

New Vision University



**The Role of the Dispute Boards
In Construction Law,
The Legal Nature of Decision and Peculiarity of Enforcement
At The International Level**

By

Anano Burnadze

Supervisor: Sophie Tkemaladze

A thesis submitted for the degree of Masters in the Comparative Private and International Law at the
New Vision University

Tbilisi, 2021

Table of Contents

- Table of Contents2
- List of abbreviation2
- Introduction.....3
- A. General Reference of Dispute Boards.....7**
 - I. Concept, Origin and development of DB.....7**
 - 1. History7**
 - 2. Concept and scope.....8**
 - 3. The role of the law in Dispute Boards11**
 - 4. Advantages and disadvantages.....15**
 - 4.1 Recommendations versus binding decisions.....18*
 - II. Classification of Dispute Boards.....20**
 - 1. Comparison between Dispute board and other forms of ADR20**
 - 2. Sorts of Dispute Board23**
 - III. Procedures, The legal Nature of Decision and peculiarity of Enforcement.....25**
 - 1. Appointment of the board members and qualities of them25**
 - 2. The legal nature of DB decision and Peculiarity of Enforcement.....27**
 - 3. Dispute Boards procedures.....31**
- B. Legal basis for Dispute Boards and Historical cases32**
 - 1. Legal systems and international organizations32**
 - 2. Historical Cases.....33**
- C. Future of Dispute Boards.....35**

- Conclusion35
- Bibliography.....37

List of abbreviation:

ADR- Alternative Dispute Resolution;

DAP- Dispute Avoidance Process;

DB- Dispute Board;

DRB- Dispute Resolution Board (or Dispute Review Board);

DAB- Dispute adjudication Board;

CDB- Combined Dispute Board;

FIDIC- International Federation of Consulting Engineers;

ICC- International Chamber of Commerce;

DRBF- Dispute Resolution Board Foundation;

NOD- notice of dissatisfaction;

Introduction:

I would like to begin present Master thesis by citing a good quotation, which describes perfectly why I sought my Master thesis topic in the field of Alternative Dispute Resolution.

The quote belongs to the 15th Chief Justice of the US Warren E. Burger:

“I was trained, as many of you were, with that a generation of lawyers taught that the best service a lawyer can render a client was to keep away from the courts” (burger 1082)¹

There are reasonable grounds why people dread litigation and trying to avoid it. There always are high chances of damaging relationships in the process of taking a dispute to a court of law, even slight cases are capable of discrediting reputations, not to mention enormous sums of money, that litigation requests. But one of the main disadvantages of it is the length of the processes. We all know the importance of time, especially in case of business processes. The amount of lawsuits increases, but also there are a lot of forms of alternative methods of solving the dispute outside the court. Alternatives of resolving the

¹ Analysis of Construction Dispute Review Boards, Duzgun Agdas, Ph.D., P.E., M.ASCE¹; and Ralph D. Ellis, Ph.D., P.E., M.ASCE², JOURNAL OF LEGAL AFFAIRS AND DISPUTE RESOLUTION IN ENGINEERING AND CONSTRUCTION © ASCE / AUGUST 2013, p.122

disputes are various and all of them offering different procedures and different conditions, which makes it captivating. The reason why ADR is this attractive is that it offers a resolution of long-standing disputes in a short time, and even it gives you a chance to produce win-win solutions to unpleasant fights that would otherwise only leave both sides damaged.²

I would like to share a very interesting story as an instance. Judge Dorothy Nelson of the U.S. Court of Appeals in San Francisco traveled to Israel. She attended a court hearing conducted by three Greek Orthodox priests. The court was conducted in a Quonset hut. A wife was suing her husband for divorce. She explained that her mother-in-law was too old to climb stairs and she occupied the ground floor, and the wife lived upstairs. There was one entrance to the house and when she got back home, the old woman continually questioned her about her activities. She loved her husband but the situation was an unbearable. Husband said that he loved both, but he could not afford two houses. The three priests rendered the judgment, which said that husband had to purchase a ladder. Wife could climb the ladder directly to her second-floor window and avoid unpleasant conversations. Judge Nelson said that as she watched the couple leaving holding hand, she could only wonder what might happen to them under an adversary system, with its orders to show cause, its lengthy hearings, and its high attorney fees.³

What I want to say with this little story is that sometimes there is a very easy way out. And it is not necessary to meet all formal needs to solve the dispute. Sometimes it is better to avoid all this formality and it is more effective to analyze parties' needs and interests. This is what ADR does. While the lawyers trying to solve the disputes by seeking legal problems, sometimes it is way more constructive to be more inventive and less bound by formality and boilerplate.

This is the reason why international contracts are sometimes provided with terms, which states that before the parties begin the litigation or arbitration, they should try some form of ADR, but even when seeking the parties' needs are conducted in good faith, it cannot be successful, unless parties can look at the vital point objectively. Construction disputes need to be solved ASAP, because in this field time is money and the lengthening of the processes might be unprofitable to the parties. There is one used technique, which is called as

² Five Ways to Keep Disputes Out of Court by [John R. Allison](#), FROM THE JANUARY–FEBRUARY 1990 ISSUE

³ Five Ways to Keep Disputes Out of Court by [John R. Allison](#), FROM THE JANUARY–FEBRUARY 1990 ISSUE

“wedding cake approach”, it consists of level of structure of dispute resolution, from the senior management level, to mediation, DB, and finally arbitration or court.⁴

The construction industry stands out as a field where there are always high amounts of disputes. Construction projects contain a lot of hazards and each project is individually complicated and has specific issues. In 1986, Lord Donaldson, one of England’s outstanding judges, said:

“It may be that as a judge I have a distorted view of some aspects of life, but I cannot imagine a civil engineering contract, particularly one of any size, which does not give rise to some disputes. This is not to the discredit of either party to the contract. It is simply the nature of the beast. What is to their discredit is that they fail to resolve those disputes as quickly, economically and sensibly as possible.”⁵

Historically, international construction contracts have used a dual dispute resolution system. This means, in case of arising of disputes, in the first place disputes must be solved by alternative methods of dispute resolution, such as mediation, negotiation, Dispute Boards and others. Only after, if disputes cannot be resolved by methods of ADR, conflict can be taken to the court or the more formal ADR mechanism, such as Arbitration. This dual mechanism is very profitable, because it is possible to solve the problem in an easy and less formal way, then going to the court, lose more time, money, and resources. In recent years, the role of the dispute boards increased. Dispute board firstly was used in the USA. After successful usage of it, DB became widespread. The World Bank, FIDIC, ICC and DRBF approved dispute boards as the default method of dispute resolution provision in international construction contracts.⁶

The main advantage of Dispute Boards is to help parties to avoid disputes (until it arises) or resolve them. DB is able to operate only within the assignment of it. The selecting of DB gives parties the possibility to have control of the situation. One of the reasons why Dispute Boards are this convenient is that DB is appointed before the disputes occurred. It is actual

⁴ Redfern & Hunter: *Law and Practice of International Commercial Arbitration* 6th Ed. OXFORD

⁵ CHERN ON DISPUTE BOARDS *Practice and Procedure*, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF, 2015 p.3*

⁶ Munachiso OGU-JUDE (UNICAF UNIVERSITY, CYPRUS), Electronic copy available at: <https://ssrn.com/abstract=3630343>

from the commencement of the contract until fulfillment of the agreement. But it has its disadvantages as well. As is was mentioned, it still goes through its early development stages, that's why there are some legal aspects that needs to be discussed. It is important to review the result of the DB, the nature of DB decision and enforcement of it.

DB has a power of contract. The selection of DB's type, its power, the nature of the decision arises from the agreement of the parties. This means that enforcement of its decision cannot be provided as it is characterized for arbitral tribunal awards. The non-compliance of the decision is perceived as a breach of contract by a defaulting party. The contractual remedy is a referral to arbitration or the court under the contract. It is important to clear up whether the referral is on the failure to comply with DB's decision or on the underlying substantive dispute. If the referral is on the first one, then the arbitral award can be an immediate award and this award can be enforced in the court. This is relative when there is no use of NOD by the parties. But parties also are capable of referring the underlying substantive dispute to arbitral tribunal to rehear the merits of the dispute. Parties are able to refer both, albeit in this time they can get an immediate interim award.⁷ The nature of decisions depending on the DB's type and the enforcement of them is discussed in this master thesis as well.

