

Dispute Resolution Board Foundation

Fostering Best Practices in
Dispute Avoidance and
Resolution Worldwide

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



Who is DRBF?

- Non-profit organization
- Formed in 1996 to promote the use of DBs worldwide
- Over 1,200 members from more than 96 countries
- Headquartered in US with regional structure and representatives to assist members globally

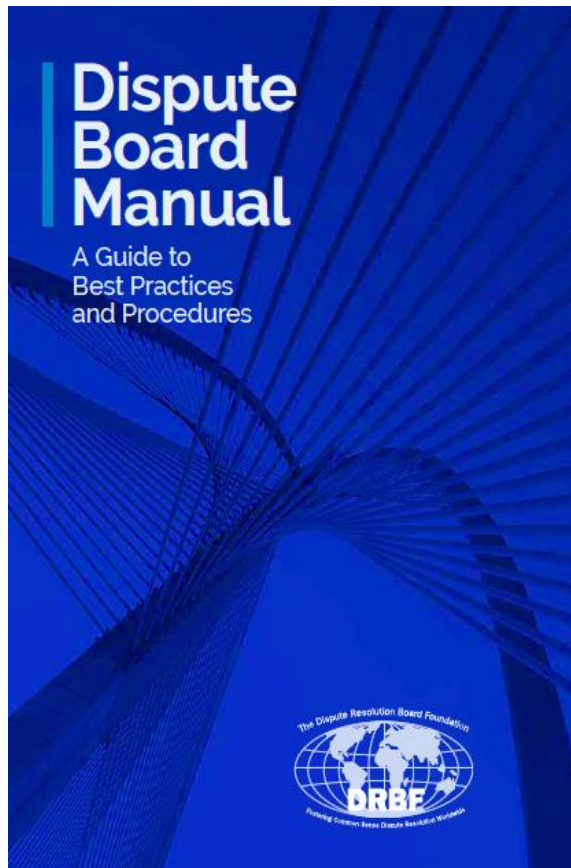
Dispute Resolution Board Foundation

→ Objectives of the organization

- Increase awareness of the Dispute Board process
- Educate the industry on the process
- Offer training workshops
- Publish *Dispute Board Manual A Guide to Best Practices and Procedures*
- Publish newsletters and other publications
- Provide networking for members/users
- Coordinate with other industry organizations

The 2019 Dispute Board Manual

A Guide to Best Practices and Procedures



**The new Dispute Board Manual
is available for free download
on the DRBF website
www.drb.org**

*Print copies can be ordered from
most retailers, see website for details!*

HISTORY OF DISPUTE BOARDS

History of Dispute Boards

1970s: Tunneling industry studied

new approaches to dispute resolution

1975: First DRB used: I-70 Eisenhower Tunnel (2nd bore)
USA

1981: First international DB, El Cajon Dam, Honduras

1992: FIDIC issues DAB Supplement to the 4th Ed. Red Book

1995: The World Bank makes DBs **mandatory** for all World Bank-financed projects in excess of US \$50M

1996: Dispute Resolution Board Foundation established; Dispute Board Manual published

History of Dispute Boards

- 1997: Asian Development Bank & European Bank** adopt DB approach for reconstruction & development
- 1999: FIDIC rainbow suite** introduces Standing and Ad Hoc Dispute Adjudication Boards
- 2004: ICC** introduces DB rules (DRB/DAB/CDB)
- 2005: World Bank** (on behalf of all development banks/multilateral lending agencies) with FIDIC develop “harmonised” set of conditions with a **DB**
- 2006: 9 Multilateral Development Banks** adopt DBs, and ICC and ICE publish DB Rules

History of Dispute Boards

- 2010:** **Dispute prevention and avoidance** becomes a major shift in focus for DBs worldwide
- 2014:** Chartered Institute of Arbitrators introduces **DB Rules**
- 2015:** ICC updates **DB Rules**
- 2017:** FIDIC Second edition emphasises **dispute avoidance role** with Dispute Avoidance and Adjudication Board (DAAB)
- 2017:** NEC includes **DBs as an option**
- 2019:** **DRBF** updates Dispute Board Manual

WHAT IS A DISPUTE BOARD?

