FGV Camara Projetos
Rio de Janeiro

Dispute Avoidance and Dispute Boards

Murray Armes

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SENSE STUDIO

PART 1
DISPUTE AVOIDANCE

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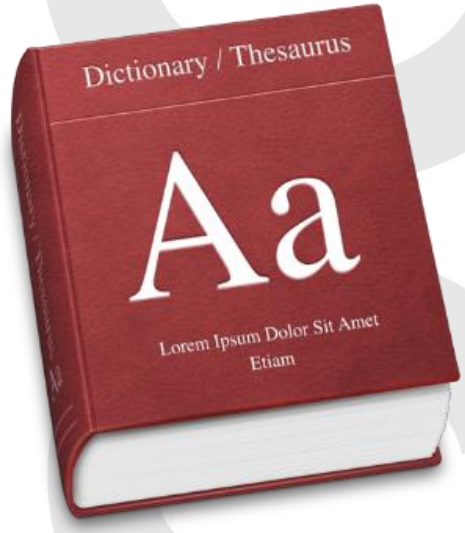
WHAT IS A DISPUTE?

- Dictionary Definition:

*"a disagreement between management and employees that leads to industrial ac*tion" *(Oxford)*

"a discussion, often heated, in which a difference of opinion is expressed" (Oxford)

"a regulated discussion of a proposition between two matched sides" (Webster)



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WHAT IS A DISPUTE?

- Contract Definition:

  "means any situation where (a) one Party makes a claim against another Party; (b) the other Party rejects the claim in whole or in part; and (c) the first Party does not acquiesce, provided however that a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAB or the arbitrator(s), as the case may be, deem it reasonable to do so."

  (FIDIC Gold Book, 2008)

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WHY DISPUTE AVOIDANCE?

"How to Stop a Simple Problem Spiraling from a Breeze to a Whirlwind"

Nael Bunni

- Disputes are costly in:
  - money
  - time
  - reputation
- Average 50% of all legal costs in the construction industry are dispute related.
- In 10% projects 10% of total project costs was "legal cost".
- ICC Arbitration: A $10m dispute will cost about $300,000 in administrative and arbitrator's fees plus the parties' legal costs, and management time.
- That time and money could be spent on the project itself….
- …. or by improving margins and financial performance of the industry.

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WHY DISPUTE AVOIDANCE?

- *"There is a solution to every problem; the only problem is finding it"*

- You have probably heard it said:

  "Hindsight is always 20/20"

  "Hindsight is an exact science"

- Proactive dispute avoidance reduces the need for hindsight:
  - By looking forward
  - By anticipating problems

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DISPUTES AND DISAGREEMENT

IN COMPLEX PROJECTS…….

- Recognize that disagreements always occur.
- There is always more than one way of looking at something: two sides to the story.
- Conflict can be positive and healthy and result in new ways of thinking.
- Dispute avoidance aims to tackle differences before they become formal disputes which require a formal process of resolution.

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DISPUTES AND DISAGREEMENT

- Disputes in construction typically about:
  - Contract Interpretation
  - Quality
  - Progress
  - Information (quality of or lack of)
  - Payment: ultimately (almost) all come down to money
- Disputes in construction commonly occur between:
  - employer and consultants
  - employer and main contractor
  - main contractor and subcontr/suppliers

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DISPUTES ARISE OUT OF UNCERTAINTY

- Construction projects are not “products”
- Each project is a prototype
- Every site is different (geotechnical information)
- Weather and climate
- Political environment and change
- Inadequately defined design
- Ill considered procurement process
- Poor project management

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DISPUTES ARISE OUT OF UNCERTAINTY

- Poor communications
- Inability to communicate
- Resorting to formal legal methods too quickly
- Cultural differences
- Dysfunctional team (personality problems)
- Uncertainty makes people defensive
- Uncertainty can lead to mistrust
- Uncertainty prevents proper assessment of risk
- These are all human traits.....disputes are about people

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DISPUTES ARISE OUT OF COMMERCIAL INTERESTS

- Disagreements always occur
- Disagreements become disputes when they adversely impact on the commercial interests of one or other party
- Usually means it has a monetary impact
- Delays also mean money
- What about reputation?