Based on mentioned above, the research for the discussed topic has a huge practical character and significance, as it is a novation for Georgia and not only for our country, but for the world, as well. Master thesis is not set boundaries only in researching for Dispute Boards in construction law. Accordingly, the paper will discuss significant aspects of Dispute Boards in construction law, such as, definition, concept, development history, legal basis, several historical cases, future of the Dispute Boards in construction law and so on. I make an effort to sum up all important legal aspects of DB, its pros and cons, the success of using it in worldwide. I try to outline the problematic legal aspect of it, as well. I find this topic interesting and effective, because in this master thesis I try to make the reader see why it is convenient to develop Dispute Boards in Georgia.

Master thesis methodological basis is general methods of science. The topic is examined on the basis of comparative, historical and logical analysis. In researching the field, there was

⁷ https://www.fenwickelliott.com/sites/default/files/nick_gould_-_enforcing_a_dispute_boards_decision_-_issues_and_considerations_paper_for_fidic_me_conf_feb_2012.indd_.pdf last seen 09.09.2021

chosen pieces of information, that makes it difference why it is important to develop Dispute Boards in Georgia. Correspondingly, the comparative studies will be useful for ADR regulations and practice of Georgia.

A. General Reference of Dispute Boards

I. Concept, Origin and development of DB

1. History

Historically, construction contracts had been following in a straight line, but gradually construction projects were becoming more composite. There should have been created something that met the needs in the construction industry. Dispute resolution mechanism had to be prompt, informal, inexpensive and independent. There is consideration that Dispute Boards owe their existence to Arbitration, but still, it is deemed that the first antecedent of DB is a Joint Consulting Board, which was created in the 1960s in the United States, for the Boundary Dam Project in Washington regarding site conflicts. The idea worked so well that it started developing. Afterward, in 1975, the first DB was constituted for the second bore of the Eisenhower Tunnel in Colorado. The first one could not be realized because of the construction disputes, but the second attempt ended successfully, because of the DB. Contracting parties appreciated the benefits of it and since the case of “The Eisenhower”, the DB has become popular throughout the United States. It has spread globally as well. The international usage of DB, began in 1980 when it was used in a huge international project in Honduras (the El Cajon Dam and hydroelectric facility). The project was so successful that it started growth internationally.⁸ Construction contracts have never been in simple contracts group, but since the world developed, appeared new challenges, which made construction industry more demanding. There was a necessity to create

⁸ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCIArb, FDBF*, 2015, p.11

something like DB, which had a lot of benefits compared to formal forms of dispute resolution. The necessities formed the DB the way it is now.

Nowadays Dispute Boards are used in numerous countries, such as the USA, UK, France, Ireland, Sweden, Switzerland, Iceland, Greece, Italy, Turkey, South Africa, Uganda, Egypt, Vietnam, Hong Kong, Ukraine, Russia, India and others.⁹ In Georgia, there is no big practice of using it, but there have been occasions of using DB as well. DB may have no big history of using compared to other forms of dispute resolution, but the speed of growth of it says a lot about the significance of DB.

2. Concept and scope

Before I discuss Dispute board's concept, I would like to consider what the aim of a construction contract is. In the construction industry, it is very important to create a contract very carefully, because the contract must prevent parties from unexpected and unpleasant damages. This field is very complex and it is why there are high chances to occur unpredictability and may situation go to the unexpected way. This is a reason why construction contracts need to be made in detail, from the very beginning of the construction project to the very end of it. Unfortunately, in spite of creating it with extra caution, there always left possibilities of arising disputes. The mechanism of dispute resolution must be considered in the contract, as well.

The feeling of frustration with all disadvantages encloses the mechanism of formal dispute resolution, caused more interest in alternative dispute resolution. In the construction industry, team-building and interest-based mechanisms gained popularity. It is way more convenient and flexible to work with an interest-based mechanism, rather than a right-based

⁹ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.13

mechanism, for solving the dispute. It gives you a chance to resolve the dispute with a win-win solution. To solve the dispute, this mechanism seeks the roots of conflict.

At first, construction disputes were resolved through negotiations and decisions of design professionals. There was as less involvement of lawyers as possible. But gradually the industry became complex and disputes, arisen in it, as well. It became necessary to grow the involvement of lawyers, because disputes moved towards the massive litigation proceeding. In this whole thing, dispute boards evolved as a convenient and efficient method. The main idea was that the group of experts in the construction field, periodically gathered on site to review. After the revision, they render a non-binding decision on various issues. It was helpful to avoid prolonged conflict.¹⁰

As Max Lucado once said: “conflict is inevitable, but combat is optional.” So what the best way in the conflict situation is. Construction projects are very challenging with specific issues and hazards. Each project is individual and encloses unique issues and complications. This is why it needs a group of experts, which have an individual method of approach. And finally, we came nearer to the definition of DB. DB falls within the area of dispute avoidance processes (DAP), which has a goal to manage conflict within a reasonable time and budget. Dispute Board is a group of three persons (mostly, but this composition is not mandatory). There are one-person Boards for small projects, which need way fewer expenses. If the project is massive, then parties can use three or more member Boards. Board members should be impartial and experienced persons, who are appointed by the parties at the beginning of the project. The members of the panel regularly visit the site and keep in touch with parties. Dispute Boards have a huge impact on preventing from arising disputes, since they are involved in detecting potential complexities and realizing every phasis of construction project. Accordingly, they identify potential disputes. DB provides parties with decisions on arisen or potential disputes. It is efficient to avoid disputes and in case if disputes cannot be avoided, as well. Whether DB decisions are binding or non-binding, it depends on the sort of the DB, which I will discuss below.¹¹

¹⁰ Managing Construction Conflict: Unfinished Revolution, Continuing Evolution By Thomas J. Stipanowich., 2014, p.4

¹¹ Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, [This article was first published in Construction Law International](#), Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010. P. 8

Who are the members of the panel? It is up to contracting parties, but in construction projects, parties select experts, who have experience in the sort of construction projects, for instance, senior engineer. Also, they select construction lawyer, who has experience and knowledge in resolving issues in the field. This kind of diversity among the panel members, gives the board the capacity to identify potential issues enclose the construction project, whether it is technical or legal. Board assists the parties until dispute arises to prevent from arising it and assist them as they arise, as well. They do their work with regular site visits. It is very effective to keep up with all pieces of information that are going on in the project. The advantage of it is, as they say, contracting parties tend to control their behavior in front of the DB members, because they are well-respected industry experts. It has a positive effect on relations between all working personals, especially between parties.¹² This may be controversial, as it is a little bit of a psychological moment, but I reckon that this kind of thing has an impact on people's actions. People tend to control their actions more in front of someone authoritative and trustworthy to them. Board involvement plays a huge role in parties' understanding of team-working. Working with Boards may inspire them that the project they are working on, is not competition, but this is a team-work. They have the same goal and they should achieve it together. Dispute Board creates an environment of team-building, which may have a positive effect on parties' conceptions.

As I already mentioned DB has two functions: to avoid disputes and to resolve those disputes which cannot be avoided. If discussions can no longer be effective in resolving the dispute, DB arranges the hearing for the parties to explain their position regarding the case. The hearing should not be perceived as it is in the trial or arbitration. It is a very short and informal meeting. End of it Board render a recommendation, which is not binding, it is the Board's vision of solving the issue.¹³

Contracting parties determine the power, rules, and procedures of the Dispute boards in their contract. The contracting parties are able to limit DB members' powers. DB members are allowed to act only within the limitations of their appointment. The discussed

¹² Feeling Combative? Let's Dance, Paula Gerber and Brennan Ong, Faculty of Law, Monash University Research Paper No 2011/19, p.34

¹³ Feeling Combative? Let's Dance, Paula Gerber and Brennan Ong, Faculty of Law, Monash University Research Paper No 2011/19, p.34

mechanism of dispute resolution can be effective only if parties are open to it. They should decide whether they want to resolve the problem or turn it into a dispute.

The FIDIC DAB is appointed between an Employer and a Contractor, which means that it only refers to disputes between employer and contractor. DB does not have jurisdiction if a dispute arises between contractor or owner and Engineer. But if an engineer's actions were conducted on behalf of the Employer, then this dispute is within the DB's jurisdiction, since the dispute is between Contractor and owner. Also, dispute between contractor and subcontractor cannot be resolved by DB. But many cases of subcontractors still refer to DB, since these disputes are recognized as disputes between contractors and owners. DB should only give decision on parties' rights and obligations, but they cannot instruct about technical issues, such as between two drawings which one should construct. It is an architect's duty which conducts on behalf of an employer. The DB is allowed to decide whether Engineer's instructions are the correct interpretation of the contractor's obligation under the contract or not. It is a similar condition when there is an issue with VAT or other taxation. It is the responsibility of the appropriate government department. DB cannot make a decision instead of the government. As I already mentioned DB has powers within its appointment, but it also may decide whether it has the power to decide on a particular question.¹⁴

3. The role of the law in Dispute Boards

This quote would be the best way of beginning the article, it belongs to Warren Burger. He revealed it in his article "The state of justice" in 1984.

