDRESSING PRACTICAL CHALLENGES
FACED DURING DB IMPLEMENTATION
WITH RECOMMENDATIONS FOR
IMPROVEMENT



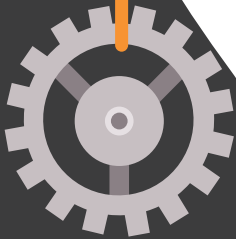
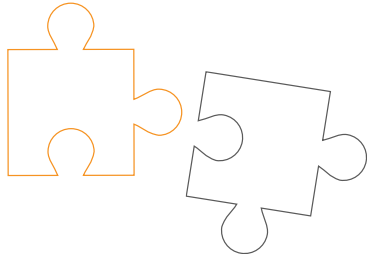
EDITORIAL

Dispute Boards originated in the construction industry over 50 years ago at the Eisenhower Tunnel in Colorado. Projects were facing an increasing number of disputes due to challenging technical issues and economic pressures. The only methods to resolve those disputes, formal litigation or arbitration, were becoming increasingly costly, time-consuming, and often created adversarial relationships.

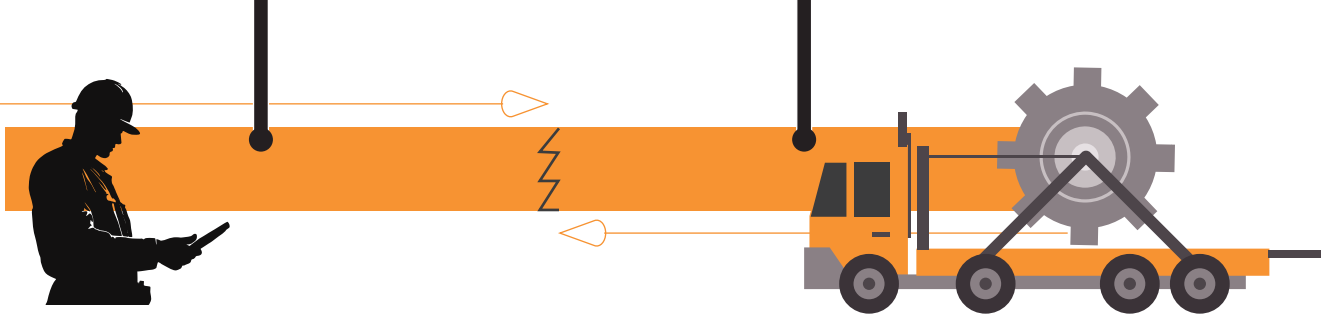
The industry needed cost-effective and practical solutions, and the Dispute Board (DB) process was born: a neutral panel of three experts who follow the project from the beginning, address issues and resolve disputes in a relatively informal and cost-effective manner. That very first DB provided all the evidence needed to demonstrate the value DBs can bring. Palmer King, one of the members of the first panel wrote that :

"The construction of the first bore of the Eisenhower Tunnel in Colorado was a financial disaster. Determined not to get burnt again, the Colorado Department of Highways (DOH), for the construction of the second bore, provided for a "Review Board" to make recommendations which could not be settled at the job level."

"The first bore of the Eisenhower Tunnel had resulted in enormous claims, on which the DOH had paid out some \$50,000,000. But with the second bore, the biggest problem the Board had was that we went along for over two years with no problems."⁽¹⁾ "

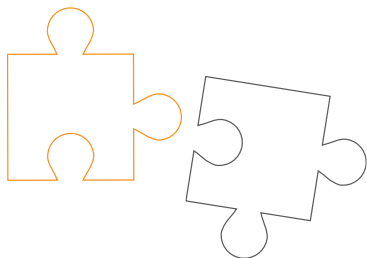


⁽¹⁾ DRBF Forum, Volume 1, Issue 1, January 1997



EDITORIAL

The construction industry faces similar challenges today : competition, tight margins, and larger and more complicated projects with more complex governmental and socio-economic requirements, environmental regulations, and public interest group pressures. To meet those challenges, the role of DBs is evolving. There is an increasing emphasis on dispute or conflict avoidance.



