

Dispute Boards: More Than Resolving Disputes

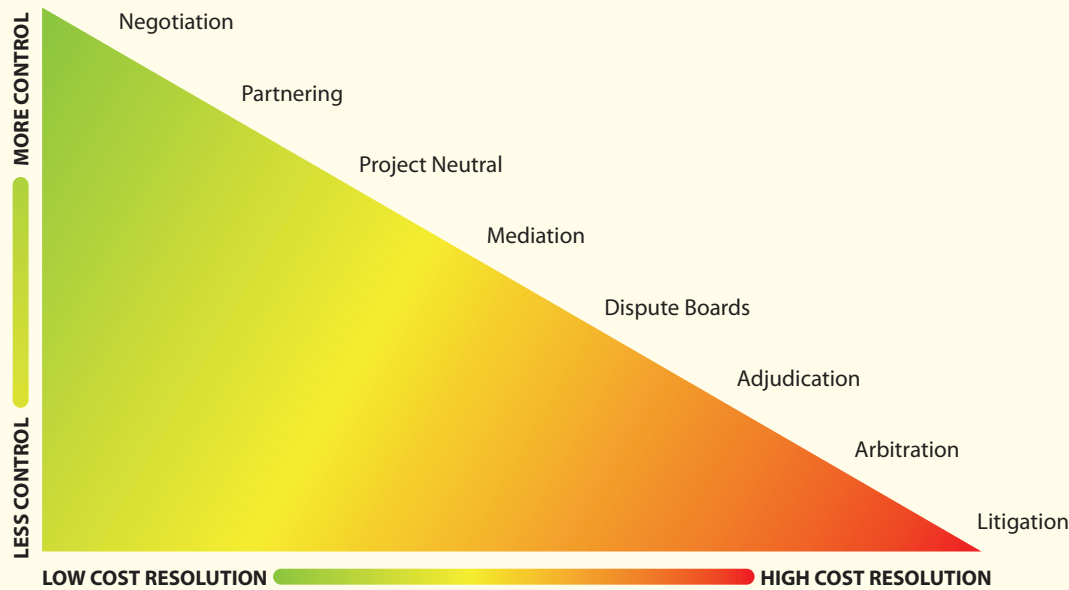
Recognizing the need to find alternatives to the costly and slow adversarial litigation process, Canadian Construction Documents Committee (CCDC) incorporates the dispute resolution concepts of negotiation, mediation and arbitration in a manner that encourages the speedy, less expensive and voluntary resolution of construction disputes.

Another process in the dispute resolution continuum (see figure), lesser known in Canada but popular elsewhere, is dispute boards. The purpose of this bulletin is to provide a brief introduction to the different types of dispute boards, and describe how they can be used to both avoid and resolve disputes.



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Dispute Resolution Continuum (source: Revay and Associates Limited)



Formation and Objective of Dispute Boards

Dispute boards are most often formed at the beginning of a project, before problems develop. Although the process is most often specified in the bid documents¹, in some cases dispute boards may be an option instituted by the parties after contract award.

The objective of the board is to avoid litigation by providing an independent review of claims as they arise rather than waiting until the end of the project when disputes become much more difficult and expensive to resolve as positions harden and costs escalate. The decision of the dispute board can be binding or non-binding depending on the preferences of the parties.

DRB Recommendation or DAB Adjudication

A dispute review board (DRB) plays a proactive role in identifying potential disputes before or after they arrive, encouraging the parties to communicate, collaborate and negotiate a solution. In the case that a dispute cannot be resolved by the parties, it can be presented to the DRB who will provide a recommendation to the parties that in most cases concerns entitlement and is non-binding. Evaluating entitlement first allows the parties to get to the DRB early. The parties can then negotiate their own financial terms; but if unsuccessful – return to the DRB for a recommendation on quantum. If neither party objects to the DRB recommendation within a certain time, then the determination could become binding.

A dispute adjudication board (DAB) provides a binding decision on both entitlement and quantum that is immediately enforced and remains so until the end of the contract. Should the parties disagree with the DAB decision, it can be appealed in arbitration but only after the end of the work. Since the DAB decision concerns both entitlement and quantum, it often takes longer to prepare a detailed statement of claim to be decided by the DAB.