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DISPUTE AVOIDANCE TECHNIQUES

- There are two main types:
  - **Management Methods**: focuses on the process
  - **Non Escalation Methods**: focuses on containing disputes

- Management methods should begin pre-contract, as soon as possible (only one party at this stage).
- Non escalation methods applicable when second party is involved: during bidding stage onwards,

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DISPUTE AVOIDANCE TECHNIQUES

- Management Methods
  - Starts Pre-Contract
  - Consider unpredictable scenarios
  - Learn from other projects
  - Be realistic: problems will arise
  - Reduce risk by good ground investigations and high quality production information
  - Select contract to promote dispute avoidance
  - Due diligence
  - Fair tender procedures
  - Is the contract price realistic?
  - Establish a collaborative, no blame regime
  - Active monitoring of progress and costs
  - Tackling problems as they arise

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DISPUTE AVOIDANCE TECHNIQUES

- Non Escalation Methods
  - Negotiation between team members
  - Negotiation between management
  - “Fair” solutions outside contract terms
  - Independent third party (can be helpful for government employees)

- **Reactive Techniques**
  - Take place after a dispute has crystallised
- **Proactive Techniques**
  - Seek to deal with problems before they become disputes

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DISPUTE AVOIDANCE TECHNIQUES

- Reactive Techniques
  - Usually Ad Hoc (but not always, eg contracted mediation)
  - Mediation: consensual but after parties have taken up positions
  - Ad hoc statutory adjudication (eg in UK, Australia, Singapore, etc)
  - **Ad hoc Dispute Board**
- Proactive Techniques
  - Dispute avoidance panel (eg London 2012 Olympics)
  - **Standing Dispute Board**

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PART 2
DISPUTE BOARDS

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WHAT IS A DISPUTE BOARD?

"A dispute board is a tribunal which is established to endeavour to avoid or resolve any disputes which may arise between the parties to a particular contract"
(Brian Totterdill and Gwyn Owen)

- A tribunal that is:
  - Independent
  - Impartial
  - Proactive
  - Judicial

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TYPES OF DISPUTE BOARDS

- Dispute Review Board (DRB)
  - non binding recommendations
  - The North American model
- Dispute Adjudication Board (DAB)
  - Informal opinions if requested
  - binding decisions
- Combined Dispute Board (CDB)
  - ICC Rules
  - recommendations, binding decision if requested b both parties
- DBs are a creature of contract

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TYPES OF DISPUTE BOARDS

- Adhoc DB – Advantages
  - Lower cost
  - Members could (in some instances) be selected for their specialist knowledge to suit a specific dispute
- Adhoc DB - Disadvantages
  - Convened only after a dispute has crystallised
  - No provisions for dispute avoidance; seldom in a position to avoid; but hybrids exist
  - Receives only the documents relative to the specific dispute
  - No familiarisation with project
  - Setting up DB for specific dispute may result in delay
  - Procedure is akin to statutory adjudication

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TYPES OF DISPUTE BOARDS

- Standing DB - Advantages
  - Formed at commencement of contract, no learning curve
  - Site visits, meetings
  - Dispute avoidance role and informal opinions
  - Promotes mutual resolution and relationships, facilitates communication and trust and cooperation
  - Early identification of issues
  - May reduce bid prices
- Standing DB – Disadvantages
  - More expensive

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WHAT DO DISPUTES BOARDS DO?

- Monitor the Project
- Review documents and visit the site
- To help avoid disputes
- Maintain communications between the Parties
- Suggest ways of working out problems at an early stage
- Provides a high level forum for discussion of issues
- To resolve disputes
- Casts a “long shadow”

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WHAT DO DISPUTES BOARDS DO?