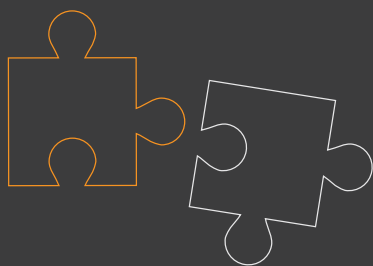
The DB works collaboratively with the project to try and prevent disputes arising in the first place, not just providing an efficient, cost-effective means of resolving any dispute that may arise.

The value of DBs is recognized by governments, funders, and contract providers, based on experience of their use.

The governments of Honduras, Indonesia, Peru, and others have mandated the use of DBs on certain projects.

- Some major infrastructure projects well-known to the public were implemented with success with the use of a Dispute Board: the Eurotunnel boring or more recently the 50+ Km new metro Lines around Paris known as the 'Grand Paris';
- The UK Government's Construction Playbook, a procurement manual, states that : *"dispute avoidance boards are a potential way to avoid and manage disputes more effectively and, where appropriate, should be engaged with projects from inception to completion."*
- Development Banks and Funding Agencies overwhelmingly support the use of DBs. The Japan International Cooperation Agency Dispute Board Manual notes that : *"The unique feature of the DB, and a major reason for its success, is that it is a tool for prevention of disputes."*
- The 2024 review edition of the Australian As-400 construction contract is the latest in an increasingly long line of standard forms to incorporate the use of DBs.
- American Arbitration Association/International Center for Dispute Resolution and Consensus Docs include DBs in their standard form contracts, and large state agencies in the U.S. use DBs in all their roads contracts.
- In the FIDIC 2017 rainbow suite, the title of the DB role was changed to *"dispute avoidance and adjudication"* (DAAB) as a reminder to the parties of the important role of the DAAB members in promoting dispute avoidance techniques including the issuing of non-binding advisory opinions, to encourage resolution of issues before they become disputes.
- Also in 2017, the NEC4 Contract introduced the Dispute Avoidance Board whose role includes assisting the parties in avoiding potential disputes.

Dispute Boards are an important aspect of best- practice project management.



Employers and Contractors Seek Value

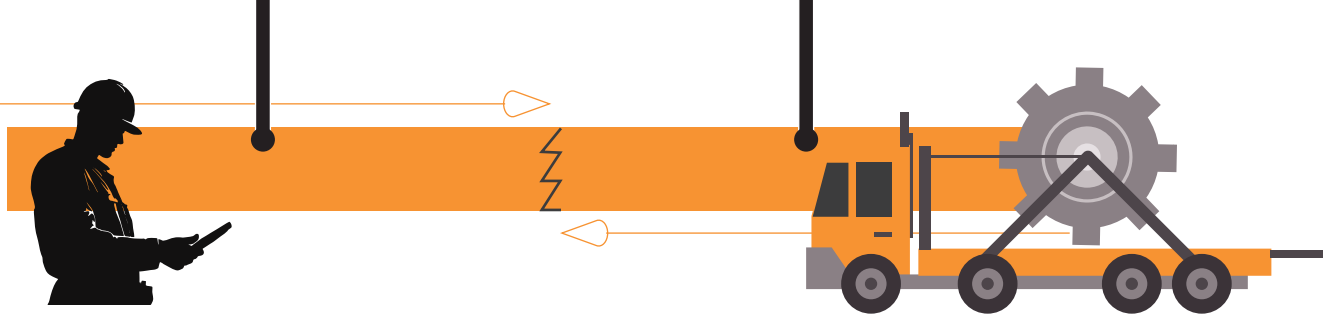
Major projects give rise to significant levels of participant risk, influenced by project type, complexity, duration, and budget.

Employers typically carry out a comprehensive risk assessment and risk management plan to handle and mitigate identifiable risks. Some may be covered by insurance, and others are addressed within the contract management processes.

DBs are perfectly positioned to assist with risks to cost and time issues :

- In their dispute avoidance role, DBs collaborate with the parties and assist in the early identification, control, and management of potential disagreements before they develop into a formal dispute.
- In their dispute resolution role, DBs provide prompt independent recommendations or decisions, enabling parties to resolve matters more efficiently at the project level and avoid escalation to lengthier and more costly methods (e.g. arbitration or litigation).