"The entire legal profession – lawyers, judges, law teachers – has become so mesmerized with the stimulation of courtroom contest that we tend to forget that we ought to be healers of conflict."

This quotation reminds us of the main role of lawyers, as we are healers of disputes. DB has the ability to reduce the number of disputes, which decreases the number of litigations. This

¹⁴ Dispute boards: procedures and practice || 2. What is a dispute board? Owen, Gwyn, Totterdill, Brian, 2008, p. 6

mechanism has to be perceived as an opportunity for lawyers to render legal aid to clients in innovative ways.¹⁵

Construction lawyers are able to advise to their clients at the very early stages of projects and outlining the most proper ways of it. Correspondingly, the first thing that construction lawyers can do for their clients is that lawyers can explain whether the certain project is suitable for DB or not. Lawyers' duty is to inform their clients what DB is and give documented information about the success and benefits of it. This will lead their clients to understand their own role in working with DB. DB is capable of being effective only if clients are open to it.¹⁶

In addition, lawyers drafting the provisions for a DB. Two documents are essential for setting up the DB:

- *DB specification*, which concludes DB procedures, such as frequency of site visits, costs and etc.
- *A tripartite agreement*, which concludes the responsibilities of the board, procedure for selecting and removing panel members and etc.

In spite of, there are “off-the-shelf” provisions, such as ICC Dispute Board Rules, which consists of standard specifications for using DB. Still, each project is very unique and needs to be analyzed individually. It needs provisions to be adjusted for each party and project. Here comes the lawyer's one of the main roles. Construction lawyers assist their clients to select the standard specification that is appropriate for their project. None of the standard provisions indeed has a requirement of one of the DB members must be a lawyer,¹⁷ but lawyers' involvement in it has a huge effect on it, since there always are needs for contractual interpretation or applications of law and etc. the involvement of a lawyer always is the benefit to avoid any legal issues and as it is known almost every construction project encloses legal issues, and legal issues cannot be resolved by experts, who have no legal

¹⁵ Feeling Combative? Let's Dance, Paula Gerber and Brennan Ong,, Faculty of Law, Monash University/Research Paper/No 2011/19,,p.34

¹⁶ Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in Construction Law International, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.9

¹⁷ Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in Construction Law International, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.10

knowledge. Experienced parties know the value of the involvement of the lawyers. The Sydney Desalination Plan Project's contract required that the DRB chairman be a Senior Counselor Victorian Bar who had construction law and dispute resolution experience.¹⁸

DB jurisdiction is limited as I already mentioned in a previous article, but standard specifications do not include limitations on the powers of DB. Also, there are some cases where it is proper DB to not be involved in a dispute. Experts with legal experience can solve this problem and are able to give pieces of information to their clients about the limitations of DB's jurisdiction.¹⁹ Lawyers have the knowledge and are able to inform parties about limitations of DB powers at the start of the project, so the involvement of lawyers can save time and resources.

Besides all mentioned above, there still remains the point of views, which look skeptically at involvement of lawyers in DB proceedings. This consideration states that lawyers can play a role in hindrance than in a help, since they are able to take over the DB process, similarly it occurred to construction arbitration, as the arbitration often fails to provide a genuine alternative to litigation. Supporters of the idea are scared that the DB may share the same fate. But it is vital for DB to keep parties out of the adversarial process as it is typical for litigation, since DB hearing is far from the judicial process, for instance, there could not happen observations of the shreds of evidence, nor cross-examination under the rules of the DRBF's standard specifications. However, there still is resemblance between DB hearings and litigation or arbitration, since purpose of them is to outline the plan of how dispute should be resolved. But in DB proceedings, parties play a main role in success. The major merit of DB is its informal approach to dispute and seeking the roots of conflict. Lawyers, in BD hearings, do not play the role of advocates for parties, but they assist their clients to be prepared and their argumentations to be clear and logical.²⁰

¹⁸ Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in *Construction Law International*, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.10

¹⁹ Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in *Construction Law International*, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.10

²⁰ Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in *Construction Law International*, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.11

DB members need to be good at contract administration and as I mentioned above they need to be confident in themselves that they can interpret provisions of contract. It is essential that board has to have ability to understand contractual provisions. This is very common to publish DB decision with grounds, thus board cannot be confident if its interpretations of provision being bizarre.²¹ Here sculpting the role of lawyer again, since they can be very confident in understanding and interpreting the contractual provision. Lawyers are the best at administration of the contract. Thus their role in DB is vital and gives confidence in decisions or recommendations.

For DB proceedings, it is important to have both, technical and legal support. DB members should be appointed with extra caution to get the right mix of group, which may become the main reason for success. Members should have proper knowledge and experience with a specific types of construction dispute. Legal support is important, but not all lawyers have this specific knowledge. Legal support can be efficient if lawyers have experience in construction contracts, because such knowledge is helpful for interpretation and application of it. If lawyer has a mentioned knowledge and has skills in negotiation and non-adversarial dispute resolution, as well, it can be very useful to avoid disputes and escalation of conflicts. Such a lawyer with experts in engineering and technical issues, can be a very effective combination in construction projects.²² Without lawyers in group, there still arises the need for legal recommendations, since construction contracts belong to the very challenging contract types. Without lawyers' help, it would be difficult to realize the contract terms and conditions. This is why lawyer should be involved in this whole thing. To be more specific, it is benefit to involve lawyers who are capable of working in the construction field and in ADR and not all persons who have legal experience, because litigators have different perspectives of seeing disputes resolution. Their legal experience is developed in a totally different way of resolving disputes. They look for legal problems and not the needs or wants of parties. The combination of proper lawyer and expert with knowledge concerning the construction field is a "deadly combination" for conflicts and disputes. But we should not forget that the main role still have parties. And lawyers make them understand it with their argumentation and

²¹ CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.16

²² Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in *Construction Law International*, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.11

negotiation skills. Lawyers have the skills of thinking and acting in the different perspectives, since this profession is made with the philosophy of resolving disputes. This perspective of thinking helps and leads them to resolve disputes or avoid to arise.

And finally, the perfect way of ending the present article is one more quotation:

“Lawyers who embrace DBs have the chance to become genuine healers of conflict rather than instruments of war; a role that is all too often performed by litigators.”²³

4. Advantages and disadvantages

Every mechanism of dispute resolution has its pros and cons. In the process of selecting the mechanism of dispute resolution, it is important to determine the way we want to resolve the conflict, what the result we want to get and how we want to get there. In achieving our goal, we should take it into account whether we search for parties’ interests and needs or parties’ rights. All of the mechanisms have their advantages and disadvantages, especially, when it goes through its early stages of development. Dispute boards are in the developing stage, since it still is perceived as novation in the law field. In the present article, I will discuss Dispute board advantages and disadvantages.

As I already mentioned construction projects are characterized as high percentage of disputes and conflicts. Thus, it needs mechanism which provides *win-win* solutions than *win-lose* solutions. This is a big advantage of DB, because both parties’ interests can be taken into account, since it is an interested-based dispute resolution mechanism. In construction projects, if parties seek fulfillment of contract and consideration of parties’ interests then DB is a great solution. But if parties seek their legal rights and they want to case be resolved to depend on the legislation, then DB may not be the right selection. One of the main advantages of DB is its “*beforeness*”. This word even does not exist in English dictionary, but I would like to create it for DB, because it describes DB’s features very well. What I mean by this is that Board is actual before a dispute has been arised. This is “endemic” for DB and

²³ Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in *Construction Law International*, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.12

main difference from other forms of dispute resolution. But I will discuss distinctiveness later. Board helps parties to avoid disputes and conflicts by regular verification.

