MC MS Blog

“To DB, or not to DB: that is the (potentially costly) question”

MAY 26, 2025

I was fortunate to spend a few days in Cape Town earlier this month at the DRBF Annual International Conference. Believe it or not, it was the 24th Annual Conference of its kind, which got me thinking about the evolution of Dispute Boards (DBs) over the past as many years - not just in terms of the varying degrees of global adoption, but in the maturity of the conversations we're now having. Indeed, in its infancy, the conference anecdotally consisted of no more than 25 people having a chat around a table in Paris. These days, the conference attracts a high calibre of international speakers and delegates for three days of focused discussion on the latest developments in the DB process and related topics essential to the effectiveness of its practice.

Closer to home, a significant contribution to this discussion was the **2024 Dispute Boards International Survey**, published by the Centre of Construction Law and Dispute Resolution at King’s College London (“the Report”). The Report analysed 213 responses from individuals (i.e., practitioners), entities (i.e., users), funders, and institutions involved in the constitution and administration of 4,019 DBs, including their global use, performance, and impact from 2018 to 2023.

“What’s in a name? That which we call a rose by any other name would smell as sweet.” - Romeo and Juliet (Act II, Scene II).

The Report defined a dispute board as any *“job site dispute avoidance or resolution mechanism, constituted by individual(s) that should operate independently from the parties to the contract(s) and with the purpose of addressing the disputes of a specific Project”*. This definition includes commonly used industry terms such as dispute adjudication boards, dispute avoidance boards, conflicts avoidance panels, dispute review boards, dispute advisory boards, and dispute review panels.

Over the 6-year period, individuals reported 3,323 projects, with 50.9% reportedly including DBs, of which 31.1% were ad hoc (set up only when a dispute arises) and 69.9% were of standing nature (established at the start of a project and active throughout). Entities reported 530 projects, but almost the opposite: 59.4% ad hoc and 40.6% standing. There is clearly a divergence or inconsistency between how individuals and entities perceive or report the use of DBs. This might suggest differences in roles, experience, or interpretation between practitioners and users, but reinforces that definitions can be blurred. For example, is a DB appointed late in the project, which has never done a site visit, but has a retainer, truly “standing”?

In any event, I don’t think the stats are entirely reflective of the true global position – not least given the significant number of DBs which operate under the radar, particularly in countries like India where local professionals typically make up the panel. In Pakistan, there has also been a recent shift to adopt the 2017 Red Book as the standard General Conditions for public works, replacing the

previously used 1987 version.

"*Sweet are the uses of adversity, which like the toad, ugly and venomous, wears yet a precious jewel in his head*." - As You Like It, Act II, Scene I

The Report highlighted several positive trends and developments, signalling growing maturity and effectiveness in the use of DBs globally, including:

Dispute avoidance: 50% of individuals and 32% of entities reported that DBs adopt dispute avoidance measures "very often" or "always". Individuals reported that the most common result of those measures was the dispute being completely avoided, whereas entities reported that the most common scenario was that the dispute was relatively reduced.

Compliance with Decisions: I think arguably the most encouraging finding of the Report and often something of a surprise for the arbitration community, is the high compliance with DB decisions. According to the Report, parties complied with DB recommendations "most of the time" (individuals) or "sometimes" (entities). Compliance with binding decisions was higher, with parties complying "most of the time" and pursuing subsequent litigation or arbitration in only 0–10% of cases. Irrespective of binding decisions or recommendations, it clearly demonstrates how effective and satisfactory DBs can be, and it's very encouraging that, in cases where disputes proceeded to litigation or arbitration after a DB decision, the outcomes rarely differed substantially from the original DB decision. Even if things do end up in arbitration, going through a DB can still be a great way for both sides to test the waters.

"*The course of true love never did run smooth*" - A Midsummer Night's Dream, Act I, Scene I

So why aren't more DBs being used? Despite the apparent advantages, there seems to be several factors hindering the broader implementation of DBs.

Cost Concerns: Whilst DBs are increasingly integrated into projects, with 41% of entities and 100% of funders requiring their inclusion in all or certain projects, according to the report, 26% of entities and 75% of funders have, however, deliberately *excluded* DBs. 86% of entities and 67% of funders that chose not to include a DB in their contracts cited cost as the primary deterrent. The respondents indicated that there was typically no provision in the contract confirming the DB's fees, but with the most common aggregated retainer of $25k per annum. Regarding the total costs of DBs, individuals reported a common range between $100,001 and $200,000, whereas entities reported a range between $200,001 and $300,000. However, there is a great variation in rates, with the International Centre for Settlement of Investment Disputes (ICSID) fees (now at $500 per hour/ $4000 per day) often being used as a reference, and anecdotally, undercutting rates is happening more and more. Query also the commonly held view that all three DB members should be paid at the same rate? DBs often include a mix of engineers and lawyers - a local engineer may be an excellent contributor to the board, but if their standard daily rate is $1,000, users understandably find it difficult to justify paying them the equivalent of a barrister/KC. While costs were cited as a concern, the Report found that DBs typically represent only 0% to 0.5% of total project costs - a modest investment considering the potential savings from avoided disputes

Lack of Familiarity: 43% of respondents indicated unfamiliarity with the DB process as a reason for exclusion, highlighting the need for greater education and awareness. Hopefully, increasing awareness through workshops and training programs can ultimately demystify the DB process and demonstrate its benefits.