- Dispute Avoidance
  - –The primary role
  - –Requires a standing board
  - –Proactive involvement with the parties
  - –Informal opinions
  - –(not always acceptable to the parties)
- Dispute Resolution
  - –Where a dispute cannot be avoided
  - –Takes place after avoidance measures
  - –A process of adjudication
  - –Quick and relatively cheap
  - –Some parties require a 3rd party DECISION to enable action to be taken

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A SHORT HISTORY OF DBs - 1

- Started in the USA in 1970s
  - Large infrastructure projects
  - Suspicion about legal profession
  - Wanted to avoid time and cost implications
- In the US DBs are DRBs
  - DRB gives non binding recommendations
- WB promoted a Dispute Board on El Cajon hydro project in Honduras in 1980
  - DB resulted in successful settlement of disputes - WB grew to favour this approach
- 1995 – WB Standard Bidding Document published using modified FIDIC conditions
  - deleting the usual provision with the "Engineer" deciding disputes, giving this task to a Dispute Review Board (DRB), similar to those being used at the time in USA

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A SHORT HISTORY OF DBs - 2

- WB rationale 1995:
  - Disputes (that could not be settled by the parties themselves) to be submitted to DRB by either party for a written “DRB recommendation” which, if no objection lodged within 14 days, became final and binding
  - In case of objections, parties free to negotiate or, ultimately take the matter to arbitration
  - WB required all borrowers of >US$50m to establish a three-man DRB by contract
  - Borrowers of between US$10m - $50m could use a one-man board or Dispute Review Expert (DRE)
  - Other development fund banks, followed this example
  - WB retained these provisions until 2000

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A SHORT HISTORY OF DBs - 3

- FIDIC 1995:
  - Widely known as publishers of model forms used internationally for construction
  - 1995 – Design-Build Turnkey form published with a Dispute Adjudication Board (DAB) – (3 person or 1 person board) empowered to decide disputes referred by either party
  - NB “Decisions” were made interim binding i.e., coercive, not merely persuasive (like the 1995 WB DRB)
- Why use a DAB rather than a DRB?
  - In some parts of the world it is difficult to accept and implement a recommendation
  - It is more acceptable to have a decision imposed by a third party

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A SHORT HISTORY OF DBs - 4

- FIDIC 1999 - Three major FIDIC model forms published, all involving DABs
  - Red Book: Conditions for Construction – standing DAB (3 person or 1 person boards)
  - Yellow Book: Plant & Design Build – ad hoc DAB
  - Silver Book: Engineer Procure & Construct (Turnkey) – ad hoc DAB
- FIDIC 2005:
  - WB (on behalf of all development banks) engaged FIDIC to draft and publish a harmonised set of conditions (MDB Conditions) for use in connection with all projects funded by the World Bank and other lending institutions. Determinations by the DB are coercive
- FIDIC 2011:
  - Gold Book (DBO), standing DAB

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WHO SELECTS THE DB?

- Depends on contractual provisions
- Normally each party nominates a member for approval by the other
- The two normal members nominate the chair
- Default provisions if no board formed or a lack of agreement as to composition of members
- Appointment by an appointing authority
- Tripartite agreement (each party and each member)

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WHO IS THE DB?

- Normally one or three members
- May be any greater odd number
  - In which case two are normally selected from the pool to decide a dispute in conjunction with the chairman
- Professionals or lawyers?
- …or both?
- Well respected and known in the industry
- Technical knowledge
- Legal knowledge

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WHAT ARE THE QUALTIES OF THE DB?