Cost Benefit Analysis

Over the years, studies have consistently shown that the carrying costs of a DB relative to the budget of the project are relatively small, usually in the range **of 0.05-0.15% of project costs**. Comparison studies between non-DB projects and those with an active DB have shown significantly fewer and smaller cost overruns and schedule delays.

Research carried out in Australia in 2014⁽²⁾ suggested that the use of DBs had a beneficial effect in reducing delays and cost overruns, not just in reducing the costs of disputes which in many projects do not arise. The research stated that the chance of an “industry norm project running late is 2.3 times greater on projects that do not have a DB and the chance of such a project running more than three months late is 6.5 times greater than projects with a DB and that there is a greater than 80% chance that a project with a DB will be completed at, or shortly after, the contract date for Practical Completion, compared to less than 50% for the industry norm.”

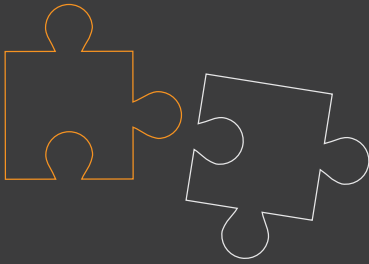
This research is reflected in the actual experience of the Florida Department of Transportation (FDOT) in the USA which was facing major litigation challenges. They began using DBs and by 2013, they had more than 750 projects with a DB averaging 0.10% of the construction cost. FDOT performed an analysis and found that for those projects with a DB, time overrun was 1.8% and cost overrun was 12.1% compared with non-DB contracts showing 19.2% in time overruns and 17.9% cost overruns. FDOT decided to use the process for almost all contracts, and over the past 25 years they have had little litigation resulting in innumerable savings of time and money.

Since 2000, the California Department of Transportation (Caltrans) has required three-person Dispute Resolution Boards (DRBs) on projects with a total bid of more than \$10 million. So successful was the new approach that in 2007, they introduced a program for one person Dispute Resolution Advisors on smaller projects between \$3 and 10 million. Professor Renato Nazzini and Raquel Macedo Moreira of King’s College London released at the end of 2024 a report entitled: “2024 Dispute Boards International Survey” based on their study of the worldwide use of DBs over the past six years. Amongst other things, the report noted that most users found DBs useful in avoiding disputes. Subsequent proceedings (such as arbitration or litigation) were only commenced under 10% of the time and even then, the final decision was rarely substantially different from the DB’s original decision. In terms of costs, the total cost tended to represent no more than 0.5% of the total costs of the projects⁽³⁾.

⁽²⁾ DRBF Forum Volume 19/Issue 1 2015

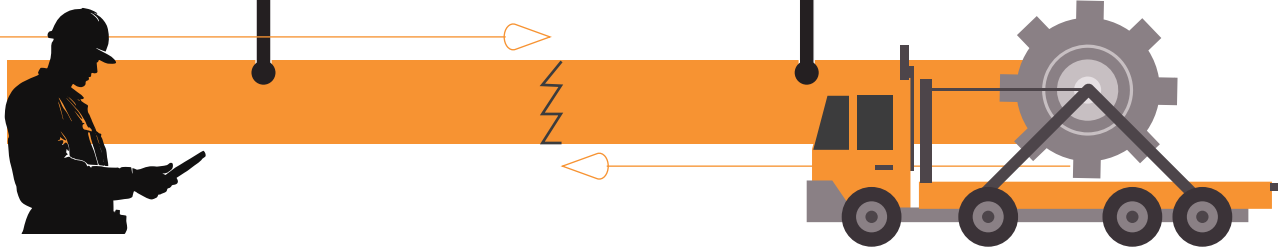
⁽³⁾ A full copy of the report can be found on [the website of the Centre of Construction Law and Dispute Resolution](#)

Challenges and Proposed Solutions



While the track record is solid, the implementation of Dispute Boards is not without its challenges. The process has adapted over time to address industry difficulties and constraints. Continuous assessment can guide users towards the best outcomes so that DBs continue to deliver on their promise of an early intervention method for the benefit of projects globally.