Structure

- **Three-person Panel:** Dispute boards generally consists of a panel of three respected and impartial subject matter experts.
 - o Typically each party in a dispute selects a board member. Then, a third member (who will chair the panel) is jointly selected by the two parties. This procedure is now less frequent on DRBs but still the norm on DABs.

¹ For sample DRB specifications, refer to the Dispute Resolution Board Foundation website at drb.org

- o It is suggested that a DRB be formed via a roster of candidates from which both parties mutually agree to select all three members. The DRB then chooses its own chair. The advantage of the more current procedure is to encourage panel members to be loyal to the project and not a nominating party.
- **Single-person Panel:** For small projects (generally less than \$10 million), the parties may agree to engage a single board member, in this case referred to as a dispute resolution adviser, referee or adjudicator.
 - o This person may be engaged at the start of work if a dispute avoidance role is desired or later when a dispute develops. Parties can request either a non-binding recommendation or a binding decision (adjudication).
 - o Single person adjudication has become very popular in Britain since it was enabled by legislation and it is available to all parties in a construction project. It is often used to resolve payment disputes because the timeline to reach a decision is as rapid as 28 days. However, rapidity may not be suitable for complex problems, leading to a sense of 'rough justice'.

How Do Dispute Boards Work

- Board members participate in regular (1 – 3 months) meetings and site visits during the course of the project.
- Board members facilitate communication between the parties, detect potential problems early and suggest means to avoid problems becoming disputes.
- An informal hearing may be conducted to resolve simple disputes. A verbal recommendation given after a few hours of deliberation is called an advisory opinion.
- A formal hearing may be conducted when problems evolve into complex claims. The parties will prepare a list of "Issues in Dispute", submit position papers and rebuttals.
- A DRB provides a written recommendation, usually concerning entitlement only, whereas a DAB provides a binding decision on entitlement and quantum.

Why Do They Work

- Promote open communication, trust and cooperation. Focus on early identification of problems, proactive dispute avoidance, and mutual desire to stay out of court.
- Minimize posturing – neither party wants to suffer loss of credibility by submitting non-meritorious claims. In fact, 60% of projects with DRBs had no disputes referred to them.
- Provide an impartial third-party evaluation, recommendation by experienced board members.
- Even if recommendation is rejected by one party, it often serves as the basis for a negotiated settlement (95% of issues presented to the DRB do not go on to arbitration or litigation).

Use of Dispute Boards in Canada

- DRBs have been used successfully on several large infrastructure projects in Canada (e.g. highways, bridges, tunnels, hydroelectric projects, and water treatment plants)².
- DABs are less frequent in Canada but very popular on large international infrastructure projects (e.g. British Chunnel, Panama Canal).
- Single person DRAs or referees may become much more frequent in the near future in Canada, particularly in Ontario. A recent study by attorneys at BLG³ recommends that the construction lien act be modified to permit the use of adjudication on any construction project. In addition, the Ministry of Transportation of Ontario has already instituted a system of referees to resolve disputes on its projects.

² For further information, go to revay.com/index.php/publications/the-revay-report/ Vol. 29, No. 2, June 2010

³ For further information go to constructionlienactreview.com/wp-content/uploads/2015/07/Striking-the-Balance-Expert-Review-of-Ontarios-Construction-Lien-Act.pdf

Summary

1. Dispute Review Board

- Proactive dispute avoidance during work;
- Issues non-binding recommendations for consideration by the parties, first with regards to entitlement, later if the parties are not able to negotiate, the quantum;
- Failure to agree leaves the dispute to be resolved by other methods, e.g. arbitration or litigation depending on the wording of the contract.

2. Dispute Adjudication Board

- Issues interim binding decisions on both entitlement and quantum;
- If either party objects issuing a notice of dissatisfaction, then the decision can be reviewed by arbitration or litigation but only after the contract is completed.

3. Single-person Board (DRB or DAB)

- Similar to either of the above but for smaller projects, smaller disputes;
- Rapid decisions make it attractive.