

# The Use of Dispute Boards in Public-Private Partnership Transactions



*The Dispute Board in Practice*







## Project Development The Developer versus Country Conundrum

- **The Developer Issue:** Exposure in "unusual" countries and the need to have a real-time effective way to resolve disputes or they price for the risk. (Which is bad for countries).
- **The Country Issue:** Endless arbitration and/or court proceedings and not having their projects or public services delivered on time and at expected cost nor do they don't want to be taken advantage of by shrewd operators.

## The Developer versus Country Conundrum

- **Solution:** Quick and effective dispute resolution is not just an isolated theoretical problem--it goes to the heart of what we all want for developing countries--delivery of infrastructure, which has a critical impact on economic growth and therefore alleviation of poverty.
- **Summary:** This issue is a commercial and political risk, not just a legal risk.

## Traditional Procurement or PPPs

## Traditional infrastructure procurement versus PPPs

- **Traditional: Government specifies the quantity and quality of the service with the construction awarded by tender. Once finished the asset is transferred to and operated by the government.**



## Traditional infrastructure procurement versus PPPs

- **PPP:** The government again specifies the service it desires and the length of time it will allow the private entity to operate the service after which the design and construction are left to the private entity as is its operation into the future with a profit split arrangement thus, in theory giving the private partner an incentive to incur additional construction cost if those costs reduce future operating and maintenance cost. The risk is now on the private party not the government – or is it?

## THE SOLUTION

## The PPP Process and DBs

- **PPPs are a major focus for the WBG, the G20 and indeed the world, as a means of addressing inequities in delivery of basic infra services (traditional and social). Governments cannot deliver these important projects on their own.**
- **Disputes are common in these typically large and complex, high profile projects -- and even small projects encounter challenges. Disparity between stakeholders' capacity and access to information can often complicate matters – where are disputes resolved? Local courts? Arbitration? Where?**

## The PPP Process and DBs

- **Especially in Fragile and Conflict Affected Situations, traditional and formal dispute resolution in courts can be challenging and time consuming.**
- **As discussed DBs are used extensively in international construction projects including PPPs and, because of their effectiveness, are embedded in the procurement rules of many IFIs (including the WB) and in many international standardized construction contracts.**
- **DBs are a real-time operational risk management tool and also a tool for engaging in a meaningful way with affected communities throughout the life of the project .**

## Types of Dispute Boards

### 1. Dispute Review Board ('DRB'):

- A DRB issues 'Recommendations', which are non-binding opinions.
- If no party expresses dissatisfaction with a Recommendation within a stated time period, compliance is required.
- If a party expresses dissatisfaction within a certain period of time, that party may resort to arbitration, if so provided, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties are not required to comply with the Recommendation.

## Types of Dispute Boards (cont'd)

### 2. Dispute Adjudication Board ('DAB'):

- A DAB issues 'Decisions', which are binding.
- The parties must comply with a Decision as soon as they receive it.
- If a party expresses dissatisfaction with a Decision within a specific time period, it may submit the dispute to final resolution by arbitration, or the courts, but the parties meanwhile remain contractually bound to comply with the Decision.

### 3. Combined Dispute Board ('CDB'):

- A CDB normally issues Recommendations but may issue a Decision if a party so requests and no other party objects.

## Use of Dispute Adjudication Boards

### *Dispute Adjudication Board or “DAB”*

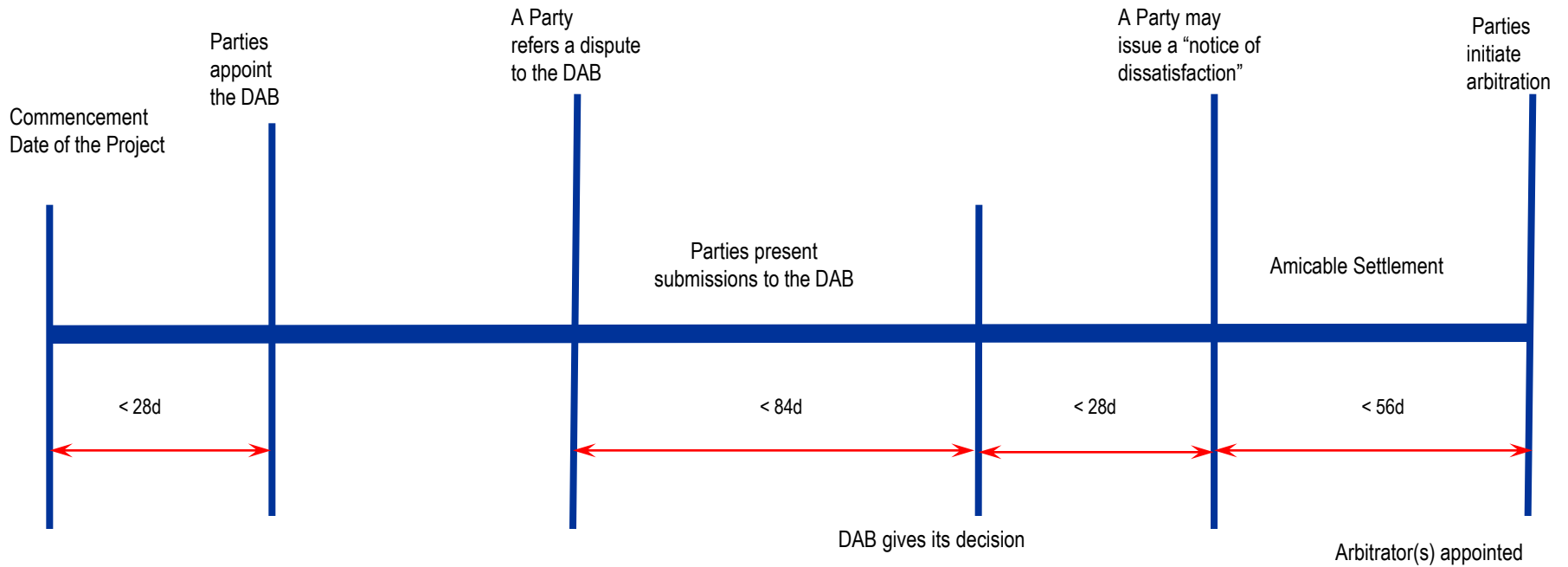
1. Now used by World Bank and all international development banks.
2. Constitution: 1 or 3 members, usually engineers, independent of parties, but all accepted by parties and/or appointed by FIDIC.
3. Permanent or *Ad Hoc*