Cost – particularly in low- and middle-income countries

DBs are perceived by some employers or project owners as being too expensive, resulting either in the deletion of the applicable contract clauses from standard form contracts or the selection of inexperienced DB members, who are perceived to be less expensive.

Proposed Solution :

More targeted education needs to be provided to appointing parties.

A focused promotion of the Cost Benefit Analysis of DBs, including statistics on the success rate and cost-savings of DBs (as referenced above), should be undertaken.

The cost issue is also related to cultural considerations where some employers perceive Dispute Boards as having little or no value (see below).

Training should be provided on the variety of dispute avoidance techniques a DB may utilize, including conflict avoidance, informal assistance, and advisory opinions.

Other approaches to managing the DB costs might include adjusting the number of in-person meetings according to the needs of the project. For example, regular virtual meetings could replace some of the site visits, but not all. It is important to maintain a minimum number of in-person DB meetings. Regular meetings and site visits are essential to the effectiveness of the DB process. Face-to-face communication is often the first, and many would say always the most important, part of dispute avoidance.

Further, when contentious issues arise, the DB can reach quicker, more efficient, and less costly conclusions, where they are already familiar with the project and the parties by employing transparent and complete presentations of the disputes.

It is important for DB members to have a wide range of skills, proficiencies, and experiences, and it is true that some new DB practitioners may have lower fees than more experienced members. Previous experience with DB procedures may provide some efficiencies, and new DB members bring fresh ideas and different perspectives, which can be invaluable to the process. Therefore, a balance is often the best solution. In any event, members should not be selected on price or prior DB experience alone.

Not all DBs are standing boards, some are ad hoc

If one has a short straightforward project, then there is no need for a standing three-member DB. Often one DB member will suffice.

Proposed Solution : Care must be taken in defining any project as straightforward. The Parties need to consider the size, value, duration, and complexity of the project,

Challenges and Proposed Solutions

as well as the technical demands and expertise that may be required. Putting mandatory limits or thresholds can be counter-productive. Again, more targeted education needs to be provided to appointing parties. Choose the right DB for your project.

Standing DBs are best suited to long-term, complex construction or infrastructure projects. A DB formed at the start of the contract will quickly become familiar with the project and key personnel, can perform dispute avoidance techniques, and follow dispute resolution processes expeditiously. It should remain in place until the end of the project.

With a three-person DB, you have the advantage of three different skillsets and approaches. If one member has to be replaced, you do not lose the experience and knowledge that the other members have gained.

An ad-hoc board can often be more expensive, as the first thing the Parties have to do when it is appointed is to bring the new DB up to speed on the project progress and situation. A standing DB will already have that knowledge and be better able to manage any dispute that has arisen; better, it may have in fact been able to assist the Parties in preventing the issues that arose from becoming a dispute in the first place.

Party sabotage

Commonly, parties that are not convinced of the added value of Dispute Boards will undermine the DB process by jointly failing to constitute the DB either at the very outset of the project or not at all. Experience could lead one to the conclusion that the common ground is that the parties tacitly concentrate only on moving the work forward, hoping to be able to rely on their ability and/or willingness to resolve disputes as they arise. This does not work.

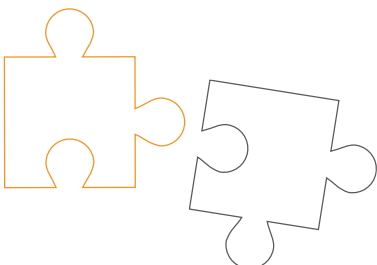
Proposed Solution :

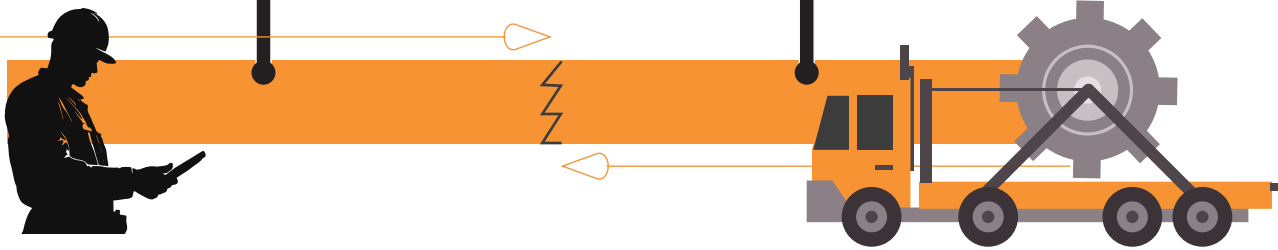
Funders often require the establishment of a standing DB. They can encourage the project owner or employer to follow the agreed process.

