

## **Oil industry Dispute Boards can save big money**

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During my 40+ years on the Operator side of the oil industry I worked to avoid disputes with contractors by timely interventions when issues arose. Only once did a dispute with a contractor escalate into an arbitration in an operation I was responsible for. Now I often work with resolving disputes after they have arisen and when costs become seriously large. Prevention costs much less than cure. Our industry can and should learn how to prevent disputes from other industries.

Dispute Boards (DB) originated in the construction sector in the 1960's. In June 1980 construction began on the El Cajón Dam and Hydropower project in Honduras<sup>1</sup>. The World Bank as one of the funders set up a DB for the project. The board was active throughout the project and provided non-binding recommendations to the parties to stop escalation of potential disputes. This succeeded and there was no recourse to litigation or arbitration on this 6 year long \$775m<sup>2</sup> project. The aim was prevention, not after the fact dispute resolution.

After the El Cajón dam project, the World Bank helped to evolve the use of DB's by creating model form contracts including a DB dispute resolution clause. These anticipated the use of DB's to make non-binding recommendations as a condition-precedent to starting arbitration proceedings. The updated 1995 version<sup>3</sup> Clause 67.1 set up a 3 person Disputes Review Board, which would review any dispute between the Employer and Contractor. The Board members must be experienced in the type of construction and in contract interpretation. One member was to be selected by each party with the 3<sup>rd</sup> member appointed by the other two – as is common practice in constituting arbitral tribunals. DB's are now mandatory for World Bank funded projects. The Fédération Internationale Des Ingénieurs-Conseils (FIDIC) now publishes a suite of model construction contracts which include terms to provide for dispute boards. These terms make DB recommendations binding unless one party exercises their power to commence arbitration.

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<sup>1</sup> [https://en.wikipedia.org/wiki/El\\_Caj%C3%B3n\\_Dam\\_\(Honduras\)](https://en.wikipedia.org/wiki/El_Caj%C3%B3n_Dam_(Honduras))

<sup>2</sup> \$775m in 1986 is equivalent to \$2,069m in 2022. <https://www.usinflationcalculator.com/>

<sup>3</sup> [https://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@emp\\_policy/@invest/documents/legaldocument/wcms\\_asist\\_4559.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_policy/@invest/documents/legaldocument/wcms_asist_4559.pdf)

Much experience of Dispute Boards has been gained over the decades. It's a mature procedure and many institutions publish model rules for DB's in a similar way to arbitration rules<sup>4</sup>.

For oilfield projects of long duration and/or high cost, experience from other industries suggests that a Dispute Board would be very likely to save money and avoid disruption to those companies involved in the project. Dispute resolution clauses in oilfield contracts usually bind the two parties to the contract to use arbitration rather than litigation to resolve disputes. However there is no reason why a separate contract should not be concluded among several parties to form a Dispute Board between them. This would be more efficient than having one board between the Operator and the main Contractor as it could include all the significant sub-contractors to the project. The parties who constitute the DB share the cost. If the cost was shared among more parties, that reduces the cost to each party. By each party bearing part of the cost, the situation is avoided where the Operator alone funds the board and this leads to an appearance of bias by the Board in favour of the funding party. It is essential for the Board member(s) to be seen to be impartial and independence with no conflicts of interest, in the same way as is required of an arbitrator.

In setting up an oilfield Dispute Avoidance Board (with the specific remit of avoiding escalation of disputes into arbitration or litigation), there are choices to be made.

- 1) Should there be an appointing authority who can assist in drafting the contract, appointing suitable independent board members and providing administrative support? If a single member is to be used, this would avoid any suspicion of partiality by that member.
- 2) Should the Board follow any particular model DB rules and should the selected rules be modified for the project?
- 3) Are there any conflicts in constituting a DB with the law of the country in which the project works?

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<sup>4</sup> See for example the Chartered Institute of Arbitrators 2014 DB rules, <https://www.ciarb.org/media/14974/ciarb-dispute-board-rules-practice-standards-committee-august-2014.pdf> or ICC 2015 rules, <https://iccwbo.org/publication/2015-dispute-board-rules-2018-appendices-english-version/>

- 4) One or three Board members? This has a direct impact on the cost of the board. A single DB member can work well but there is no immediate backup in case of sickness or unavailability.
- 5) What qualifications and experience should the board have among its members?
  - a) Long experience at a senior level in the industry is a key requirement. One component of the DB is for the board to have confidential access to all relevant information on request. Their experience will give them the knowledge of what to request. Legal arguments about production of documents or interviews are detrimental to a swift assessment and resolution of the issue. The process is inquisitorial.
  - b) Availability – staying in regular contact with key team members, site visits 3 or 4 times a year, investigating problems that might lead to disputes.
  - c) Experience of dispute resolution, such as mediation or arbitration.
  - d) Ability to read and interpret contracts. It's not necessary to be a lawyer to do this.
- 6) Should Board findings be non-binding recommendations, or immediately binding on the parties, or binding unless one party decides to escalate to arbitration? If binding, how is that enforced? It may be possible for the courts in the country to enforce such a decision as the contract would make it a breach of contract to resist the finding. To enforce in other jurisdictions might need a two-step approach where an arbitral tribunal issues an award which mirrors the finding and this could then be enforced under the New York Convention<sup>5</sup>.
- 7) What time limit should be given for Board recommendations or decisions?

Careful consideration of the project, its legal jurisdiction, existing dispute resolution clauses and the needs of the Parties must all feed in to building the correct DB contract to constitute the Board. The Dispute Resolution clauses of existing contracts may need amending. For an oilfield project of high cost and long duration, setting up a Dispute Avoidance Board would ideally be done at project inception. However better late than never; if a project still has much time to run and money to spend, a Dispute Avoidance Board could still be set up to avoid future expensive and disruptive disputes.

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<sup>5</sup> See <https://www.newyorkconvention.org/>.

Arbitra International has international experience in setting up and managing Dispute Boards and is able to put forward a full proposal to an interested party.

### Other References

- 1) International Arbitration Law review article "*The Role of Disputed Boards in the Construction Industry*"; Juan Eduardo Figueroa Valdés and William R Schubert, 2017. <https://www.camsantiago.cl/wp-content/uploads/2021/01/Articulo-the-Role-of-Dispute-Boards-in-de-Construction-JEF-y-Bill.pdf>