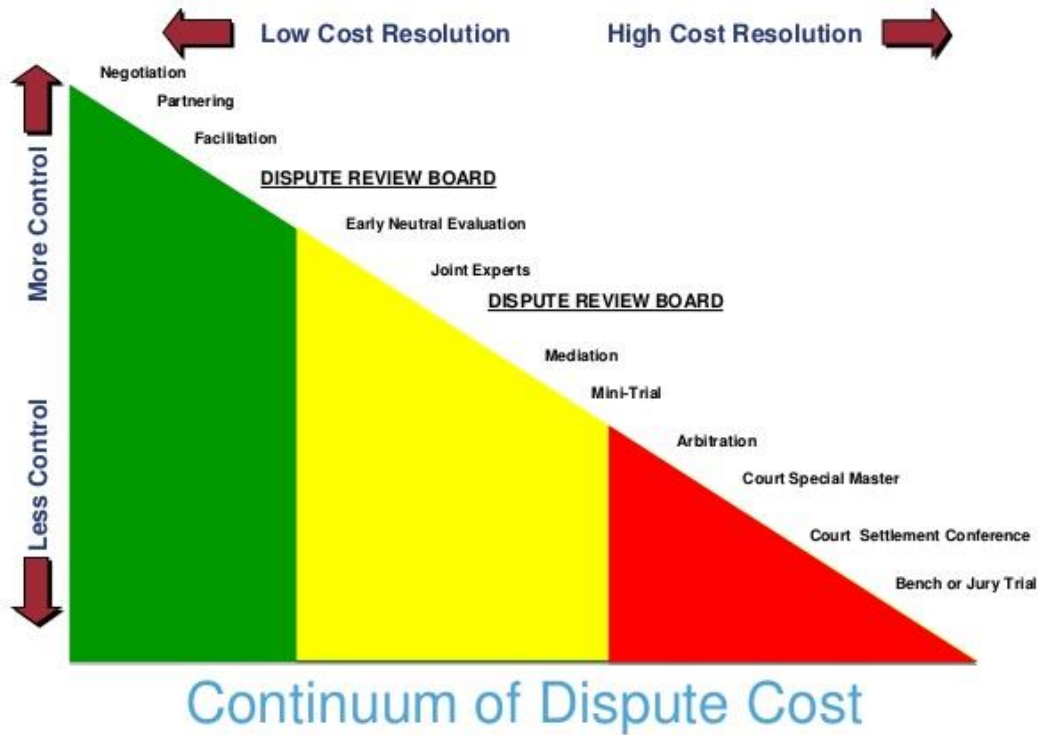


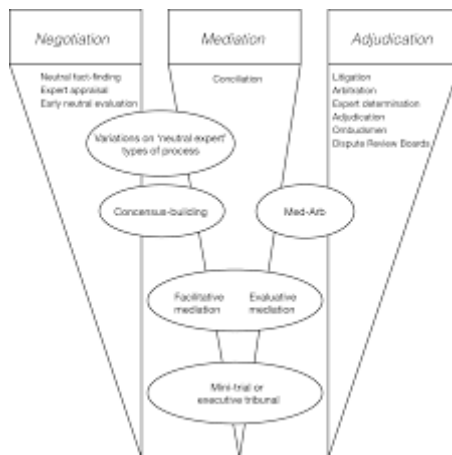
## DISPUTE RESOLUTION BOARD - DRB



Engineering & Construction contracts including infrastructure and heavy industry, by their nature, complexity and long term, have the possibility of being affected by events unforeseen by the parties.

The fact that the problems and conflicts are not solved during the work, bring enormous insecurity to the parties, either by extra costs or by delays.

**“In life there is no way to avoid death, taxes and claims”.**



The ICC is an international entity comprised of national committees established in most countries involved in international commerce. It is well known for its Court of Arbitration. It administers more international arbitrations than any other organization, and a large number of those arbitrations involve disputes arising in the international construction industry.