- Experience (in the type of work)
- Contract experience
- Language of the contract
- Dispute resolution experience
- Procedural knowledge
- Availability
- Impartiality
- Independence
- Legal Knowledge

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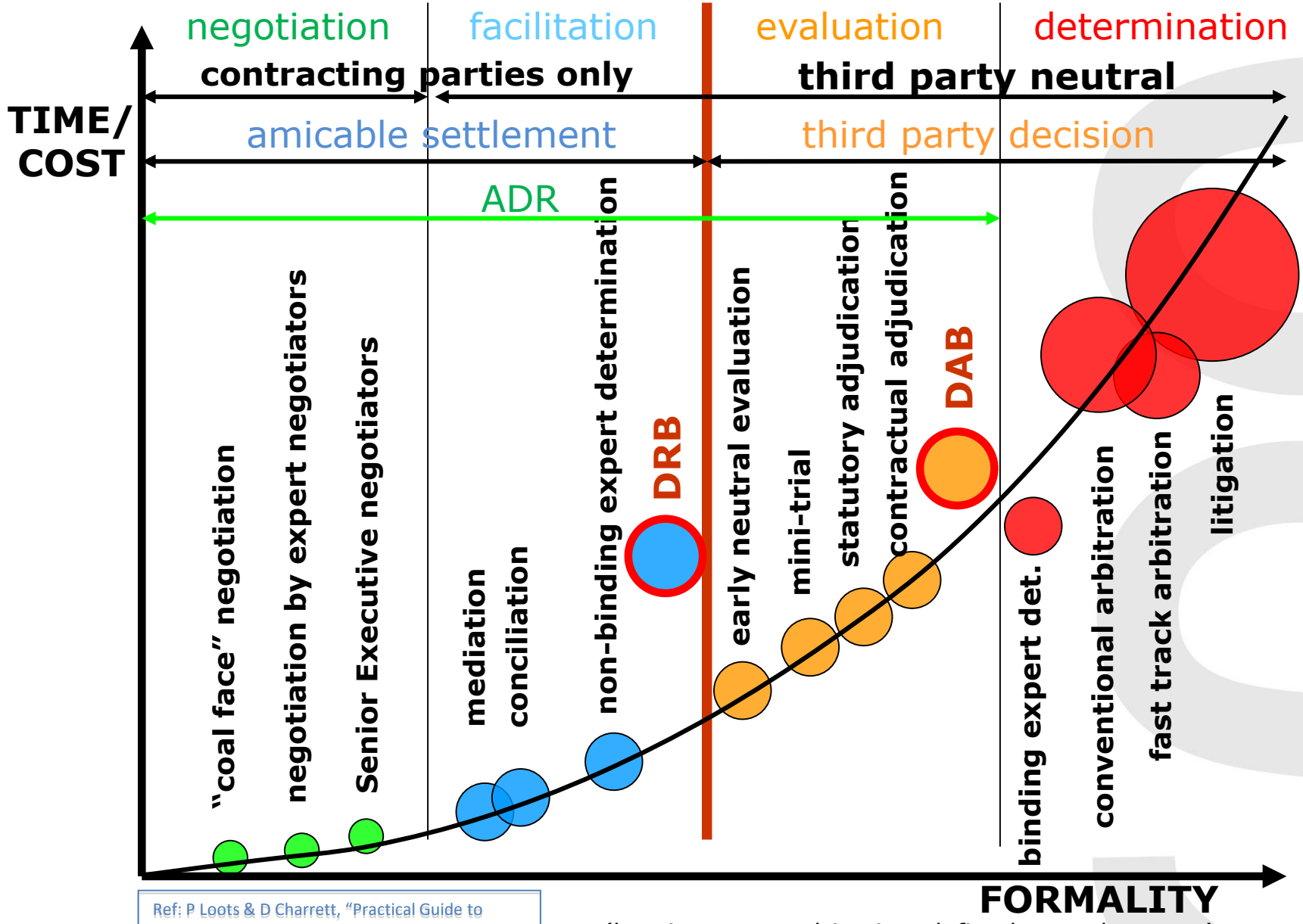
DISPUTE RESOLUTION ALTERNATIVES



Ref: P Loots & D Charrett, "Practical Guide to Engineering and Construction Contracts" (2009)