Dispute Avoidance: An Unrealised Ideal? The 2017 FIDIC suite introduced the "A" in DAAB – so now a Dispute Avoidance and Adjudication Board – with the aim of resolving issues before they become disputes. In practice, however, and perhaps an unintended consequence of the 2017 FIDIC Suite, is that many boards could be swamped with formal referrals and time bars (e.g., the 42-day

limit under SC 21.4.1(a)) that prevent informal assistance. There's a clear tension between avoidance and adjudication. Many parties eventually relax the contract to allow informal help, but public employers often can't, due to rigid procurement rules. FIDIC has yet to reconcile this contradiction, despite codifying what DBs have long done in practice.

Speaking of FIDIC, the Global Use of FIDIC by Chinese Architecture, Engineering, and Construction (AEC) Firms report by the Tianjin University in China and London South Bank University found that striking through DAB provisions is the most common amendment in the FIDIC 1999 form and 2017 forms. I think employers are often reluctant to relinquish financial control, particularly when it comes to dispute resolution. However, this hesitation isn't always in their best interest—especially in the current climate of rising inflation, where arbitral awards can carry substantial financing costs. If construction costs can be repaid, a timely decision from a DB may be treated as part of the capital expenditure. By contrast, an arbitral award handed down several years later is typically recorded as a straight loss, potentially turning an otherwise profitable year into a financial setback. Perhaps unsurprisingly, lawyers advising parties are slightly less likely to be the instigators of removing the DB provisions.

Unlocking the potential of Dispute Boards

Looking ahead, I think there are several promising opportunities to expand the use and impact of DBs:

International convention for DB enforcement?: The idea of a "New York Convention for DBs" has been floated, which is intriguing. Getting global buy-in might be a long shot, but it's worth continued discussion—especially in light of growing concerns around enforcement in cross-border projects. Most respondents support the introduction of a convention to facilitate the circulation and enforcement of DB decisions - notably, 58% of individuals, 63% of entities, 92% of institutions, and 50% of funders expressed support for this proposal. Developing international conventions to standardise and enforce DB decisions can hopefully in time address concerns about their legal standing. In this vein, I would commend to you the 2024 SCL Hudson prize winning paper by Professor Renato Nazzini KC and Aleksander Godhe – *Internationalising Adjudication: Towards an Incremental and Polycentric Harmonisation*.

UNCITRAL's Model Adjudication Clause - UNCITRAL have produced a model adjudication clause which could boost global DB uptake. It's certainly a step forward, but I think we'll need real-world adoption to gauge its impact. This is again something referred to by Nazzini & Godhe.

Diversity - It's nearly impossible to discuss any form of dispute resolution today without addressing the topic of diversity — and rightly so. A significant portion of individuals (42%) found that the average composition of DBs was only "a little diverse," though many acknowledged noticeable improvements over the past five years. Among entities, opinions were split: 36% viewed DBs as "diverse," while another 36% still considered them only "a little diverse." Let's hope we see further improvements again over the next five years, including in terms of professional background. This structure can be cost prohibitive, but it allows for a useful mix of legal and technical expertise. A one-person DB may be cheaper but can be stretched too thin in a short period of time. Also, including at least one lawyer is a best practice that balances adjudicative rigor with technical insight. Data from the Kings' Report shows parties are involved in 88% of board nominations. FIDIC's President's List is a common resource, though actual FIDIC or ICC nominations are rare. It seems to be the case that personal reputation and prior experience still drive appointments.

New Industries - Although progress has been slow, likely due to a lack of relationships with industry leaders outside construction, there's growing interest in bringing DBs/DABs to new sectors such as IT and software development, aerospace and defence, and pharmaceuticals where there are often IP issues, shifting regulatory landscapes and milestone-driven payments.

Private Financing and the Role of DBs? With Multilateral and Unilateral Development Bank funding likely to shrink, persuading private financiers of the value of DBs is essential. They must be shown that timely dispute resolution protects project value and mitigates delay risk — something that traditional arbitration often can't do fast enough.

"*All the world's a stage, and all the men and women merely players*." - As You Like It (Act II, Scene VII)

So, in essence, DBs are maturing, but clearly challenges remain. Adoption in other industries, enforcement mechanisms, and fee structures remain areas ripe for development, but we have better data, more structured contracts, and growing recognition of the DB's dual role in avoiding and resolving disputes than ever before. Despite some concerns over costs, DBs are being widely adopted and have proven to be effective in dispute avoidance and resolution. However, to my mind, their real effectiveness is often in preventing costly arbitration and litigation, so less a case of "dispute" avoidance, and more a case of "expensive arbitration/litigation" avoidance. However, board quality is key; poorly qualified boards can undermine confidence and outcomes, and I think the future of DBs will depend on their adaptability—both in how they work and where they're used.

Finally, and most encouragingly, decisions made by DBs are in most cases accepted without further escalation. A key highlight from the King's Report underscores the high level of compliance with these decisions, and with growing momentum behind an international convention to strengthen their enforcement, DBs are proving to be an effective and satisfactory alternative to often costly arbitration or litigation.

So, you could say that, while arbitrators only enter after the curtain falls, dispute board members tread the boards throughout the performance, ensuring that the play runs smoothly ….

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