In September 2004, the ICC published its rules on DBs, which created documents for three types of DBs:

- A Dispute Review Board - DRB

Experts issue recommendations, which the parties commonly undertake to comply with, otherwise the matter is referred to arbitration or to the judiciary.

- A Dispute Adjudication Board- DAB

Experts make decisions, which the parties undertake to issue recommendations, which the parties undertake to comply by means of a contractual agreement.

- A Combined Dispute Board- CDB

Specialists offer recommendations, but can make decisions if one of the parties asks for the choice is tied to pre-established criteria

The ICC rules provide standard contract clauses for DBs and a model Three-Party Agreement.

Whatever the form of the DB, **the DB is neither a judge nor an arbitrator**. The DB's role is only to settle disputes temporarily, **in order to prevent the paralysis of the project.**

If a party does not agree with the solution suggested or imposed by the DB, that party can refer the dispute either to a judge or to an arbitrator in order to obtain a judgment or an award that will definitively settle the dispute (possibly against the DB's opinion) and be legally enforceable.

While waiting for the judgment or the award, a party cannot be forced (in the strict sense of the term) to comply with a recommendation or a decision of the DB. However, a party who refuses to comply can be deemed in default under the contract and be sentenced to pay damages.

In practice, this threat acts as an effective deterrent: a vast majority of DB recommendations and decisions are carried out spontaneously by the parties, even when they are not satisfied with it.

**Experience proves that a problem that can be addressed immediately is very likely to be solved through an amicable agreement.** This is a very important aspect of the DB's action **because in a long term contractual relationship an atmosphere of co-operation has to prevail in order for the parties to work together quickly and efficiently.**

While neither the recommendations nor the decisions are final, the parties almost always accept them and refrain from referring them to a judge or an arbitrator, which makes irrevocable de facto the solutions reached by the DB; therefore, in a majority of cases, the determination of the DB, regardless of the form of the DB, solves definitively the dispute.

### **Risk**

As a reference, there are several types of Projects Using DBs: Airports, bridges, building, dams, energy, highways, ports, infrastructure, mining, power plants, chemicals plant, underground, others.

Question: What do they have in common? Lengthy duration, Complex site/ construction methods and High risk.

### **Cost**

According to the Dispute Review Board Foundation, research carried out by them suggest that a dispute review board costs 0.05% of the final construction costs where there were few disputes. If there are many disputes then the cost is around 0.25%. In the research, the lowest reported percentage was 0.04% of the final construction cost. The highest was 0.26%., with the average being 0.15%. The average number of dispute recommendations across all of the projects sampled was 4

## SOME CASES



### **Ertan – China, 1991-2000**

- ✓ **Revisor Comitte**
- ✓ **Cost: USD 5 Billion**
- ✓ **FIDIC Contracts**
- ✓ **40 disputes to DRB**
- ✓ **0 dispute to arbitration**



### **Hong Kong Airport**

- ✓ **Adjudication Comitee**
- ✓ **Cost: USD 15 Billion**
- ✓ **FIDIC Contracts**
- ✓ **6 disputes to DAB**
- ✓ **1 dispute to arbitration**

### **Brazil**

The technical and legal communities are not quite familiar yet with the format. Few construction contracts foresee DRB clause in the country. The DRBs entered in scene in Brazil in 2003 in three administrative contracts related to the expansion of São Paulo Metro System. They are still very few in our country.

### **Final considerations**

- ✓ Project owners are still very reluctant about the DRB clauses, seeing the method as a potential loss of their power. Moreover, owners still see a DRB not as an investment, but as a cost item.
- ✓ Brazilian construction market shows relevant potential for the DRBs. **It's a solution for both public and private sectors, avoiding long dispute in court.**
- ✓ The method is legally feasible in Brazil. (Peru use Law No. 30225).
- ✓ Most effective way: If selected before construction begins: DRB members become familiar with project. Many disputes are avoided

- ✓ It has been successful internationally,
- ✓ Add value to business and conflict management in projects.
- ✓ 9 Multilateral Development Banks adopt DBs
- ✓ Resolution rate to date: over 98% of matters going to the DB do not go on to later arbitration or litigation.