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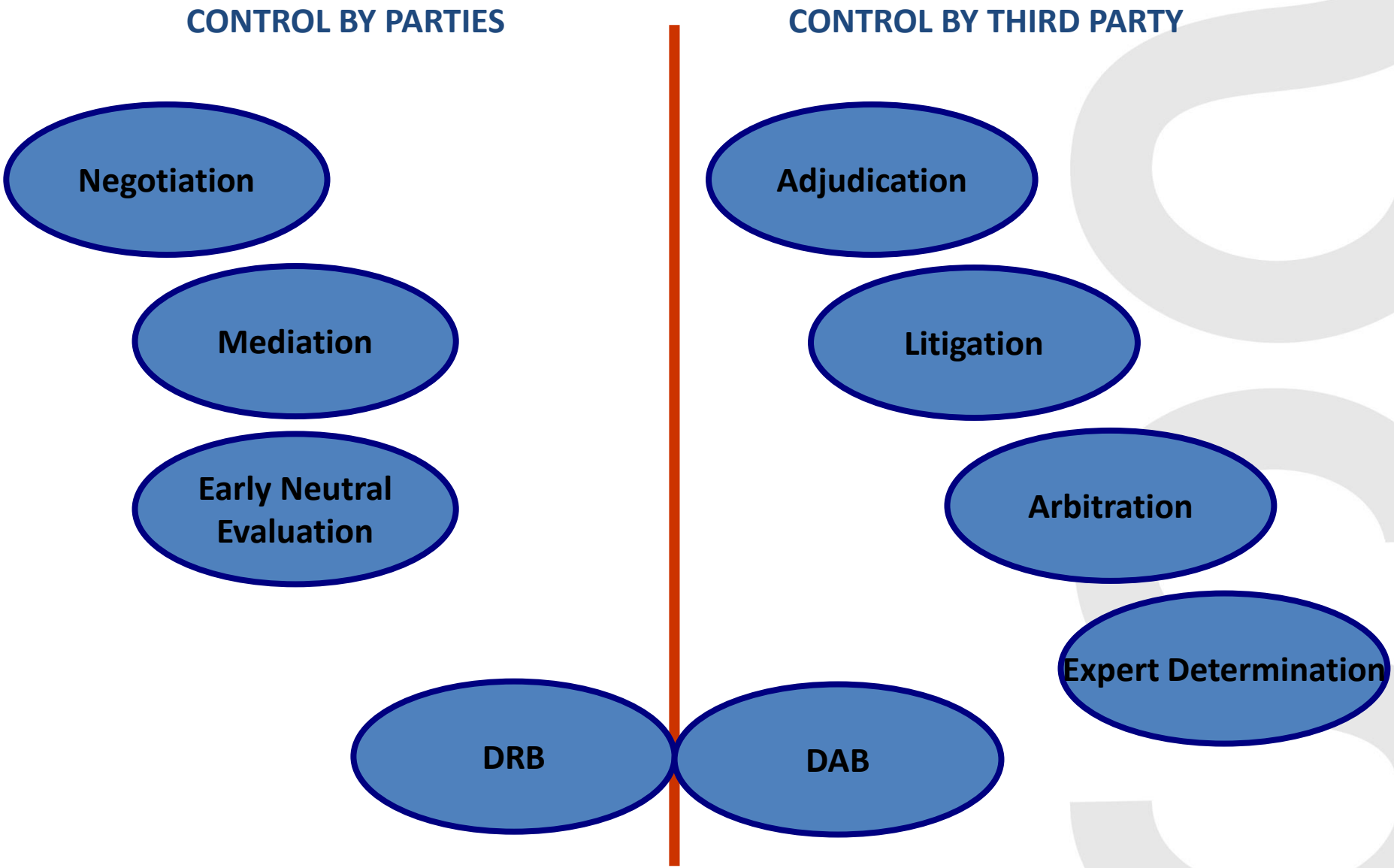
CONTROL OF OUTCOME OF DISPUTE



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WHY USE A DISPUTE BOARD?