Dispute Boards are **NOT**:

- Arbitrators
- Mediators
- Project Managers
- Expert Witness
- Advisors
- Consultants
- Inspectors
- The Engineer
- Audit Officers

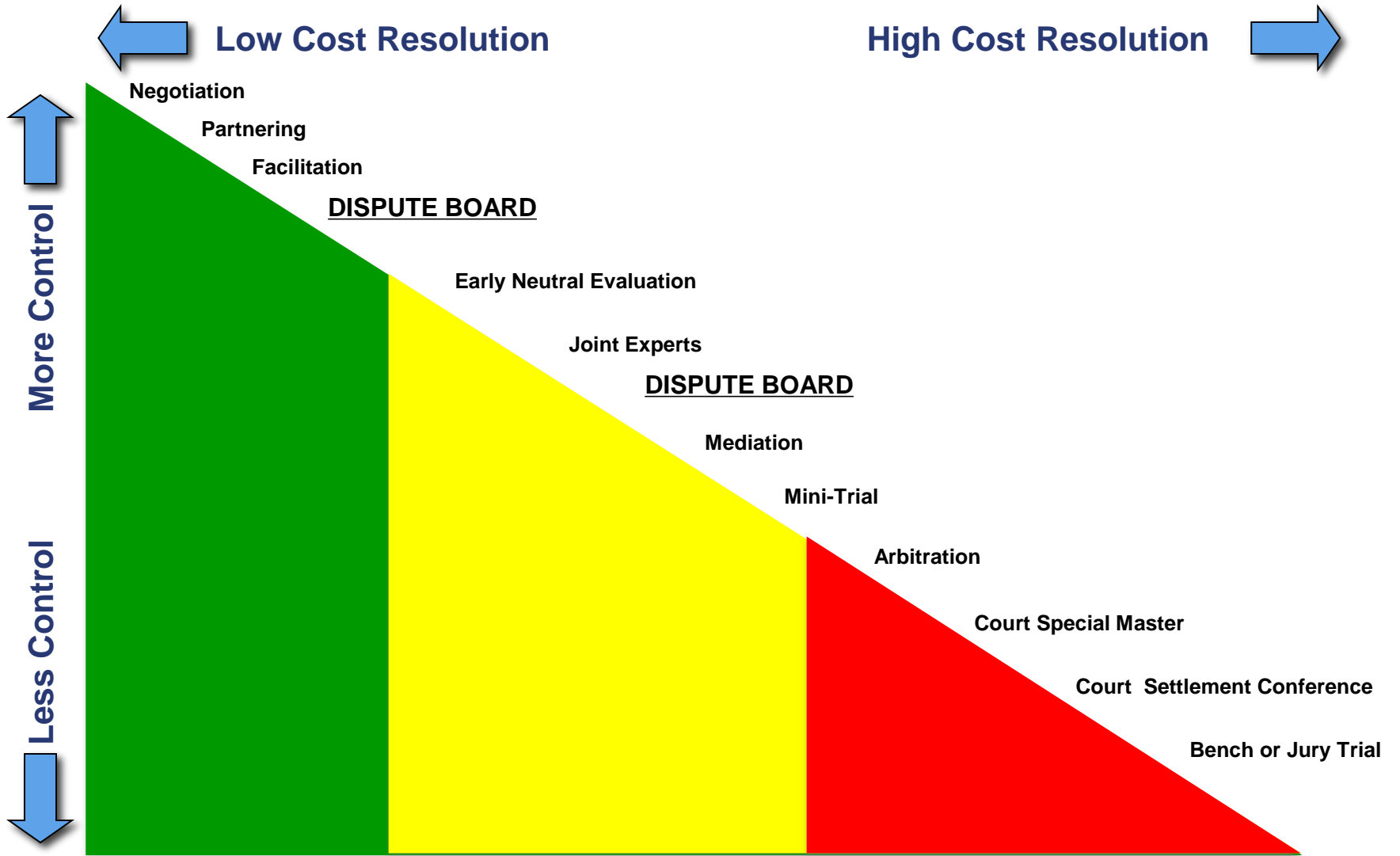


What is a Dispute Board (DB)?

“... a proactive real-time process for the prevention and resolution of issues and claims, controlled by the owner and the contractor.”

What is a Dispute Board (DB)?

- 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**.