Training of staff responsible for the procurement and implementation of contracts at project level, and continuous collaboration between funders and the project owner or employer can assist with this.

Parties should pre-agree on a list of potential DB members during the tender or start-up phase of the project.

If one party is keen on establishing the DB, then it should be proactive and nominate one and inform the other party it is their turn to make an appointment. The appointed Board member will then also start pushing for the appointment of the other two members. If necessary, that party might need to consider approaching the nominating body appointed under the contract, although it is always preferable to appoint a DB consensually.





Lack of geographical diversity in DB members

There have been concerns expressed by some parties regarding the ability of international DB Members to effectively, and neutrally deal with local contractual issues or understand cultural considerations that may be at play.

Proposed Solution : Parties should consider appointing at least one of the DB members from the region where the project is located but not of the same nationality as either of the parties.

Parties should ask potential DB members for details of their experience in the region. Many DB members may have worked there in some capacity. A standing DB would also have the time find out about the local customs.

Again, DRBF training can help provide a solution where there is a perceived lack of knowledge or awareness.

Cultural biases

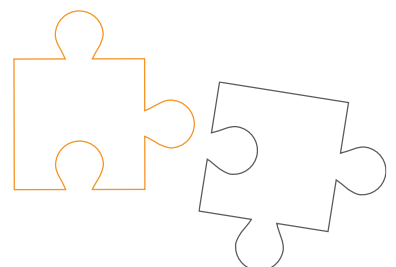
Some cultures will just not want to accept a DB to resolve disputes. There is also a view that they can be a little condescending and some cultures do not like being told what to do. In some areas, local parties will simply ignore DB decisions as it has no legal standing. However, in other countries (that have no statutory regime for adjudication either), parties will often follow an award pending arbitration if they are obliged so to do under the contract. It is indeed a cultural thing.

Proposed Solution:

Again, continued education for all, is necessary to establish the benefits of the DB process and the best ways to work together with DBs to help realise those benefits.

Parties should be aware of the cultural situation when entering into contract and be realistic. Consideration should also be given to the traditional ways of resolving disputes both in the region of the project and where the Parties are from. Many of these have their roots in forms of dispute or conflict avoidance.

DBs are successful in many places where they are not “law.” Again, education, which includes acknowledging the validity of these concerns and offer practical strategies, can assist in helping parties to understand the benefits of the DB process as a contractual matter between parties who wish to resolve issues and move away from the legal argument.



Challenges and Proposed Solutions

DB members should approach their roles with cultural sensitivity and respect – for example, a demonstrated willingness to engage in active listening or to understand/consider local customs and practices.

The key message is that you do not need to have legislation to know that you are better off resolving issues and disputes at the project level.

Lack of Borrower Compliance

The Multilateral Development Banks and International Financial Institutions (MDBs and IFIs) generally require the use of the 2017 Editions FIDIC Conditions of Contract that include their own mandatory Particular Condition wording of Sub-Clause 8.1, which says that the Notice to Commence cannot be issued unless the “....constitution of the DAAB in accordance with Sub-Clause 21.1 and Sub-Clause 21.2 as applicable” has been completed. MDBs and IFIs seem reluctant to mandate compliance with Sub-Clause 8.1 with the common result that the DB is not constituted at the outset of the project or at all.

Proposed Solution :

The MDBs and IFIs should consider implementing the practice of some funders to refuse to disburse funds to the borrowers unless and until the DB is in place. Lenders should enforce the mandatory nature of the use of DBs by their borrowers also under their loan agreements.

MDBs and IFIs should prevent borrowers from circumventing their payment obligation following a DB ruling in favour of the contractor.