- Members familiar with the project
- Job Site Process
- **Dispute Avoidance**
- Choice of Board Members
- Less cost
- More control over the outcome
- Helps maintain relationships
- THE PRIMARY ROLE OF THE DISPUTE BOARD IS THAT OF DISPUTE AVOIDANCE

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WHY USE A DISPUTE BOARD?

- THE PRIMARY ROLE OF THE DISPUTE BOARD IS THAT OF DISPUTE AVOIDANCE
- In some jurisdictions DABs are now referred to as “Dispute Avoidance Boards”
- Sometimes “dispute” in the name puts people off
- Should they be called something else?

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DISPUTE AVOIDANCE IN THE CONTEXT OF DISPUTE BOARDS

- Assists in identifying the issues
  - What is disagreed?
  - Why is it disagreed?
  - What are the solutions?
- Articulation of the issues
  - The Parties themselves improve their knowledge/ understanding of the matters in dispute
- Informal opinions
  - Preparing joint submissions to the DB (for an opinion), may enable the Parties to resolve their differences

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DISPUTE AVOIDANCE IN THE CONTEXT OF DISPUTE BOARDS

- Informal discussion
  - informal discussion between the Parties, which may lead to resolution
- 3rd Party advice/opinion
  - can explain / clarify / put issues in a different light / perspective
  - can facilitate resolution
  - opinion prior to involvement of legal representation avoids potential procedural issues, legal point scoring and potential high jacking of the process
- Avoids disagreements becoming disputes

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DISPUTE AVOIDANCE IN THE CONTEXT OF DISPUTE BOARDS

- Proactive approach
  - can positively influence project participant behaviour and improve relationships
- If the process does not depend on decisions that are binding, (DRB), there is less danger of relationships being damaged by a failure to implement or enforce them
- However not all parties can act on an opinion/recommendation
- Some parties need to act on a decision
- Most international projects using DBs use a DAB rather than DRB

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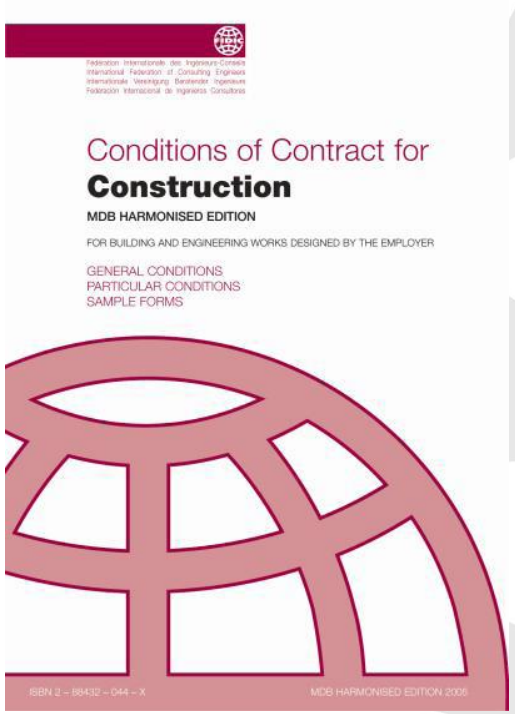
HOW IS THE DISPUTE BOARD PROACTIVE?

- Monitors project
- Documents and reports provided by Parties
  - FIDIC Procedural Rule 4
- Watches and is aware of warning signs
- No learning curve: board understands the project
- Regular site visits and meetings
  - FIDIC Procedural Rule 1
- DB promotes discussion between Parties
- Informal opinions
  - FIDIC Sub Clause 20.2



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IS DISPUTE AVOIDANCE WORTH IT?

- DB costs 0.05%-0.26% of the construction costs
  - Typically 0.1% (DRBF Conference NY, Oct 2012)
- About 99% of disputes referred to DBs are resolved in less than 90 days, the average cost is about 0.02% of the value of the dispute
- 98% of referred disputes end with the DB
- Of the 2%, half are subsequently upheld
- Of the 1% of decisions upset by arbitration/courts, almost always due to procedural irregularity, not on the substance of the decision

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IS THE DISPUTE AVOIDANCE WORTH IT?