ADR Continuum

Types of Dispute Boards

→ **Dispute Review Board (DRB)**

- Nonbinding opinions / recommendations

→ **Dispute Adjudication Board (DAB)**

- Binding decisions
- Parties may request informal assistance

→ **Combined Dispute Board (CDB)**

- Parties may agree binding decision or recommendations

→ **Dispute Resolution Expert (DRE) or Dispute Resolution Advisor (DRA)**

- Parties may agree binding decision or recommendations

Dispute Board: Ad Hoc

- Commonly used in bespoke forms of contract & previous editions of FIDIC contracts
- Formed only after a dispute has crystallised
- No provisions for dispute avoidance
- Recommendations or binding decisions

Dispute Board: Standing

- Formed at commencement of contract
- Site visits, regular meetings
- Dispute avoidance role
- Informal opinions
- Recommendations or binding decisions



What Are the Essential Characteristics of a Standing Dispute Board?

- Independent
- Impartial
- Proactive

Main Functions of a Standing DB

- Become & remain conversant with the contract & periodically visit the site;
- Keeps up to date with progress, developments and (potential) problems at the site;
- Encourage parties to resolve issues before they become disputes, to give opinions;
- Adjudicate a dispute that is referred to it.

Function of an **ad hoc DB**
is solely to decide referred disputes.

HOW DOES A DB WORK?

How does a DB work?

- 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
 - Have **complimentary skill sets**

How does a DB work?

- ➔ Each member has **copies of the contract documents**
- ➔ Each member becomes familiar with the
 - ➔ **Project**
 - ➔ **Parties** to the contract
 - ➔ **Other participants** in the project
- ➔ All communications are through the Chair;
no *ex parte* communications

How does a DB work?

- **Joint meetings during regular site visits** with owner and contractor representatives
- **Help resolve 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**

About the Roles of the...

- **Project Owner/Employer**
- **Funding Agency**
- **The Parties**
- **The Dispute Board Members**

Role of the **Project Owner/Employer**

- Evaluates **applicability of DB** to the project
- Includes **DB specifications and DB Agreement** in bidding documents
- **Awards construction contract**

Role of the **Funding Agency**

- Customarily have **monetary thresholds and mandatory provisions** requiring the adoption of a DB
- Standard forms of contract in bidding documents normally contain **DB specifications and DB Agreement**

Role of the Parties

- All Board members are **approved by both parties**
- **DB is formally convened**
 - DB Agreement signed
 - First meeting held
- DB meetings and site visits are **held at regular intervals**

Role of the DB

- **Keeps abreast of project activities and developments**
- **Encourages resolution** of issues before they become disputes
- **When a dispute is referred to the DB:**
 - Conducts **hearing**
 - Completes **timely deliberations**
 - Prepares **written recommendations/Decisions**

DB Opinions, Recommendations, & Decisions: **2 types**

→ *Advisory Opinions:*

Verbal/or written opinion given on issues **after an informal hearing**, before they develop into disputes.

→ *Recommendations and/or decisions:*

provided **in writing** with supporting rationale after a **full hearing** by the DB.

WHY USE DISPUTE BOARDS?

Why Use A Standing Dispute Board?

→ Proactive

- Choice of Board Member(s)
- Members familiar with the project
- On site process

→ Cost efficient

→ More potential to avoid / resolve disagreements

**Dispute
Avoidance**

Disputes Cost Money and Time!

- Disputes can threaten budgets and schedules.
- They:
 - Carry transactional costs
 - Sour relationships
 - Tie up project resources (focus on claim position, not progressing the job)
 - Left unresolved, create a breeding ground for “end of contract” claims

Risk Management Role of the DB

→ Dispute avoidance role

→ Resolves contentious issues and contractual disagreements before they develop into a formal dispute

→ Dispute resolution role

→ Provides an independent recommendation, enabling parties to resolve matters at the project level

Dispute Management

- Conventional methods are very costly:
 - Expert consultants and lawyers
 - Project personnel tied up in preparing or defending claims rather than on project delivery
- Work delays and disruption
- For public works, can generate community and political issues, adding more costs and delays
- Unresolved disputes cause parties to become entrenched, leading to costly arbitration or litigation.