In the construction industry, it is enormous occasions of minor disputes in massive projects. DB can make parties sit together at the table to make an effort to comprise. DB tries to help parties' to avoid arbitration or litigation and tries to find the balance in the battle of the compromises with its experienced experts. Board is combined with experience experts, which may have technical and legal experience. This is a huge benefit for parties in resolving the dispute. Cyril Chen cited statistics, which shows that it is earning of DB that 99% of disputes is resolved successfully within less than 90 days and about 2% of the disputes is resolved regardless of the much effort needed.²⁴

"The advantages can be summarized:

- The DB is made up of professionals with practical experience of the type of situations which have resulted in the dispute.
- The DB was appointed by agreement between the parties, or by a designated appointing authority, and so will have the confidence of the parties.
- The DB is active during the construction period and so receives the evidence of its own observations as well as from discussion with the people who were present when the problem occurred.
- Problems and queries can be discussed with the DB, which can assist with communications and project management.
- The DB can be proactive in helping prevent problems and claims from developing into disputes.
- The DB can be instructed to give a decision on all, or part, of the dispute, or in stages for entitlement, merits and quantum, whatever is required.
- The process is controlled by the parties and the DB, with construction professionals who are involved in the project, using legal advice as required.

²⁴ Czech (& Central European) Yearbook of Arbitration®, Volume IV, Independence and Impartiality of Arbitrators, Editors: Alexander J. Bělohávek, Naděžda Rozehnalová, Filip Černý, 2014, p.173

- The presence of the DB encourages cooperation and so reduces costs.
- The DB gives a fast, temporarily binding decision, at the time of the dispute, and the dispute can be referred onwards for further review by an Arbitrator or the Courts if required.
- An independent recommendation by a DRB, or decision by a DAB, can help to persuade the parties to agree to an amicable settlement of the dispute.
- All disputes must be settled eventually and a fast-track immediate resolution procedure brings faster completion of the final account, with a saving to the parties in management time and costs.”²⁵

As I already mentioned, it is normal to exist pros and cons contemporaneously. DB also has features that may be perceived as cons for some projects. When we are talking about disadvantages it is worth mentioning if it is small projects, the cost and time that is needed for DB may not be valuable. There are features that people perceived as cons of DB and “The most often expressed drawbacks are:

- The DB is an additional layer in the project administration which interferes with the role and effectiveness of the Engineer or other professional.
- The DB is an additional layer in the dispute resolution process.
- ADB costs money and may not succeed in resolving the dispute. Claims can be negotiated without additional cost.
- A DB may impose its own concept of fairness on the parties.
- A DB does not have the power to order discovery or to require witnesses to attend a hearing and the hearing is informal without cross examination.
- The DB decision is only contractual and cannot be enforced in the courts. And Arbitration gives an award which is final and can be enforced in the courts.”²⁶

²⁵ Dispute boards: procedures and practice || 2. What is a dispute board?, [Owen, Gwyn, Totterdill, Brian](#), 2008, p.8

²⁶ Dispute boards: procedures and practice || 2. What is a dispute board?, [Owen, Gwyn, Totterdill, Brian](#), 2008, p.8

Despite determining some features that are perceived some of them as cons and some of them as pros, I still reckon advantages and disadvantages are depend on the case. Whether it is an advantage or disadvantage, it depends on what parties want. For some cases, one feature may be pros and for another, it could be cons. As I already mentioned, it should be taken into account whether parties seek an interest-based solution or a right-based solution. Thus, it is important to have information about the characteristics of DB and with this knowledge, parties will make a decision which features are pros and which are cons depending on their goals. In the process of selecting mechanisms of dispute resolution, precisely this should be considered. They should decide if DB is able to offer what parties' needs and wants are.

4.1 Recommendations versus binding decisions

When DB was born, its aim was to review the conflict and offer its opinion of how conflict should be solved. It had recommendation characteristics. It was very convenient, because parties knew it was just a recommendation and they had no reason to fear of the DB, since it was non-binding. After some period, it could be possible to transform non-binding recommendation to a binding decision after a certain period of time unless it is objected. This allowed parties to determine if boards' comments on the case, were binding or non-binding. This method made the DB model formed as it is now: a decision that is binding and immediately actionable.²⁷ I will discuss the advantages and disadvantages of both of them.

It is worth mentioning that even if a recommendation is non-binding, it still does not lose efficacy of the decision, because if DB recommendation is admissible in arbitration and litigation, arbitrator and judge will be influenced by the recommendation, since it is

²⁷ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.6

rendered by impartial, experienced construction parties, who were involved from the very beginning of the construction project.²⁸

There are a lot of benefits in non-binding recommendations:

“The preparation for any hearing is less than other procedures, Hearings are shorter, Hearings are simpler, Hearing costs are reduced, experienced parties are very often able to resolve matters based on a recommendation alone, Cultural backgrounds may be of influence; for example, in China, the tradition of conciliation will often lead to the adoption of the recommendation by the parties to avoid further conflict.”²⁹ But some people think it has its drawback such as recommendations may not be effective and can be nil. From my standpoint, it is not drawback it is its feature, which in some cases becomes a big advantage and in some cases disadvantage. Thus, parties should make their own decision on which model of DB they want.

The binding decisions have its features that may be perceived as a benefit: If necessary, they may be “enforced by legal processes, the binding nature of the decision is unlikely to be ignored, even by an unwilling or an impecunious party (breach of contract)”³⁰ but at the same time binding decisions have cons as well: “Hearing preparation costs and hearing time and costs are likely to be higher, as generally more documentation is put before the board.”

31

To sum up briefly, we cannot say which model of DB is good and which one is bad. The aim of the present subtitle was not to determine which model of DB is better. Both of them have their own features that should be used in selecting the model. It depends on the case, on the parties’ needs and some other circumstances, as well as cultural background.

²⁸ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCIArb, FDBF*, 2015, p.7

²⁹ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCIArb, FDBF*, 2015, p.7

³⁰ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCIArb, FDBF*, 2015, p.8

³¹ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCIArb, FDBF*, 2015, p.8

II. Classification of Dispute Boards

1. Comparison between Dispute board and other forms of ADR

Countries, which have well-developed legal systems tend to have an interest in ADR. As the legal system got sophisticated, so expenses and delays of dispute resolution increased. There are a wide variety of different forms of non-formal or less formal dispute resolution that are gathered under the umbrella of ADR.³² Forms of ADR can be put in an order from least formal to most formal: Negotiation, Conciliation, Mediation, Neutral fact Finding Expert, Ombudsperson, DB, Expert Determination, Arbitration.³³

Negotiation-this is the most widely used method in construction projects, since it is less formal. This method gives parties options to reach an agreement. Lawyers need creativity to explore various ways of solving conflict. "Within ten days after notification of a claim in writing, a representative(s) of the Owner and the Contractor shall meet and endeavor to negotiate a resolution. Representatives of both parties shall attend with authority to settle any claim."³⁴

Conciliation- "the terms 'mediation' and 'conciliation' are often used interchangeably. However, in the UK conciliation is usually regarded as more evaluative than facilitative approach. For example, under the Institution of Civil Engineers (ICE) Conditions, parties may refer their dispute to conciliation and, in the event of a conciliated settlement not being reached, the conciliator has the power to make a 'recommendation' for the settlement of the dispute."³⁵

³² **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.9

³³ **DISPUTE AVOIDANCE AND RESOLUTION BEST PRACTICES FOR THE APPLICATION SERVICE PROVIDER INDUSTRY**, prepared by ASP Industry Consortium and WIPO Arbitration and Mediation Center

³⁴ [ARTICLE: THE CONSTRUCTION ATTORNEY'S TOOLBOX -- BUILDING SOLUTIONS](#), Kent B. Scott, 2004,

³⁵ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.10

Mediation- This is one of the most popular forms of ADR. There is much to say about mediation, but to cut a long story short, “Mediation is a procedure where two or more parties attempt to resolve their dispute with a neutral party ("mediator"). The mediator remains neutral throughout the meeting. The process is confidential and no resolution can be reached without the consent of the parties. If an agreement is reached, the agreement will be binding and can be enforced by the courts.”³⁶ Mediation has non-binding nature. Mediator is not able to make a decision, the main point is to parties should reach an agreement. Parties play a critical role in the agreement. In DB parties have a vital role in resolving the dispute, but unlikely to mediator, board is allowed to render a decision (it may be binding or non-binding, depending on the type of DB). DB has more power and role in resolving the dispute, since it is able to give a decision or recommendation, but mediator does not have this power, it has a different role in process of mediation. The result of the mediation is totally up to parties. Furthermore, the mediator is allowed to meet parties separately. It is a very common action and has its aims. Mediator discusses the issues with the one party that could not be discussed with the attendance of another party. Meetings separately and talking privately might be helpful to facilitate the negotiation. In case of DB, it is very bad ton to meet one party privately. DB renders a decision and this decision might be based on information that is not known to another party, which could be the ground of doubts.

