

ADVANCED METHODS FOR RISK MANAGEMENT TO PREVENT AND RESOLVE DISPUTES DURING CONSTRUCTION USING DISPUTE REVIEW BOARDS

Presenters

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History of DRBs

- ▶ Early 1970s tunneling industry conducted studies on new approaches to dispute resolution
- ▶ First DRB used on second bore of I-70 Eisenhower Tunnel (1975)
- ▶ 1996 DRBF established; DRB Manual published
- ▶ By 2016 over 2,800 US projects worth US\$275B with DRBs



History of DBs - International

- 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
- 1997: Asian Development Bank & European Bank for Reconstruction & Development adopt DB approach
- 1999: FIDIC rainbow suite introduces Standing and Ad Hoc Dispute Adjudication Boards
- 2004: ICC introduces DB rules (DRB/DAB/CDB)
- 2006: 9 Multilateral Development Banks adopt DBs

What is a DRB?

A Dispute Review Board (DRB) is 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.

How do DRBs fit with other Alternative Dispute Resolution (ADR) processes?

- Only ADR process in construction that includes dispute avoidance
- DRB process precedes other methods, such as arbitration and litigation

← Low Cost Resolution

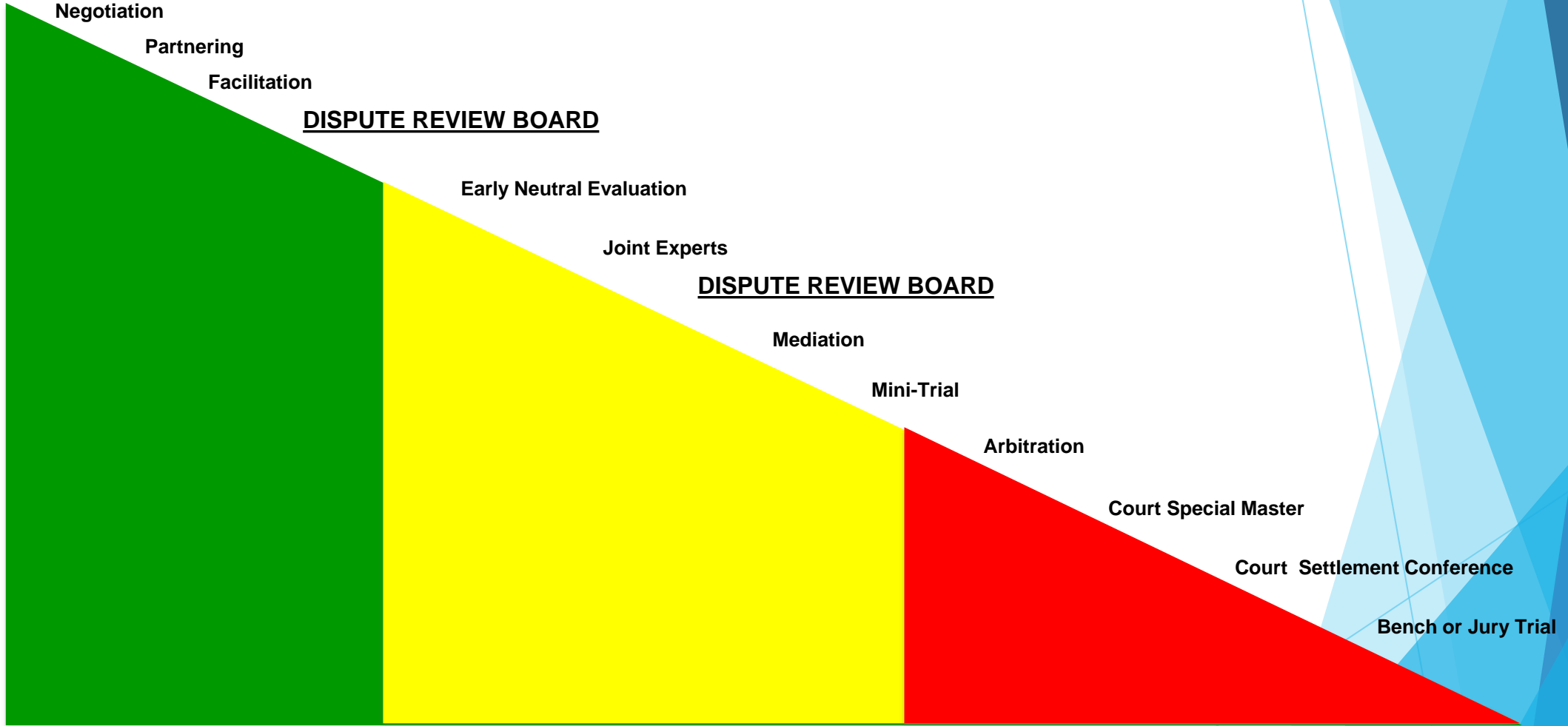
High Cost Resolution →



More Control



Less Control



ADR Continuum

What is a DRB?

- ▶ Organized before construction begins
 - ▶ Typically 3 members with one member serving as Chair
- ▶ Parties ensure that all members of the DRB are
 - ▶ Impartial
 - ▶ Experienced in the work of the contract
 - ▶ Have complimentary skill sets

How does a DRB work?