DB as Project Insurance

- Insurance is designed to prevent or minimize losses and/or to pay for losses that may arise through a transfer of risk to insurers.
- DB provides a similar, although more positive, role
- Considered effective if loss is prevented
- Cost of insurance exceeds cost of a DB by a wide margin

Cost-Benefit Analysis

- Fixed cost of DB against the benefits of cost/time savings
- Considerations:
 - Carrying costs generally 0.05% to 0.15% of project costs
 - Works within management structure to minimize costs (such as on-site meetings)
 - Informal nature minimizes use of external consultants or lawyers, does not include document-discovery and uses real-time information readily available

Other Benefits

- Open communication and collaborative behavior preserves contractual relationships
- Early intervention when parties are most amenable to resolution
- Dispute resolution is managed in an orderly and neutral manner.
- Resolution while project continues, delivering better project outcomes

Other Benefits

- Outcomes respect and maintain contract provisions and allocation of risk
- Merit-based process maintains integrity and procedural fairness
 - Based on factual records, project documentation, and applicable law.
 - DB provides reasoned and detailed findings by experienced and independent experts

CRITICAL SUCCESS FACTORS OF A DISPUTE BOARDS

10 CSF of a DB

1. **DB members are neutral and subject to the approval of both parties.**
2. DB members **sign a Three-Party Agreement** obligating them to serve both parties equally.
3. **DB fees and expenses are shared equally** by the parties.

10 CSF of a DB

4. DB is **organized when work begins**, before there are any disputes.
5. DB keeps abreast of job developments through **periodic review** relevant documentation and regularly visiting the site.

10 CSF of a DB

6. The parties have access to an **Advisory Opinion process.**
7. A dispute can be referred to the DB by **either party.**
8. An **informal but comprehensive hearing is convened promptly.**

10 CSF of a DB

9. The written recommendations/decisions of the DB **are admissible later** in arbitration or litigation.
10. The **DB members are absolved** from any personal or professional liability arising from DB activities and **cannot be called as witnesses** in subsequent proceedings.

DB Track Record

The DB process has resulted in a **very high rate of success** in resolving disputes **without arbitration or litigation.**

Resolution rate to date: 85-98% of matters going to the DB do not go on to arbitration or litigation.

MISPERCEPTIONS

Misperception:

“DBs do not add value.”

Reality: Cost advantages

- more competitive bids
- better communication on the job
- resolution of issues at job site level
- fewer end-of-project claims

... all resulting in lower total contract completion costs and **time savings**.

Misperception:

“DBs impose their own concepts of fairness and equity.”

Reality:

DBs must apply the contract as written, in accordance with the Three-Party Agreement.

Misperception:

“The presence of a DB will promote claims.”

Reality:

- **Avoiding disputes is the greatest benefit** of DBs, many parties discover.
- **Neither party** wants to suffer **loss of credibility** by submitting claims that have no merit.

Misperception:

*“DB Board members
have bias or are not qualified.”*

Reality:

Parties accept only those whom both parties consider to be **impartial and experienced** in the type of construction of the contract.

Misperception:

“DBs are unreliable: they lack the formalities of legal proceedings.”

Reality:

- **Board members** experienced in the type of construction **ask probing questions.**
- DBs conduct **thorough, orderly hearings.**
- **Less than 2% of all disputes** referred to DBs **have gone to arbitration or litigation.**