Fact Finding-this form is more inquisitive, since it is concentrated on the facts. This means fact-finder must detect what the objective factuality is. When a dispute has arisen in the difficult technical or scientific field, parties try to dispute be resolved by the neutral expert (fact-finder)³⁷. Since construction industry is very challenging and it consists of a lot of technical difficulties, this is a very convenient form of ADR. There is the similarity between fact-finding and DB, but DB is more formal and board covers way more issues, such as technical and legal as well.

Ombudsperson-this form is used mostly regarding consumers’ rights. Their decision is not binding for the parties, but there are high chances that the court will render the same decision as the ombudsperson does. This is why ombudspersons mostly are former prosecutors and

³⁶ [ARTICLE: THE CONSTRUCTION ATTORNEY'S TOOLBOX -- BUILDING SOLUTIONS](#), Kent B. Scott, 2004

³⁷ მედიაცია დავის გადაწყვეტის ალტერნატიული ფორმა (ზოგადი მიმხილვა), გიორგი ცერცვაძე, თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტი დავის გადაწყვეტის ალტერნატიული მეთოდების სამეცნიერო-კვლევითი ინსტიტუტი, თბილისი 2010, p.138

former judges. This mechanism is very attractive, because of its shortened procedure and facultative decision.³⁸

Expert Determination- this is form of ADR, when under the parties' agreement specific issue is evaluated by the expert of the field. Parties are able to make decision of the expert binding, the recognition and execution of the decision cannot be done by the court.³⁹ This method is similar to DB, which may have the same effect.

Arbitration- "Arbitration has long been favored as a means of resolving construction disputes. Many standard construction contract documents provide for mandatory binding arbitration of all disputes arising under or related to the contract."⁴⁰ There are a lot of differences between Arbitration and DB, since Arbitration is more formal, but the main difference is that the award of Arbitration is final and binding, and it can be recognized and enforced in the court. But DB's decision has a contractual power, which means that recognition and enforcement are not provided. In the case of failure to comply with the decision, it can be referred to Arbitration or litigation to get enforceable award or judgment.

DB is different from all of the forms of ADR. In general, all of them are actual when dispute has arisen, but Dispute Board may be created contemporaneously to the signing of the contract and it is not terminated until the contract is not fulfilled. The main difference between DB and the rest of the forms of ADR is that board permanently is involved in the processes of fulfilling the contract. In case of difficulties in fulfilling the contract, Board gives bits of advice and recommendations to avoid any conflict or dispute. We may say that DB has a mix of functions of the rest of the other forms of ADR. The quantity of form of ADR is so large, that there are different classification of them.⁴¹ It is not important to classify them, but it is important to have information about their main principles, and depending on this, parties should select the mechanism which is more relevant for the case.

³⁸ მედიაცია დავის გადაწყვეტის ალტერნატიული ფორმა (ზოგადი მიმხილვა), გიორგი ცერცვაძე, თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტი დავის გადაწყვეტის ალტერნატიული მეთოდების სამეცნიერო-კვლევითი ინსტიტუტი, თბილისი 2010, p.91

³⁹ მედიაცია დავის გადაწყვეტის ალტერნატიული ფორმა (ზოგადი მიმხილვა), გიორგი ცერცვაძე, თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტი დავის გადაწყვეტის ალტერნატიული მეთოდების სამეცნიერო-კვლევითი ინსტიტუტი, თბილისი 2010, p.91

⁴⁰ [ARTICLE: THE CONSTRUCTION ATTORNEY'S TOOLBOX -- BUILDING SOLUTIONS](#), Kent B. Scott, 2004

⁴¹ მედიაცია დავის გადაწყვეტის ალტერნატიული ფორმა (ზოგადი მიმხილვა), გიორგი ცერცვაძე, თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტი დავის გადაწყვეტის ალტერნატიული მეთოდების სამეცნიერო-კვლევითი ინსტიტუტი, თბილისი 2010, p.89

2. Sorts of Dispute Board

DB is designed to resolve the dispute that has arisen in a construction project. As I already mentioned DB is able to render a non-binding recommendation or a binding decision. This depends on the type of DB. ICC Board rules allow parties to use three types of boards:

- *Dispute Review Boards* or some of them called it *Dispute Resolution Boards*. This type of Boards was developed in the US and issue non-binding recommendations;
- *Dispute Adjudication Boards*. This type was developed by FIDIC and issue binding decisions.
- *Combined Dispute Boards* were developed by the ICC and are a hybrid type of boards, which means they can issue recommendations and binding decisions if parties agree.

42

DRB-gives a recommendation on how to solve the conflict. Thus, it has more negotiation spirit. If parties do not object to it within the stated period of time, it will transform from non-binding recommendation to binding decision, which means that it will get the power of contract under the applicable law. But in case of objection, then parties are entitled to submit to Arbitration or Court.⁴³ In the period of pending a ruling by the arbitral tribunal or the court, the parties are still able to comply with the recommendation but are not bound to do so.⁴⁴

Article 4(3) of ICC Dispute Board Rules states:

“The Parties agree that if no Party has given written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation within 30 days of receiving it, the Recommendation shall become final and binding on the Parties. The Parties shall comply

⁴² Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in *Construction Law International*, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010, p.8

⁴³ მედიაცია დავის გადაწყვეტის ალტერნატიული ფორმა (ზოგადი მიზნით), გიორგი ცერცვაძე, თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტი დავის გადაწყვეტის ალტერნატიული მეთოდების სამეცნიერო-კვლევითი ინსტიტუტი, თბილისი 2010, p.97

⁴⁴ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.33

without delay with a Recommendation that has become final and binding and agree not to contest that Recommendation, unless such agreement is prohibited by applicable law.”⁴⁵

DAB- it allows rendering a provisionally binding decision. Parties must comply with the decision immediately. If parties object to the decision within the stated period of time, it may submit to Arbitration or the court. But the parties still remain contractually bound by the decision unless the arbitral tribunal or court says otherwise. If there is no objection within the stated time period, then parties remain bound by it.⁴⁶

CDB-this is the latest model of DB and International Chamber of Commerce (ICC) possesses copyrights to it. This is a combination of the DRB and DAB, since it can give a non-binding recommendation and render the decision as well. Generally, it gives a recommendation, but if parties agree onto rendering a decision then it is allowed to do so. If parties cannot agree on it, Board will decide whether to issue a recommendation or a decision.⁴⁷

The difference between a decision and the recommendation is that parties must comply with the decision “without delay as soon as they receive it”, whereas a recommendation has this requirement “only if no party expresses dissatisfaction within a stated time limit”. In Both cases, if parties express dissatisfaction with a DB’s decision, it may refer to arbitration or to the court. Only this is the way to get enforceable award or judgment.⁴⁸ Neither of them is final, which means that recognition and enforcement by courts are not provided as it is in case of Arbitration. In addition, In the case of failure of compliance with them, they can be referred to Arbitration or litigation. The nature and enforcement of DB’s decision in detail will be discussed later.

There is another range of Dispute Board types from which the parties should choose:

⁴⁵ <https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/> last seen 01.09.2021

⁴⁶ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.34

⁴⁷ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.34.