It should be mandatory that both parties give effect to the DB decision as provided for in their contracts, unless it is escalated and revised following litigation or arbitration.

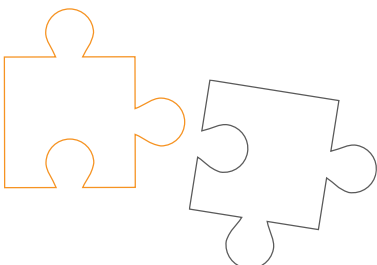
More professional diversity of DB members

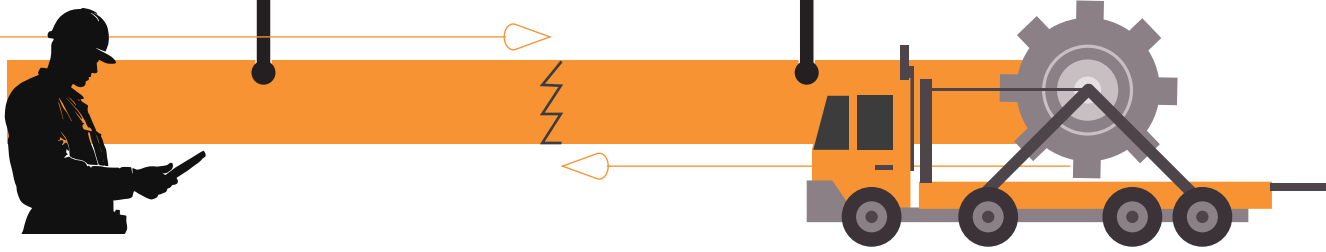
There is a need to train and to qualify suitable DB members. At present, there are only about 115 individuals that have been admitted to the FIDIC List of Accredited Adjudicators. Although they welcome the recent increase in numbers, EIC and CICA view this list to be insufficient to meet the needs of the international construction community.

Proposed Solution :

Training and assessment of additional DB candidates is required.

Parties should be educated on best practices for Board member selection.





An effective panel is comprised of three members who bring complementary skills to the Board. These skills include qualifications and experience as well as good communications and management attributes. Other considerations include impartiality, independence, and availability.

In some cases, with a complex project, parties may struggle to find the necessary technical competence in three members. An option is to appoint a pool of DB members (contract managers, designers, geotechnical engineers, and other technical competencies) and a standing Chair, with different backgrounds. When an issue arises, the Chair of the DB can draw from the pool of appointed DB members to find those who are most suitable to resolve the issue at hand.

Time Delays

Contracts specify the timeframe for dispute resolution – FIDIC prescribes 84 days and ICC prescribes 90 days. Often, these time-frames are not respected, and the average duration is longer. This has a detrimental effect on the primary benefits of DBs: to resolve issues and disputes in real-time, efficiently, and effectively so that projects remain on track.

Proposed solution :

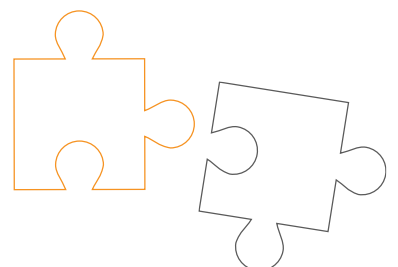
Qualified Dispute Board members are in high demand, and the need to expand the pool of trained and competent DB members has already been addressed.

DB members should ensure they will be available for all site visits and regular DB meetings for the duration of the project. Potential DB members should consider their own availability carefully. If a DB nominee has schedule constraints, these should be made known to the parties at the time of nomination.

The DB plays a key role in any project. Parties should spend time to find suitable candidates that remain available for the duration of the project.

In addition, parties can potentially unnecessarily prolong the DB process with submissions and supporting documents that run to many thousands of pages. Care should be taken when deciding what issues to refer to the DB, and the documentation required for their clear understanding of the issues.

Sometimes, in the interests of ensuring the right outcome is achieved, issues can take



Challenges and Proposed Solutions

more time than the prescribed timeline. The DB can propose a prolongation in these cases which need to be accepted by the parties.