DISPUTE BOARD APPLICATION WORLDWIDE

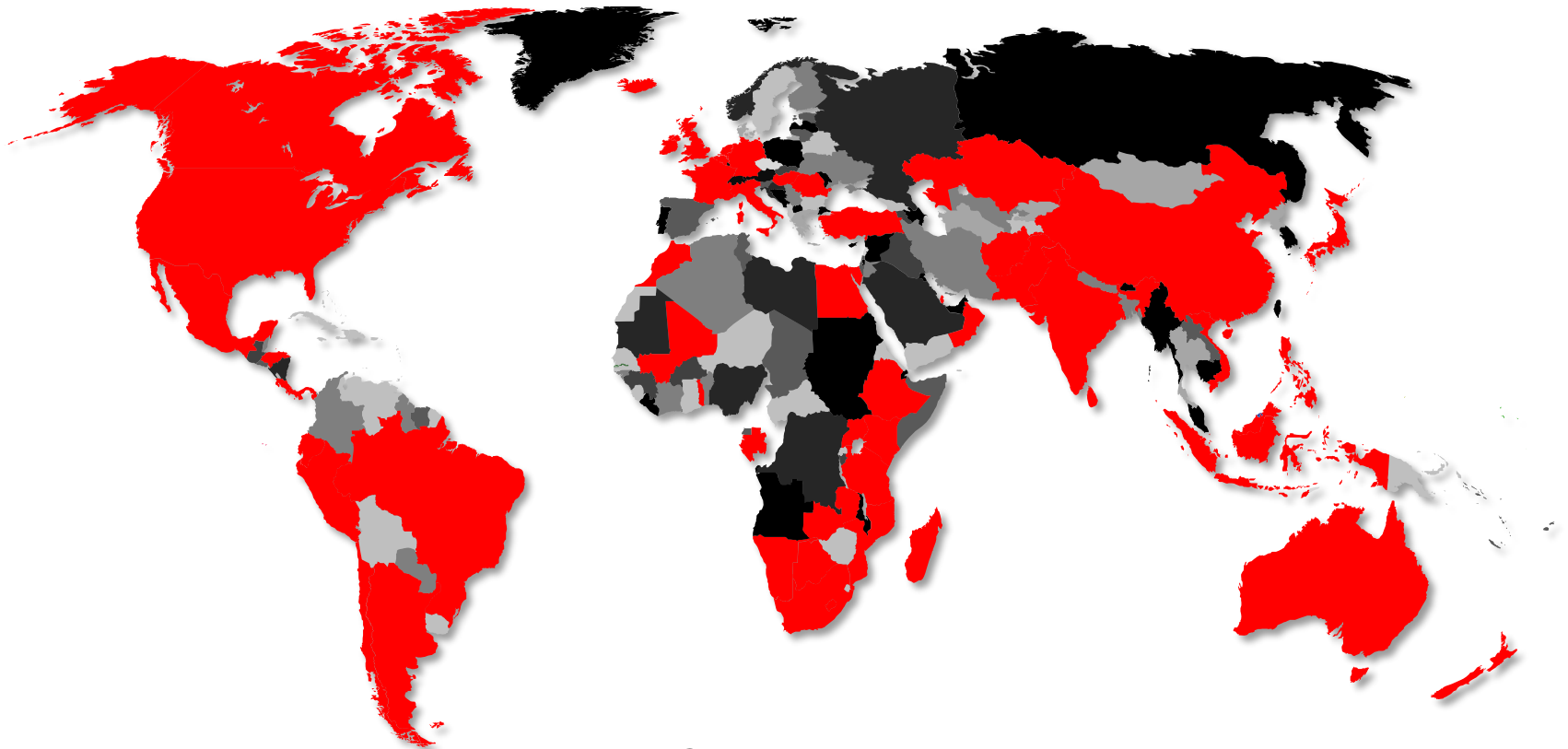
Application to Public and Private Projects

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

What do they have in common?

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

Dispute Boards Worldwide



Countries in **red** have DBs

Notable Projects

- Olympic Games, Rio de Janeiro and London
- Panama Canal
- Sydney Light Rail
- Telecommunications LTE – Australia
- San Francisco Central Subway USA
- National Roads Development – Philippines

Notable Projects

- Bosphorus Crossing – Istanbul
- Coca Coda Sinclair Hydroelectric – Ecuador
- Cairo Airport
- Australian Embassy – Jakarta
- MRT - Jakarta

WHAT USERS SAY

The DB process: What users say ...

“Dispute Boards help us prevent disagreements from 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

The DB process: What users say ...

*“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

The DB process: What users say ...

*“DRBs have become **quite common on very substantial infrastructure type projects** around the world, many of them involving **hundreds of millions of dollars** or more. DRBs can **look at disputes as they emerge and make recommendations to the parties** with a view to "nipping in the bud" such incipient disputes. Obviously, for each contract which provides for a DRB, one needs to analyse what its terms of reference are and contractually what its functions are to be.”*

- Mr Justice Akenhead, 2013

Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd

The DB process: What users say ...

“ The avoidance role of dispute avoidance/adjudication boards (DAAB) is critical and no major project can be contemplated without a DAAB in place.”

- Sir Vivian Ramsey, International Judge and Arbitrator
2021 Keynote Address, FIDIC Users Conference



Q & A