- Disputes are not inevitable
- When disputes occur they are disruptive and costly
- Dispute avoidance helps the industry to make savings in management time, legal costs and reputation
- Remember.....you have a choice!

OR

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WHERE DOES A DB GET ITS POWERS?

- The DB gets its powers from:
  - The contract
  - Party agreement
  - Agreed Procedural Rules (FIDIC, ICC, CIArb, etc…)

- Some contracts have provisions for DBs incorporated into them (FIDIC)
- Contracts which don't have such provisions:
  - May use a number of standalone rules by the ICC, CIArb, etc
  - Or of course use the FIDIC rules in other contracts

- Bespoke rules:
  - But ensure the procedures are flexible (a unique feature of DBs)

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WHERE DOES THE DB GET ITS POWERS?

- Provisions for dispute resolution in the contract
  - Provides for appointment of DAB
  - Procedural rules
  - Provisions for institutional intervention for party default
- Procedural rules:
  - Are institutional rules required?
  - **Keep it simple and make the rules flexible**
- Works within each jurisdiction, eg is there a statutory adjudication regime?

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AND IF THE DISPUTE CANNOT BE AVOIDED?

- Provisions for dispute resolution (eg FIDIC)
  - Depends on contract/rules adopted
- Dispute referred (sent to chair)
- Time period for a Decision (eg FIDIC = 84 days)
- Party submissions
- Site visit?
- Hearing
- Written Decision

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AFTER THE DECISION

- Parties may serve a Notice of Dissatisfaction within 28 days (FIDIC)
- If no NOD(s) within 28 days DAB Decision is final and binding
- NODs must set out the matters in dispute and the reason(s) for dissatisfaction
- Neither Party may commence arbitration unless a NOD has been given

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THE COOLING OFF PERIOD

- Amicable Settlement (optional)
- Arbitration will be stayed for 56 days
- No procedure is specified in FIDIC SC 20.5
- Amicable settlement can be at any time, eg: before referral to DAB
- Consult with the other Party
- Success will depend on whether there is a common intention to avoid arbitration
- DAB Decision may be persuasive

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AMICABLE SETTLEMENT PROCEDURE

- What is Amicable Settlement?
  - Meetings between core group/senior managers
  - Mediation
- With/without legal advisers?
- Party/party meetings
- Meetings between legal advisers
- Is to be confidential?
- Is it to be Without Prejudice?
- Need to agree beforehand the procedure to adopt
- Is agreement possible?

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AND IF THAT DOES NOT WORK?

- FIDIC SC 20.6: unless settled amicably any dispute where the DAB Decision has not become final and binding shall be settled by international arbitration
- Arbitration under the ICC Rules (default)
- May open up, revise any certificate or determination, instruction, opinion or valuation of Engineer: effectively starting again from scratch
- Engineer may be called as a witness
- Becoming more difficult to arbitrate before using the DB procedure
- Enforcement

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DISPUTES AND DISAGREEMENT

- DBs have been very successful in:
  - minimising disputes
  - retention of relationships
  - retention of reputations
  - where they cannot be avoided by providing a rapid and cost effective method of dispute resolution
  - allowing parties to move on and work for the benefit of the project
  - often the mere presence of a DB may influence the parties to try to resolve problems for themselves
  - often the mere inclusion of a DB in a contract may result in lower bid prices

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CONDITIONS CONDUCIVE TO THE USE OF DBs

- Contracts requiring complicated performance over the medium and long term
- Where “Real Time” dispute resolution can have an impact on dispute costs
- Where traditional disputes resolution can badly disrupt performance and relationships
- Where fear of protracted dispute resolution can increase tender amounts, or even discourage a tender
- This does not just apply to construction projects

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Sense Studio Limited
Aldwych Studios
8th Floor 71-91 Aldwych House
London WC2B 4HN