**Permanent DAB:** maintains familiarity with project, visits site periodically, decides disputes that arise by (provisional) binding decisions.

***Ad Hoc* DAB:** constituted for and decides an individual dispute by a (provisional) binding decision.

4. Experience to date: successfully used on all major projects internationally.

## Typical Sequence of Dispute Events





## World Bank

### World Bank DBs

- For projects financed by the World Bank, the World Bank's Standard Bidding Documents for Procurement of Works ("SBDW") are mandatory in major works contracts (estimated to cost more than \$10 million, including contingency allowance) unless otherwise agreed.
- SBDW Clause 20 provides for a combination of a "Dispute Board", amicable settlement, and ICC arbitration.

## The DB Experience

**The DBs experience to date:**

- 1. Internationally, the immediately binding decision feature of the DAB procedure seems to make it more effective than the DRB procedure.**
- 2. But there is still a need for the DB procedures to gain the confidence of parties around the world.**
- 3. The experience and expertise of the members of the DB is critical to the success experienced.**

## Current Problems with the DB

**Internationally, the only problems with DBs include:**

- 1. Parties think there will be no disputes on “their” project and delay putting DBs in place at the start of the contract and wait till problems arise.**
- 2. Delay in payment on DB Decisions.**
- 3. Changing the recommended language and/or rules.**

## The Dispute Board

### How Dispute Boards Are Different From Arbitration

## How Dispute Boards Are Different from Arbitration

Referral to a Dispute Board is similar to arbitration, but can be distinguished from arbitration in two principal ways:

- While an arbitrator is chosen to exercise a judicial function and to resolve a dispute based upon submissions by the parties, a Dispute Board is chosen for its expertise in a certain subject matter and often does its own investigation or appreciation of the issue, with or without submissions by the parties.
- While arbitral awards can be judicially enforced, a Dispute Board determination, unless re-qualified as an arbitration, is in some jurisdictions not enforceable in court. The enforceability issue is governed by local law, and is unresolved in many jurisdictions.



## Sample Dispute Board Projects

### ERTAN HYDRO Dispute Board

<b>Project description:</b>	<b>Concrete Dam /and Hydro plant</b>
<b>Approx value:</b>	<b>US\$5,000m</b>
<b>Location:</b>	<b>China</b>
<b>Employer:</b>	<b>Chinese State Organisation</b>
<b>Contract:</b>	<b>FIDIC 4<sup>th</sup> with 2 main contracts with DRBs</b>
<b>Construction period:</b>	<b>1991 – 2000</b>
<b>Contractors:</b>	<b>International Joint Ventures with local partners</b>
<b>Number on DRB:</b>	<b>3 – each side chose one and they chose Chair</b>
<b>Frequency of visits:</b>	<b>3 times each year</b>
<b>Total site visits:</b>	<b>About 20</b>



## Sample Dispute Board Projects

### ERTAN HYDRO Dispute Board

**DB determinations:**                      **Recommendations, not automatically final and not automatically binding**

**Disputes referred to DB:**      **40**

**Disputes that went to arbitration:** **0**



## Sample Dispute Board Projects

### ERTAN HYDRO Dispute Board

#### Special factors:

- **First DB in China**
- **For most, first exposure to DB**
- **Chinese initially wary but later supportive as DB helped clear difficult disputes**
- **DB increasingly proactive, assisting both formally and informally**
- **DB instrumental in securing parties' consent to final accounts settlement**