⁴⁸ **CHERN ON DISPUTE BOARDS Practice and Procedure**, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p.35

Standing (full-term) DB- it is appointed before any dispute has arisen. They are selected in the contract or a little later. They characterize that they can act immediately when a dispute arises or before it will arise.⁴⁹

Ad-hoc DB-it is appointed after a dispute has arisen. It cannot interfere as quickly as standing DB. Ad-hoc DB is more difficult to be appointed and more time-consuming, as well, since parties are already in conflict. It is way easier to agree on the appointment of DB when there still is not conflict. Standing DB is more active to prevent parties from dispute. Board regularly does site-visits, discusses the challenges, and detects the difficulties and tensions that may cause the disputes. Along with the benefits of standing DB, it has its downside. Its costs are higher than ad-hoc DB. Parties are able to choose one-member DB and the cost will be way less, but having a three-member DB, giving parties a chance to combine people with different knowledge, which is a huge benefit in resolving the dispute.⁵⁰

III. Procedures, The legal Nature of Decision and peculiarity of Enforcement

1. Appointment of the board members and qualities of them

It is more effective to appoint the board at the beginning of the construction project. The contract between parties has to determine the type of DB and the procedures. Parties are able to include the details in their contract or indicate a standard procedure.⁵¹

There are several types of selection of the members. The most common is “Bottom-up” selection, which means that each party appoints one member of the board and these two appoint the third member, who becomes a chairperson with the approval of the parties. This is the typical method, but it is possible to chairperson be appointed by the parties directly or

⁴⁹ [INTERNATIONAL CONSTRUCTION ABITRATION: Dispute Boards](#), Andreas REINER, 22 Croat. Arbit. Yearb. 161, 2014/2015

⁵⁰ [INTERNATIONAL CONSTRUCTION ABITRATION: Dispute Boards](#), Andreas REINER, 22 Croat. Arbit. Yearb. 161, 2014/2015

⁵¹ Dispute boards: procedures and practice || 2. What is a dispute board?, [Owen, Gwyn, Totterdill, Brian](#), 2008, p. 12

by the first two members without parties approval. The second selection method is called “top-down” selection, which means that parties select the chairperson and then the chairperson selects two other members.⁵²

It does not matter which party selects the member, members must be impartial anyway. Several criteria are necessary for the members. The DB member must be:

Independent- it means that members are not representatives of the party who appoint them. They must be independent in exercising their obligations. If there are grounds that may have an influence on members, this must be declared. Any connection between member and party in the past or the present, must be declared and if the other party objects to it, the member must decline the appointment. Also, during their working relationship, members are obliged to inform the parties of changes that may influence their independence.⁵³

Impartial- members must not be preconceived and biased. Members should not have private correspondence with one party. They should work together with participation of both parties. Since construction industry is small, parties and members may already have met each other in previous projects, but this experience must not affect members' impartiality.⁵⁴

Proactive-this means that members must take part in discussing issues in the construction projects. They must be proactive in making decisions or recommendations. They must help parties to avoid any conflicts and disputes.⁵⁵

Judicial- as I already mentioned, DB does not seek justice and it is not a right-based mechanism, but DB must not only seek the facts or parties interests, it must also follow the applicable law, consider something that is “rules of natural justice”, since DB giving a decision which concerns parties’ rights and obligation.⁵⁶ This is why it is important member to be judicial and fair.

Furthermore, “it is possible to include specific provisions in the contract as to the recommended (or required) qualifications of the DB members. Often, however, such clauses

⁵² CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p. 15

⁵³ Dispute boards: procedures and practice || 2. What is a dispute board?, [Owen, Gwyn, Totterdill, Brian](#), 2008, p. 4

⁵⁴ Dispute boards: procedures and practice || 2. What is a dispute board?, [Owen, Gwyn, Totterdill, Brian](#), 2008, p. 5

⁵⁵ Dispute boards: procedures and practice || 2. What is a dispute board?, [Owen, Gwyn, Totterdill, Brian](#), 2008, p. 5

⁵⁶ Dispute boards: procedures and practice || 2. What is a dispute board?, [Owen, Gwyn, Totterdill, Brian](#), 2008, p. 6

create more difficulties than they resolve, particularly in case of Ad-Hoc Dispute Boards which need to be set up when a dispute has already arisen.”⁵⁷

2. The legal nature of DB decision and Peculiarity of Enforcement

The parties accept the use of DB by contractual consent. The legal ground of selection of it and the power of the decision is an agreement between the parties. Parties express their consent to be bound by its decision in their contract. The decision has the power of contract under the applicable law. The non-fulfillment of decision is perceived as a breach of contract. The damaged party is entitled to request compensation for the failure of the DB decision, as it is characterized for the contractual breaches.⁵⁸ As I already mentioned recognition and enforcement cannot be provided for DB decision as it is characterized for the arbitral tribunal award. If parties want to get a final and binding decision they must refer to arbitration or litigation. ICC Dispute Board rules’ first article states: “Dispute Boards are not arbitral tribunals and their Conclusions are not enforceable like arbitral awards.”⁵⁹

DB is able to give a recommendation or binding decision depending on the type of the DB. The recommendation is not binding and if parties do not object to it within the stated period of time it will become binding to the parties. DAB decision is binding at the outset, but it is not final yet. If parties do not object to it within the period of time, it will become binding and final, as well. If parties object to the decision within the stated period of time, it cannot become final and it may be submitted to Arbitration or the court.

As I already mentioned a DAB decision will become final if neither party provides written notification of their dissatisfaction within the stated period of time. In this stated period of time decision is still not final. DAB decisions, both final and non-final are binding on the parties. But the difference is that final decision cannot be challenged. If party fails to comply with a final decision, another party is entitled to submit the case to arbitration or to the

⁵⁷ [INTERNATIONAL CONSTRUCTION ABITRATION: Dispute Boards](#), Andreas REINER, 22 Croat. Arbit. Yearb. 161, 2014/2015

⁵⁸ <https://ycetinel.av.tr/wp-content/uploads/2021/03/nature-of-dispute-board-decisions-wth-special-emphasis.pdf> last seen 05.09.2021

⁵⁹ <https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/> last seen 05.09.2021

court. This party is enabled to get the enforceable arbitral award. The problem is non-final award, since it cannot be enforceable in the same manner as final decision.⁶⁰ In construction industry time is vital. So what is the level of the damaged party if another party issues NOD in the stated period of time, decision will not become final. Let's discuss it with well-known case, known as "Persero, in Singapore.

The Persero series involves a dispute based on the FIDIC red book and is governed by Indonesian law. A DAB rendered a decision that the employer had to pay the contractor US\$17 million. Employer issued NOD and refused to comply with the DAB decision. The Persero series is about contractors seeking enforcement of the DAB decision. The first attempt was that contractor submitted to arbitration in 2009 on the discrete question of whether there was a requested to comply with the DAB decision. The arbitration said that employer must make a payment immediately. This arbitral award was rejected by the High Court of Singapore. The court said that arbitral tribunal was not entitled to transform the non-final DAB decision into a final award without detecting the merits of the underlying dispute. However, the court said that if contractor procured a second DAB decision on the discrete question of non-compliance with the first decision, then contractor would be able to submit the second decision to arbitration and the arbitral tribunal could decide, since the second one would be referred on its merits. This approach is known as the "two-dispute". This decision of High court was appealed, but The Court of Appeal agreed with the High court decision. The Court of Appeal did not confirm the Two-dispute approach. The court said that arbitral tribunal would be entitled to enforce the DAB decision if contractor submitted the underlying dispute to tribunal with the issue of non-compliance in the same referral. In this way, tribunal would first give an interim award on the non-compliance and then substantive dispute on its merits. This approach is known as the "one-dispute". The contractor began a new arbitration under the one-dispute approach and in 2011 arbitral tribunal rendered an interim award stating employer to make immediate payment as it was written in DAB decision. The High Court approved the interim award and one-dispute approach in 2014. This decision of the High Court found a "security of payment regime". The aim of the principle is to "facilitate the cash flow of contractors by requiring the employer to

⁶⁰ <https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/court-appeal-persero-ii> last seen 05.09.2021

pay immediately, while preserving its right to argue later the substantive merits of the dispute in arbitration (i.e. “pay now, argue later”).” In 2015, Court of Appeal by majority approved interim award, but the court said that none of approach was correct. The court said that binding but non-final DAB decision should be enforceable as interim awards “without referring the secondary dispute back to the DAB and without the need to also submit the underlying dispute to arbitration.”⁶¹

Majority set out three prepositions:

“(a) A DAB decision is immediately binding once it is made. ...

(b) The corollary of a DAB decision being immediately binding once it is made is that the parties are obliged to promptly give effect to it until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award.