- ▶ Each member is provided with copies of the contract documents
- ▶ Each member becomes familiar with the
 - ▶ Project
 - ▶ Parties to the contract and other participants in the project
- ▶ All communications are through the Chair;
no *ex parte* communications

How does a DRB work?

- ▶ Holds joint meetings during regular site visits with owner and contractor representatives
- ▶ Encourages resolution of 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

DRB Opinions & Recommendations

- ▶ **Advisory Opinions:** verbal opinion given on issues after an informal hearing before they develop into disputes.
- ▶ **Recommendations:** provided in writing with supporting rationale after a full hearing of the dispute.

10 Recommended Elements for a Successful DRB

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

Recommended Elements for a Successful DRB

4. DRB is organized when work begins, before there are any disputes.
5. DRB keeps abreast of job developments by periodically reviewing relevant documentation and regularly visiting the site.

Recommended Elements for a Successful DRB

6. The parties have available to them an *Advisory Opinion* process.
7. Either party can refer a dispute to the DRB.
8. An informal but comprehensive hearing is convened promptly.

Recommended Elements for a Successful DRB

9. The written recommendations of the DRB are non-binding, but are admissible later in arbitration or litigation.
10. The DRB members are absolved from any personal or professional liability arising from DRB activities, and cannot be called as witnesses in subsequent proceedings.

Costs of DRBs

- ▶ Direct cost are a fraction of final construction contract amount, and are shared equally between the parties.

Typical costs may include:

- ▶ \$1500 to \$3000 per day per member
- ▶ Travel time to meetings and expenses
- ▶ Progress review at an hourly rate between DRB meetings
- ▶ Board deliberations and report preparation following a full hearing

Costs of DRBs

- ▶ Indirect costs
 - ▶ Distribution of progress updates and other documentation to the DRB members
 - ▶ Parties' expenditures in preparing for and participating in DRB meetings and hearings

Misperceptions about DRBs

“DRBs do not add value”

Reality:

▶ DRB cost advantages include

- ▶ 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.

Misperceptions about DRBs

“DRBs impose their own concepts of fairness and equity”

Reality:

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

Misperceptions about DRBs

“The presence of a DRB will promote claims”

Reality:

- ▶ Many parties have found that the avoidance of disputes is the greatest benefit of DRBs
- ▶ Neither party wants to suffer loss of credibility by submitting non-meritorious claims

Misperceptions about DRBs

“Presence of bias or lack of qualifications in Board members”

Reality:

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

Misperceptions about DRBs

“DRBs are unreliable because they lack the formalities of legal proceedings”

Reality:

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

Cost Savings

- ▶ Cost savings for the project and the parties
 - ▶ Reduces legal and consultant fees
 - ▶ Reduces bids by ensuring less costly dispute resolution

Dispute Avoidance and Resolution Benefits

The presence of a DRB:

- ▶ Promotes mutual resolution
- ▶ Facilitates:
 - ▶ Positive relationships
 - ▶ Open communication
 - ▶ Trust and cooperation
- ▶ Minimizes posturing

Dispute Avoidance and Resolution Benefits

- ▶ Focuses on early identification of issues
- ▶ Reduces job delay due to disputes
- ▶ Provides informal and rational basis for resolution
- ▶ Better informed decisions by experienced Board with contemporaneous project knowledge
- ▶ Extremely high resolution rates

Application to Types of Projects

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

Case Study: Sound Transit

- ▶ Sound Transit has had 5 DRBs:
 - ▶ 3 on heavy civil underground projects
 - ▶ 1 at-grade light rail contract
 - ▶ Heavy civil underground contract

Case Study: Sound Transit

Sound Transit believes DRBs are:

- ▶ Efficient way to resolve disputes
- ▶ Able to resolve disputes more quickly than other types of dispute resolution
- ▶ DRB members typically understand a dispute more thoroughly than do other types of adjudicators

University of Washington

- ▶ Began using Dispute Boards in 1993
- ▶ Replaced arbitration and mediation in contracts
- ▶ Total number of projects exceeds 45
- ▶ Total value of all projects exceeds \$2.6 Billion

University of Washington

- ▶ In 1997 added Informal Advisory Opinion option
- ▶ Overwhelming majority of issues resolved after informal guidance meeting
- ▶ Only 4 dreaded “end of job” hearings since 1993
- ▶ All issues ultimately resolved without arbitration or court

University of Washington

- ▶ Only 2 formal hearings since 1993 (5 days and 12 days)
- ▶ Owner, contractor and subcontractors involved; all had counsel
- ▶ UW is pleased with Dispute Board process
- ▶ Dramatically reduced the program costs of disputes
- ▶ No court or arbitration since 1993

DRBF Statistical Database

1975 - 2016

Number of completed projects: **Over 2,800**

Total construction value: **Over US \$275 Billion**

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.*

Dispute Resolution Board Foundation

- ▶ Non-profit organization
- ▶ Formed in 1996 to promote the use of DRBs worldwide
- ▶ Over 1,000 members from more than 70 countries

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 *Practices and Procedures Manual*
 - ▶ Publish newsletter and other publications
 - ▶ Provide networking for members
 - ▶ Coordinate with regional chapters and other industry organizations

Questions?

Dispute Resolution Board Foundation

Email: info@drb.org

Website: www.drb.org