## Sample Dispute Board Projects

### KATSE DAM Dispute Board

<b>Project description:</b>	<b>High Concrete Arch Dam</b>
<b>Approx value:</b>	<b>US\$2,500m</b>
<b>Location:</b>	<b>Lesotho (Southern Africa)</b>
<b>Employer:</b>	<b>Lesotho Development Authority</b>
<b>Contract:</b>	<b>FIDIC 4<sup>th</sup> with 1 main contract subject to DRB</b>
<b>Construction period:</b>	<b>1993 – 1998</b>
<b>Contractors:</b>	<b>International Joint Ventures with local partners</b>



## Sample Dispute Board Projects

### KATSE DAM Dispute Board

<b>Number on DB:</b>	<b>3</b>
<b>How chosen:</b>	<b>Jointly selected by parties</b>
<b>Frequency of visits:</b>	<b>2½ times each year</b>
<b>Total site visits:</b>	<b>About 16</b>
<b>DRB determinations:</b>	<b>Recommendations, not automatically final and not automatically binding</b>
<b>Disputes referred to DB:</b>	<b>12</b>
<b>Disputes that went to arbitration:</b>	<b>1 and importantly the DB was upheld</b>



## Sample Dispute Board Projects

### KATSE DAM Dispute Board

#### Special factors:

- **First DB in Africa**
- **Party representatives all new to the process**
- **Some initial resistance to DB from employer**
- **Referrals to DB had to follow formal notice of arbitration**



## Sample Dispute Board Projects

### HONG KONG AIRPORT Dispute Board

<b>Project description:</b>	<b>International Airport</b>
<b>Approx value:</b>	<b>US\$15,000 Billion</b>
<b>Location:</b>	<b>Hong Kong SAR China</b>
<b>Employer:</b>	<b>Airport Authority</b>
<b>Contract:</b>	<b>Bespoke, similar to HK Government form with 22 main contracts subject to DAB</b>
<b>Contractors:</b>	<b>International, some Joint Ventures with local partners, many specialists (e.g. Air Traffic Control systems)</b>



## Sample Dispute Board Projects

### HONG KONG AIRPORT Dispute Board

**Number on DB:** Convenor (non sitting) plus 6 others of various disciplines

**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



## Sample Dispute Board Projects

### 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**



## Sample Dispute Board Projects

### 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

## Sample Dispute Board Projects

### Río Paraná Dam Expansion Dispute Board

Project description:	Hydro Plant
Approx value:	US\$5,500m
Location:	Argentina
Employer:	Local Electric Authority
Construction period:	2003 – 2006
Contractors:	International JV
Number on DAB:	3 – <u>Parties chose Chair</u> who chose rest
How chosen:	DBF Appointment
Frequency of visits:	Quarterly
Total site visits:	14





## Sample Dispute Board Projects

### Río Paraná Dam Expansion Dispute Board

<b>DAB determinations:</b>	<b>Decisions, automatically final and binding unless taken to arbitration/court</b>
<b>Disputes referred to DB:</b>	<b>8</b>
<b>Disputes that went to arbitration:</b>	<b>0</b>

#### Special factors:

- Parties had minimal choice of DAB members
- Formal hearings well presented by engineers, not lawyers
- DB was asked to advise on several disputes without any Hearing and resolve community disputes re the project

## Sample Countries with PPPs and Active DABs

*Romania, Lithuania, Georgia, Poland,, Belarus, Russia, Ukraine, China, Taiwan, Hong Kong, Singapore, Malaysia, Thailand, Libya, South Africa, Uganda, Malawi, Morocco, Tunisia, Ghana, Indonesia, Philippines, Canada, Iceland, UAE, Oman, Jordan, Qatar, Turkey, India, Pakistan, Nepal, Nigeria, Vietnam, Cambodia, St Lucia, Panama, the Bahamas, Trinidad, Mexico, Paraguay, Uruguay, Brazil, Chile, Argentina, Colombia, Ecuador, Venezuela and Costa Rica*

## Dispute Board Benefits

The benefits for owners, contractors, funders, and industry are:

- **The Dispute Board is part of the project**
- **Routine visits provide focus for parties to discuss disputes and potential disputes – tremendous opportunity for dispute avoidance**
- **The Dispute Board is “up to speed” at all times by routine visits (usually 3 times per year) and through review of regular reports**
- **The Dispute Board understands the project, the parties, individuals involved, physical difficulties, economic background**

## Dispute Board Benefits

### Benefits continued:

- **Speed of dispute resolution**
- **Economy (less than 0.2% of project cost)**
- **99% of the time the dispute is ended by the Dispute Board as parties reluctant to go on to arbitration/courts especially if the Dispute Board output is admissible**
- **Fear of unknown dispute resolution tribunal avoided**
- **Expanding the role of DBs to community outreach and greater dispute avoidance to include the needs, hopes and concerns of the affected communities.**

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