(c) The fact that a DAB decision is immediately binding once it is made and unless it is revised by either an amicable settlement or arbitral award is significant ... the issuance of an NOD [notice of dissatisfaction] self-evidently does not and cannot displace the binding nature of a DAB decision or the parties’ concomitant obligation to promptly give effect to and implement it.”⁶²

Anyway, the decision of majority was not far from the one-dispute approach, since they also found that non-complying party could require to heard the underlying dispute in the same arbitration by filling a counterclaim, but after tribunal made an award about non-compliance with the DAB decision. The minority’s opinion was different:

“Failure to comply with the non-final DAB Decision did not fall within the scope of “dispute” in Sub-clause 20.4, or anywhere in the arbitration agreement, and therefore it could not be the subject of an arbitral award. Also, The 2011 Majority Arbitrators had no mandate under Sub-clause 20.6 to issue the Interim Award pending the final adjudication of the Underlying Dispute.” But what was the most interesting argument for me is that “in order to enforce the

⁶¹ <https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/court-appeal-persero->
|| last seen 06.09.2021

⁶² <https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/court-appeal-persero->
|| last seen 06.09.2021

DAB Decision contractor would need to go outside the contractual machinery, for instance by seeking summary judgment in a court of competent jurisdiction.”⁶³

As I mentioned above DB has a power of contract. The non-compliance of the decision is perceived as a breach of contract by a defaulting party. The contractual remedy is a referral to arbitration or the court under the contract. It is important to clear up whether the referral is on the failure to comply with DB’s decision or on the underlying substantive dispute. If the referral is on the first one, then the arbitral award can be an immediate award and this award can be enforced in the court. This is relative when there is no use of NOD by the parties. But parties also are capable of referring the underlying substantive dispute to arbitral tribunal to rehear the merits of the dispute. Parties are able to refer both, albeit in this time they can get an immediate interim award.⁶⁴

It makes a difference to realize distinction between “binding” decision and “binding and final” decision. If there is no using NOD by the parties, then the decision is converted from only “binding” to “binding and final”. This means it cannot be challenged. Albeit in case of using the NOD, the decision is perceived temporary binding, unless arbitral award is issued. Arbitral tribunal is allowed to review both non-compliance of DAB’s decision and merits of the dispute. It can render an immediate interim award and give immediate effect to the DAB’s decision. And then it will consider merits of the dispute and issue a final award. The binding and final decision can be given effected promptly by tribunal with issuing an interim award for immediate payment, unlikely to the just binding decision. This interim arbitration award can be provided if the tribunal is convinced that the DAB had jurisdiction to issue the decision. The practical problem in this is that arbitrate at all is still in respect of the non-compliance of the decision, since the first touch in the case for arbitral tribunal was that non-compliance and not the use of the NOD by the party. The revision of the merits of the dispute must go beyond a consideration of the non-compliance of the DAB’s decision.⁶⁵

⁶³ <https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/court-appeal-persero-ii> last seen 06.09.2021

⁶⁴ https://www.fenwickelliott.com/sites/default/files/nick_gould_-_enforcing_a_dispute_boards_decision_-_issues_and_considerations_paper_for_fidic_me_conf_feb_2012.indd_.pdf last seen 09.09.2021

⁶⁵ https://www.fenwickelliott.com/sites/default/files/nick_gould_-_enforcing_a_dispute_boards_decision_-_issues_and_considerations_paper_for_fidic_me_conf_feb_2012.indd_.pdf last seen 09.09.2021

If there is no use of NOD, then decision transform binding and final, which means that it cannot be challenged. Albeit if there is non-compliance with binding and final decision, tribunal should issue an award to give prompt effect to this decision. Before it issues an award “the tribunal will need to consider the jurisdiction of the DAB not just at the outset of the DAB procedures but also during the proceedings and then in respect of the giving of the decision itself.” And all those things may expand the arbitral tribunal’s jurisdiction, since it is able to “consider the law, facts and merits of the underlying dispute.”⁶⁶

3. Dispute Boards procedures

DB makes suggestions to the parties and it can be done through the meetings on the site and hearings. The report is drafted after each visit and it consists of the recommendations and suggestions of members. The report also contains information about attendees and the agenda.⁶⁷

It is important that the procedure for the hearings be simple, not demanding to understand, fair and effective. Difficulties decrease mutual understanding and increase confrontation. The World Bank, FIDIC, ICC publish standard procedures, which is very helpful and makes it easier. There are no strict rules of evidence in DB hearings. All documents have to be provided beforehand for the hearing. DB should prevent the production the non-essential material that does not have any significant weight and merely bring the black-out in the case. DB must do this without prejudicing neither party by an “ambush”, which is very challenging. It is very hard to find the right balance between them.⁶⁸

⁶⁶ https://www.fenwickelliott.com/sites/default/files/nick_gould_-_enforcing_a_dispute_boards_decision_-_issues_and_considerations_paper_for_fidic_me_conf_feb_2012.indd_.pdf last seen 09.09.2021

⁶⁷ Chapter 11: International dispute boards and adjudication (third edition), Robert Gaitskell, Keating Construction Dispute Resolution Handbook ISBN 978-0-7277-6164-4, 2016, p. 160

⁶⁸ CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p. 25

B. Legal basis for Dispute Boards and Historical cases

1. Legal systems and international organizations

DB is part of a contract, which means parties must create the DB in their contract. The legal basis for its decision is referred to the law of the country where contact is executed or the country parties on which parties agreed in their contract. There are two major legal systems in the world: Common law and Civil law.⁶⁹

DB gradually became one of the most popular form of ADR in construction contracts. The popularity of it could be seen through the approval of DB by the leading international organization. I wants discuss several of them:

ICC-International Chamber of Commerce is the largest, most representative business organization in the world. It was founded in 1919, in France. September of first in 2004, ICC published ICC Dispute Board Rules, which considered DB as a form of ADR. The current ICC Dispute Board Rules are in force as of 1 October 2015 and the Appendices in force as of 1 October 2018. "The ICC Dispute Board Rules consist of a comprehensive set of provisions for establishing and operating a DB. They cover such matters as the appointment of the dispute board member(s); the services they provide and the compensation they receive."⁷⁰

FIDIC- this is the International Federation of Consulting Engineers, which was founded in 1913, headquarter has in Switzerland, and founder of it are: Switzerland, France and Belgium. It is non-governmental organization, which has a membership all over the world.

⁶⁹ CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p. 41

⁷⁰ <https://iccwbo.org/dispute-resolution-services/dispute-boards/> last seen 04.09.2021

DB first was appeared in FIDIC in 1995 and today it is an important part of it and other contracts as well.⁷¹ Nowadays, FIDIC has two forms of DAB: standing and ad hoc DAB.

The World Bank- is an international financial institution that provides loans and grants to the governments of countries, who have low and middle income for pursuing capital projects. It was founded in 1944 in the United States. The organization in the early 1990s, published a modified contract of FIDIC, but with provisions for DRB, which had non-binding recommendations. After that FIDIC, as I already mentioned, first introduced DAB by amending its standard form construction contracts. This is the time when first occurred division of traditional DRB (with its non-binding recommendation) and ADB (with its interim-binding decision). In 2000, the World Bank moved from the USA model of DB to FIDIC DAB. It adopted a contract that provided DRB (it did not change the name) interim-binding recommendation.⁷²

2. Historical Cases

China: Ertan Hydroelectric Project

“The Ertan Hydroelectric Project comprises Asia’s largest underground powerhouse. The project also boasts one of the world’s longest diversion tunnels. The employer was the Chinese State organization and the FIDIC 4th Edition contract was used. There were two main contracts subject to a dispute review board. Here, both the employer and the international joint venture each chose one member of the dispute board and those two members then chose the chairperson. At the outset it was agreed that the board would make site visits three times per year and during the period of construction there were a total of about 20 site visits. In this particular project the nature of the dispute board’s determinations were recommendations only, which were not automatically final and not automatically binding.

⁷¹ Czech (& Central European) Yearbook of Arbitration®, Volume IV, Independence and Impartiality of Arbitrators, Editors: Alexander J. Bělohávek, Naděžda Rozehnalová, Filip Černý, 2014, p. 174

⁷² CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, BArch, JD, AIA, RIBA, FCIArb, FDBF, 2015, p. 12

During the construction period, 40 disputes were referred to the board and of this 40 not one went on to arbitration or litigation.”⁷³

England: Saltend Private Power Plant

“The construction period was 1997–2000. Due to the nature of the project, there was one contract subject to the dispute board. The dispute board here had five members and of these there were three main members with two alternatives. They were all chosen by agreement of the parties after full interviews. It was agreed that the nature of the determinations made by the dispute board would be decisions that would be both final and binding, and as a result the total number of disputes referred to the dispute board was zero and of course none went to arbitration.”⁷⁴

France–England: Eurotunnel

“A final example of large projects that utilize dispute boards, is the Channel Tunnel joining France and England. This was one of the biggest European infrastructure projects ever constructed. With the project having a total value of US \$14 billion, only 13 disputes arose, of which 12 were settled and only one was taken further.”⁷⁵

The DRBF published the statistic in 2015. It shows the success of the DB. According to the statistics 98% of all disputes resolved by DB and are not brought to arbitration or litigation and the remaining 2% were referred to arbitration and almost all arbitrations shared the dispute board’s decisions.⁷⁶

In the beginning of 2015, almost 7,500 and more disputes were the subject of dispute board’s decisions. There were only under 40 cases where a dispute board’s decisions or recommendations were brought to arbitration or the courts.⁷⁷

⁷³ CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p. 93

⁷⁴ CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p. 96

⁷⁵ CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p. 100

⁷⁶ <http://www.disputeboardsmena.com/impressive-statistics/>, last seen 04.09.2021

⁷⁷ CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, *BArch, JD, AIA, RIBA, FCI Arb, FDBF*, 2015, p. 13

C. Future of Dispute Boards

The construction industry is demanding, which is the ground of different kinds of conflicts and disputes in the field. Construction contracts are one of the challenging contracts. Thus, the courts are not able to bear loads of construction disputes. This industry needs less formality and experts that help to avoid disputes. The popularity of DB is increasing, because it can offer benefits that are vital in the field. This form of ADR offers time and cost savings.