In addition, one of the parties may seek to prolong the process. Most DB rules give the DB power to ensure that the DB proceedings remain proportionate and on track.

Decision or Recommendation ?

In some jurisdictions, there is concern that DB recommendations or opinions are not implemented because public officials are anxious to avoid any suspicion of corruption. This can cause deadlock and lead to further, more costly disputes.

Conversely in other jurisdictions, there is a preference for recommendations as this is more in line with the particular culture and parties feel more able to use the recommendation to achieve a final agreement.

Proposed solution :

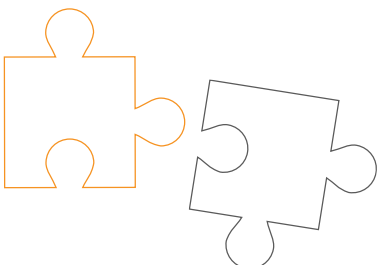
All parties, including funders, owners and employers, contractors and engineers should consider from the outset which approach works best in the circumstances of their particular project.

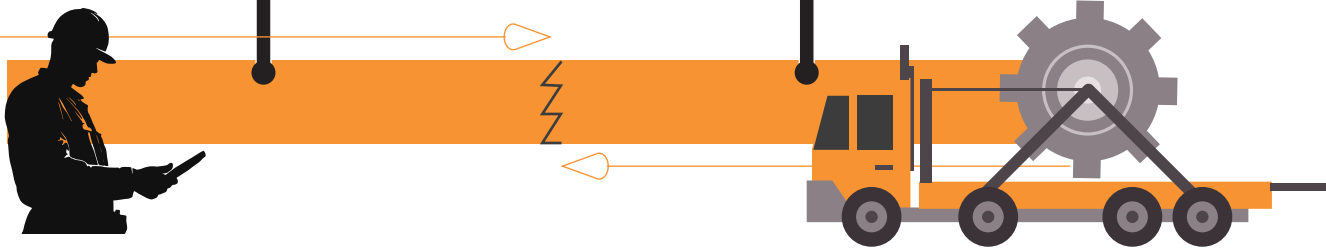
Whichever is preferred, it is always important that parties recognise the alternative: either going to straight to arbitration, which may be difficult if the project is still ongoing or storing up all the issues which may lead to an expensive and time consuming arbitration which follows completion.

Even where there is an expressed preference for formal decisions, a standing DB may still be able to assist the Parties by adopting dispute or conflict avoidance techniques. If it is not possible to avoid the Referral, it may be possible to narrow the issues in dispute.

Often problems can be caused because those tasked by public authorities to audit projects are not familiar with the construction process or the progress of the particular project. Rather than auditors making or reviewing decisions in isolation, consideration should be given to initiating education and training programmes and inviting those officials to DB or other site meetings in order to help them understand the reasons why decisions are being taken. Ideally both.

The Parties can also consider asking the DB to address particular questions which may be of relevance to funders or the public accounting process.





Where do we go from here : the next steps in Dispute Board practice

In 2003, Professor Kathleen Harmon reflecting on her research into the use of early DBs commented that: *"a DRB that resolves disputes contemporaneously with the emergence of a problem is likely to result in less stress, greater job satisfaction and a more efficient workforce that can concentrate their efforts on constructing the project..."*⁽⁴⁾ "

That statement is as true today as it was 20 years ago.

However, it is important that DBs and users continue to work together and progress towards greater efficiency, through increased education of funders, users, and practitioners.

To advance the use of DBs, we propose the following actions :

- Establishing standing boards at the commencement of the construction contract.
- Increased and continued education for DB practitioners and all users.
- Covering the cost of the DB by including and identifying it in the project budget.
- Increasing pool of potential DB members, thereby providing greater diversity.
- Increasing awareness of the value of conflict or dispute avoidance and the value of the informal opinion or recommendation.
- Promoting further research into the value of DBs.

Continuous improvements to the Dispute Board process benefit all stakeholders – funders, employers, contractors, DB practitioners, and the communities that are served best by well-managed projects delivered on time and on budget.

⁽⁴⁾ Effectiveness of Dispute Boards, Journal of Construction & Engineering, December 2003