The future of DB in construction law is heartening as it gives facilitations to construction field.

In the future success of the DB in construction industry, state laws have an important role. If state laws encourage the enforceability of the forms of ADR, parties will select the method of ADR they like. What I mean by this is that if state law states to negotiate before using form of formal dispute resolution, this will increase the popularity of ADR and of DB as well. In the success of DB international organizations have a huge impact as well. "If the contractor and the employer both respect the process dispute boards could remain an effective procedure."⁷⁸

Conclusion

The Master Thesis's main aim is to increase the familiarity and popularity of the Dispute Boards in Georgia. The meaning of the Dispute Boards and the peculiarities that enclose them was the fulcrum of the present Master Thesis. While discussing the topic it got cleared that Dispute Boards have their advantages and disadvantages. The construction industry stands out as a field where there are always high amounts of disputes. In Georgia, courts have loads of disputes. This is why it is important to increase the role of DB in this field. As the master thesis stated the legal role of DB is very significant worldwide. The construction industry adopted this mechanism of ADR and the popularity of its usage is getting higher at

⁷⁸ <https://www.linkedin.com/pulse/dispute-boards-future-resolution-international-munachiso-ogu-jude> last seen 05.09.2021

the international level. In Georgia, this way of resolution of dispute is not this popular and it is novation. With this master thesis I made an effort to show the importance of DB in the construction industry in the instance of international successful usage. The historical cases show the advantages may become inspirational of increased popularity in Georgia.

The master thesis researches the role of the law in DB and the DB's role in the law. Some authors might reckon that lawyers' participation in DB is not the cornerstone of the success of DB, but the present thesis attempts to confirm that the lawyer has a huge impact on the success of DB. Lawyers are a vital part of the DB, because the perspective of thinking helps and leads them to resolve disputes or avoid arising. Herewith, the lawyer can be very confident in understanding and interpreting the contractual provision. The lawyers are the best at the administration of the contract. Thus their role in DB is vital and gives confidence in decisions or recommendations.

DB's role in construction law has a very significant effect, since it is the effective prompt informal, and interest-based mechanism, which decreases the litigations. It reduces workloads on the courts, which is very vital and essential in Georgia. DB gives the chance to lawyers to become the veritable healers of conflicts.

The DB's different sorts are one more attractive part, which gives parties opportunity to select the most convenient one. This is one more reason for its popularity at the international level.

And last but not least, the cornerstone of the present master thesis is the research about the legal nature of the decision and the peculiarities of enforcement. This is perceived as a controversial issue, but sophisticated discussion scatters the misunderstandings. The legal nature of DB is based on the contract. The contractual power puts the DB within limits. The decision cannot be enforced as it is characterized for arbitral tribunal awards. DB can issue different types of decision depending on the sort of it. It can render the non-binding recommendation or the binding decision. But the binding nature does not mean that it is final. Master thesis ascertained the difference between just "binding" and "binding and final". The paper examined where the legal border goes between those two. DAB renders the binding decision, which technically is temporary binding. If there is no using NOD by the parties in the stated period of time, then the decision is converted from only "binding" to "binding and final". And this means that decision is no more challengeable. DRB offers non-

binding decision that also has a perspective to become binding decision, if parties do not object it within the stated period of time.

To sum up, briefly, the present master thesis combined two sorts of discourse: descriptive and analytical. Both parts are important as both of them have theoretical and practical assignments. Dispute Boards are novation that does not have big practical usage in Georgia and this master thesis attempted to make it more familiar and popular, and also made an effort to analyze the legal aspects of it.

Bibliography

Analysis of Construction Dispute Review Boards, Duzgun Agdas, Ph.D., P.E., M.ASCE¹; and Ralph D. Ellis, Ph.D., P.E., M.ASCE², JOURNAL OF LEGAL AFFAIRS AND DISPUTE RESOLUTION IN ENGINEERING AND CONSTRUCTION © ASCE / AUGUST 2013;

ARTICLE: THE CONSTRUCTION ATTORNEY'S TOOLBOX -- BUILDING SOLUTIONS, Kent B. Scott, 2004;

CHERN ON DISPUTE BOARDS Practice and Procedure, Third Edition, CYRIL CHERN, BArch, JD, AIA, RIBA, FCI Arb, FDBF, 2015;

Czech (& Central European) Yearbook of Arbitration®, Volume IV, Independence and Impartiality of Arbitrators, Editors: Alexander J. Bělohávek, Naděžda Rozehnalová, Filip Černý, 2014;

Chapter 11: International dispute boards and adjudication (third edition), Robert Gaitskell, Keating Construction Dispute Resolution Handbook ISBN 978-0-7277-6164-4, 2016;

Dispute boards: procedures and practice || 2. What is a dispute board? Owen, Gwyn, Totterdill, Brian, 2008;

DISPUTE AVOIDANCE AND RESOLUTION BEST PRACTICES FOR THE APPLICATION SERVICE PROVIDER INDUSTRY, prepared by ASP Industry Consortium and WIPO Arbitration and Mediation Center;

Dispute boards: is there a role for lawyers?, Brennan Ong and Dr. Paula Gerber, This article was first published in Construction Law International, Vol 5 No 4, December 2010, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association 2010;

Five Ways to Keep Disputes Out of Court by John R. Allison, FROM THE JANUARY–FEBRUARY 1990 ISSUE;

Feeling Combative? Let's Dance, Paula Gerber and Brennan Ong, Faculty of Law, Monash University Research Paper No 2011/19;

INTERNATIONAL CONSTRUCTION ARBITRATION: Dispute Boards, Andreas REINER, 22 Croat. Arbit. Yearb. 161, 2014/2015;

Managing Construction Conflict: Unfinished Revolution, Continuing Evolution by Thomas J.Stipanowich, 2014;

Munachiso OGU-JUDE (UNICAF UNIVERSITY, CYPRUS), Electronic copy available at:
<https://ssrn.com/abstract=3630343>

Redfern & Hunter: Law and Practice of International Commercial Arbitration 6th Ed. OXFORD;

https://www.fenwickelliott.com/sites/default/files/nick_gould_enforcing_a_dispute_boards_decision_-_issues_and_considerations_paper_for_fidic_me_conf_feb_2012.indd_.pdf last seen 09.09.2021

<https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/> last seen 01.09.2021;

<https://ycetinel.av.tr/wp-content/uploads/2021/03/nature-of-dispute-board-decisions-wth-special-emphasis.pdf> last seen 05.09.2021;

<https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/> last seen 05.09.2021;

<https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/court-appeal-persero-II> last seen 05.09.2021;

https://www.fenwickelliott.com/sites/default/files/nick_gould_-_enforcing_a_dispute_boards_decision_-_issues_and_considerations_paper_for_fidic_me_conf_feb_2012.indd_.pdf last seen 09.09.2021;

<https://iccwbo.org/dispute-resolution-services/dispute-boards/> last seen 04.09.2021;

<http://www.disputeboardsmena.com/impressive-statistics/> , last seen 04.09.2021;

<https://www.linkedin.com/pulse/dispute-boards-future-resolution-international-munachiso-ogu-jude> last seen 05.09.2021

მედიაცია დავის გადაწყვეტის ალტერნატიული ფორმა (ზოგადი მიმხილვა), გიორგი ცერცვაძე, თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტი დავის გადაწყვეტის ალტერნატიული მეთოდების სამეცნიერო-კვლევითი ინსტიტუტი, თბილისი 2010;

Declaration:

I confirm that this Master thesis is my own work and any material from published or unpublished work from others is appropriately referenced.

Signature: Anano Burnadze